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Court of Appeals
Division III
State of Washington

NO. 31210-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re the Detention of:

KENNETH LONGSDORFF,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred when it entered an order of commitment as a sexually violent predator because the State failed to prove beyond a reasonable doubt that the appellant Kenneth Longsdorff would likely engage in predatory acts of sexual violence unless confined to a secure facility.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Does a trial court err if it enters an order of commitment as a sexually violent predator when the State has failed to prove beyond a reasonable doubt that Mr. Longsdorff would likely engage in predatory acts of sexual violence unless confined to a secure facility?

C. STATEMENT OF THE CASE

Appellant Kenneth Longsdorff was the respondent in a second civil commitment trial, held pursuant to RCW 71.09, in September, 2012. 2Report of Proceedings (RP) at 7.[1] Mr. Longsdorff, himself a victim of sexual abuse when he was young, was previously convicted of sex offenses and accused of adjudicated offenses, was incarcerated in the Department of Corrections until 1992. 2RP at 58. Following the 1992 conviction, Mr.

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[1]The record of proceedings consists of six volumes:
1RP—July 20, 2012, September 11, 2012, and September 12, 2012; 2RP—September 13, 2013; 3RP—September 14, 2012; 4RP—September 18, 2012; 5RP – September 19, 2012; and 6RP –September 20, 2012.

Longsdorff participated in sex offender treatment at the Monroe Correctional Complex. While at Monroe, Mr. Longsdorff completed treatment in the Sex Offender Treatment Program. 4RP at 172.

On April 23, 2009, shortly before Mr. Longsdorff completed his sentence from the sex offender conviction, the State filed a petition in Walla Walla County Superior Court to civilly commit Mr. Longsdorff as a sexually violent predator (SVP) under RCW 71.09. The court remanded Mr. Longsdorff to the custody of the Special Commitment Center (SCC) at McNeil Island during the pendency of the case, and ordered him to submit to interviews and testing by the State. Mr. Longsdorff has been at the SCC at McNeill Island since May 2009. 2RP at 63. At the SCC he was classified as having special needs due to limited intellectual functioning. 2RP at 52, 88, 102, 103, 146. He remained in treatment at the SCC at the time of trial in September, 2012. 2RP at 182. Mr. Longsdorff has a full scale IQ of 66, which is considered to be mildly mentally retarded. 2RP at 181, 184, 3RP at 169, 5RP at 31.

This case came on for a second trial before a jury beginning September 11, 2012. During the trial, the State called numerous witnesses, and played excerpts from depositions.

As its primary witness, the state called Dr. Henry Richards. Dr. Richards reviewed Mr. Longsdorff's case. 3RP at 48 Following this recitation of his training and experience, Dr. Richards testified concerning his review of the case and the testing performed, his review of Mr. Longsdorff's prior offenses and his review of Department of Corrections treatment records. 3RP at 48.

Based upon his interviews and review of materials, Dr. Richards rendered a number of opinions. The first was that Mr. Longsdorff suffered from pedophilia. 3RP at 68. He also diagnosed Mr. Longsdorff as having a cognitive disorder, borderline intellectual functioning, and personality disorder (not otherwise specified) as contained in the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)." 3RP at 69.

Dr. Richards testified that Mr. Longsdorff was likely to engage in predatory sexual acts if not confined to a secure treatment facility. 3RP at 125. Dr. Richards went on to explain that he was basing this prediction upon Mr. Longsdorff's test results on four actuarial prediction tools: the Static-99R and Static 2002R, the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), and SORAG, which are generally accepted in the

psychological community as valid predictors of potential sexual recidivism. 3RP at 107. He testified that Mr. Longsdorff's Static 99R score indicated a 5.5 percent chance to reoffend within 5 years, and 9 percent within ten years. 3RP at 108. He stated that according to the Static 2002R, Mr. Longsdorff's results showed a 12.3 percent chance to reoffend within five years and 18.2 percent chance to reoffend within ten years. 3RP at 109. According to the MnSOST-R results, individuals who scored in Mr. Longsdorff's category have has a 57 percent chance of reoffending within six years after release to the community. 3RP at 109. According to the SORAG results, Dr. Richards stated that Mr. Longsdorff had a recidivism rate of 45 percent over seven years, and 59 percent over ten years. 3RP at 109.

Dr. Richard Wollert evaluated Mr. Longsdorff in 2009 and 2010. 4RP at 162. He testified that Mr. Longsdorff does not have the criteria relevant to being an SVP and that he is not likely to reoffend if released in the community. 4RP at 163, 164.

After both sides rested, the court instructed the jury. 6RP at 11-28; Clerk's Papers {CP) 423-451. Following instruction, the parties presented closing argument. 6RP at28-54 (State's closing argument); 6RP at 54-75 (Mr. Longsdorff's closing argument); 6RP 75-85 (State's rebuttal argument).

Following deliberation, the jury returned its verdict, finding that the State had proven beyond a reasonable doubt that Mr. Longsdorff was a sexually violent predator. CP 452.

After accepting the verdict of the jury, the court entered an order committing Mr. Longsdorff to the Special Commitment Center under the custody of the Department of Social and Health Services. CP 453.

Timely notice of appeal was filed October 18, 2012. CP 460. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER OF COMMITMENT AS A SEXUALLY VIOLENT PREDATOR BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. LONGSDORFF WAS LIKELY TO ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE.

Under RCW 71.09.060, prior to committing a person to a secure treatment facility and thereby taking away that person's liberty, the State must prove beyond a reasonable doubt that the person to be committed is a "sexually violent predator." Under RCW 71.09.020(18), the term "sexually violent predator" is defined as follows:

> (18) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or

> personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.
>
> RCW 71.09.020(18).

This subsection contains four phrases that have special definitions under RCW 71.09.020. They are: (1) "crime of sexual violence," (2) "mental abnormality or personality disorder," and (3) "likely to engage in predatory acts of sexual violence if not confined tin a secure facility." Subsection (17) of the statute defines the first phrase as follows:

> (17) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which acts, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal

> solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

RCW 71.09.020(17).

Subsections (8) and (9) of the statute define the second set of terms as follows:

> (8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.
>
> (9) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

RCW 71.09.020(8) and (9).

Finally, subsection (7) of RCW 71.09.020 gives the following definition to the last phrase:

> (7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

RCW 71.09.020(7).

Since an order to commit an individual as a sexually violent predator under RCW 71.09.060 constitutes a significant curtailment of that individual's civil rights, due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, require that the State prove beyond a reasonable doubt that the person to be committed is both "mentally ill" and is "currently a danger to others." *Detention of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003); *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Under RAP 2.2(a)(8), a person committed as an SVP has a right to appeal that determination and the order of commitment.

As part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and as part of the "proof beyond a reasonable doubt standard," the Court on appeal must reverse the order of commitment unless each factual finding necessary for commitment under RCW 71.09 is supported in the record by substantial evidence. *Detention of Sease*, 149 Wn.App. 66, 201 P.3d 1078 (2009). This is the same "proof beyond a reasonable doubt" and "substantial evidence" requirement to exists in criminal cases. *Detention of Thorell*, 149 Wn.2d at 731.

"Substantial evidence" in the context of a criminal case, as well as an SVP case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). In the context of a criminal case, the test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979). To paraphrase *Jackson v. Virginia*, in an SVP case, the test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the [State] any rational trier of fact could have found the essential required elements of [commitment] beyond a reasonable doubt."

In the case at bar, Mr. Longsdorff argues is that the record does not contain substantial evidence that proved beyond a reasonable doubt that he was "likely to engage in predatory acts of sexual violence if not confined in a secure facility" as that phrase is used in the definition of an SVP. The State's evidence on this issue was presented through Dr. Richard's testimony

concerning the four actuarial assessment tools he employed to evaluate Mr. Longsdorff's propensity to commit further crimes of sexual violence. According to Dr. Richards, Mr. Anderson's scores on the first of these four tests, the Static-99, indicated a "high risk of reoffense," meaning that there was a 5.5% risk for reoffense at 5 years, and a 9% risk for reoffense within 10 years. 3RP at 108. On the Static-2002R actuarial assessment tool, Dr. Richards scored Mr. Longsdorff with a 12.3% risk of reoffense after 5 years and a 18.2% risk of reoffense after 10 years. 3RP at 108. According to the SORAG results, Dr. Richards stated that Mr. Longsdorff had a recidivism rate of 45 percent over seven years, and 59 percent over ten years. 3RP at 109. Finally, on the MnSOST-R actuarial assessment, Dr. Richards' scoring predicted a 57% risk of re-offense after six years of release. 3RP at 109.

The problem with this evidence is the actuarial tests that Dr. Richards employed did not constitute evidence of what current risk Mr. Longsdorff was for re-offense. Rather, they only provided an assignment of risk many years into the future. In addition, even had the assessment tools assigned current levels of risks, those levels ran from a low of 5.5% to a high of 57%. This did not constitute evidence that proved "beyond a reasonable doubt" that Mr. Longsdorff was "likely to engage in predatory acts of

sexual violence if not confined in a secure facility." This is in contrast to "proof beyond a reasonable doubt" in criminal cases; if a jury heard a case involving a criminal charge of a sex offense in which the only evidence of who committed the offense comes from a DNA sample obtained from the body of the victim of the crime, and if the record reveals that the only evidence identifying the defendant as the perpetrator of the offenses is the testimony of the State's expert that there is a 5.5% to 57% statistical probability that the DNA belonged to the defendant, a reviewing court would almost certainly reverse the conviction based upon this evidence because a 5.5% to 57% statistical probability does not constitute proof beyond a reasonable doubt and is a preposterously wide range of probablity. Yet in the case at bar, this is precisely what occurred. The jury evidently found that a 5.5% to 57% statistical probability of re-offense, and that sometime years into the future, constituted proof beyond a reasonable doubt that Mr. Longsdorff was "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Since this does not constitute proof "beyond a reasonable doubt," this Court should reverse the verdict that the State has proven all of the elements necessary to justify commitment in the case at bar.

E. CONCLUSION

The State failed to prove all of the elements requisite for commitment under RCW 71.09. As a result, this Court should reverse the order of commitment and order the appellant released from DSHS custody.

DATED: October 21, 2013.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on October 21, 2013, that this Opening Brief was e-filed to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by first class mail to the following:

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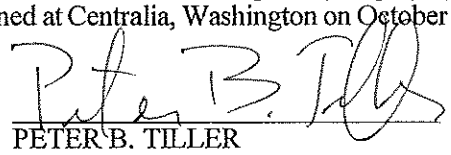
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 21, 2013.



PETER B. TILLER

RCW 71.09.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of social and health services.

(2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

(3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

(4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

(5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

(6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition

affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

(10) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(11) "Prosecuting agency" means the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney, as provided in RCW 71.09.030.

(12) "Recent overt act" means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

(13) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(14) "Secretary" means the secretary of social and health services or the

secretary's designee.

(15) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(16) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(17) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(18) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(19) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2009 c 409 § 1; 2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

RCW 71.09.060

Trial — Determination — Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in *RCW 71.09.020(15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually

motivated as defined in RCW 9.94A.030.

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release.

If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to dismiss the petition. The retrial may be continued upon the request of either party accompanied by a showing of good cause, or by the court on its own motion in the due administration of justice provided that the respondent will not be substantially prejudiced. In no event may the person be released from confinement prior to retrial or dismissal of the case.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of

the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) Except as otherwise provided in this chapter, the state shall comply with RCW 10.77.220 while confining the person. During all court proceedings where the person is present, the person shall be detained in a secure facility. If the proceedings last more than one day, the person may be held in the county jail for the duration of the proceedings, except the person may be returned to the department's custody on weekends and court holidays if the court deems such a transfer feasible. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

(4) A court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section and in accord with the provisions of this chapter.

[2009 c 409 § 6; 2008 c 213 § 13; 2006 c 303 § 11; 2001 c 286 § 7; 1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]