Cases of Note

Note that the following summaries are provided as a convenience only.
In all cases, please refer to the court's full decision for more detail.

R. v. Taylor, 1992 CanLII 7412 (ONCA): An accused is unfit to stand trial if they have a mental disorder that prevents them from understanding the nature or object of the proceedings, understanding the possible consequences of the proceedings, or communicating with their lawyer. An accused does not need to make decisions in their best interest, but they must be able to recount necessary facts to their lawyer allowing the lawyer to properly present a defence.

Winko v. British Columbia (Forensic Psychiatric Institute), 1999 CanLII 694 (SCC):

1. The court or Review Board must consider the need to protect the public from dangerous persons, the mental condition of the not criminally responsible (NCR) accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused. The court or Review Board is required in each case to answer the question: Does the evidence disclose that the NCR accused is a "significant threat to the safety of the public?"

2. A "significant threat to the safety of the public" means a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature.

3. There is no presumption that the NCR accused poses a significant threat to the safety of the public. Restrictions on his or her liberty can only be justified if, at the time of the hearing, the evidence before the court or Review Board shows that the NCR accused actually constitutes such a threat. The court or Review Board cannot avoid coming to a decision on this issue by stating, for example, that it is uncertain or cannot decide whether the NCR accused poses a significant threat to the safety of the public. If it cannot come to a decision with any certainty, then it has not found that the NCR accused poses a significant threat to the safety of the public.

4. The proceeding before the court or Review Board is not adversarial. If the parties do not present sufficient information, it is up to the court or Review Board to seek out the evidence it requires to make its decision. Where the court is considering the matter, it may find that it cannot readily make a disposition without delay and that it should be considered by the Review Board. Regardless of which body considers the issue, there is never any legal burden on the NCR accused to show that he or she does not pose a significant threat to the safety of the public.

5. The court or Review Board may have access to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused and more.

6. A past offence committed while the NCR accused suffered from a mental illness is not, by itself, evidence that the NCR accused continues to pose a significant risk to the safety of the public. However, the fact that the NCR accused committed a criminal act in the past may be considered together with other circumstances to indicate a pattern of behaviour that may be relevant to the issue of whether the NCR accused presents a significant threat to public safety. The court or Review Board must, at all times, consider the circumstances of the individual NCR accused before it.

7. If the court or Review Board concludes that the NCR accused is not a significant threat to the safety of the public, it must order an absolute discharge.

8. If the court or Review Board concludes that the NCR accused is a significant threat to the safety of the public, it has two alternatives. It may order that the NCR accused be discharged subject to the conditions the court or Review Board considers necessary, or it may direct that the NCR accused be detained in custody in a hospital, again subject to appropriate conditions.

9. When deciding whether to make an order for a conditional discharge or for detention in a hospital, the court or Review Board must again consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused, and make the order that is the least onerous and least restrictive to the NCR accused. [from paragraph 62 of the decision]

R. v. Owen, 2003 SCC 33: The NCR regime is designed to protect the public before violence occurs and not rely on punishment afterward. Detention due to problematic addiction can be the least onerous and least restrictive order appropriate. A review board cannot impose a condition in its order as punishment.

Penetanguishene Mental Health Centre v. Ontario (Attorney General), 2004 SCC 20:
The conditions a review board imposes must be the least onerous and least restrictive of an NCR accused's liberty, consistent with the s.672.54 considerations. The disposition and the conditions imposed must be considered together.

Pinet v. St Thomas Psychiatric Hospital, 2004 SCC 21: Just because an NCR accused's risk cannot safely be managed in the public does not necessitate their detention in a maximum-security setting.

R. v. Wiebe, 2004 MBCA 109: While a review board cannot mandate a certain course of treatment, it is incumbent on the board to look into whether there are alternatives for treatment, particularly when presented only with an option that is effectively "virtual solitary confinement in an inappropriate hospital setting."

R. v. Wodajio, 2005 ABCA 45: A review board can consider unproven criminal charges in assessing whether an accused poses a significant threat. Also, an NCR accused's mental illness does not need to contribute to the significant threat.

Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services), 2006 SCC 7: A review board does not have the ability to order a particular form of treatment. The board can, however, impose conditions regarding or relative to the supervision of treatment. The board has an obligation to form an opinion on a treatment plan and clinical progress.

Manitoba (Attorney General) v. Wiebe, 2006 MBCA 87: A review board must ensure an NCR accused has opportunities for medical treatment where necessary and appropriate, but cannot mandate a hospital to administer a particular treatment.

Evers v. British Columbia (Adult Forensic Psychiatric Services), 2009 BCCA 560: When a Review Board determines a previously unfit accused is now fit and should be referred back to court, the board does not have jurisdiction to impose a further disposition. (See also *Re Pichette*, 2022 ONCA 438).

R. v. Conway, 2010 SCC 22: Review boards are courts of competent jurisdiction and can grant remedies under s.24(1) of the *Canadian Charter of Rights and Freedoms.*

R. v. Ferguson, 2010 ONCA 810: If an NCR accused does not pose a significant risk to the safety of the public, they must be absolutely discharged, even if it is in their best interest to remain under the review board's jurisdiction. For a risk posed to be significant, the risk must be that an NCR accused will commit a serious criminal offence.

Re Lamb, 2014 ONCA 169: A conditional discharge is not appropriate for an NCR accused who is unable to consent to treatment. (See also *R. v. Coles,* 2007 ONCA 806)

Ontario (Review Board) v. Ranieri, 2015 ONCA 444: The legislative change to s.672(54) adopted in 2014, which mandated that review boards must make dispositions that are necessary and appropriate, did not remove the obligation to impose the least onerous and least restrictive conditions as are appropriate.

Re Marzec, 2015 ONCA 658: The onus does not rest with an accused to establish that they do not pose a significant risk. A review board cannot impose a discharge on conditions strictly out of an abundance of caution.

Re Carrick, 2015 ONCA 866: The standard of what poses a significant threat to the safety of the public is an onerous one.

Re Kalra, 2018 ONCA 833: Lack of insight alone is not a reason to deny an absolute discharge. Some people with a mental illness will never be able to achieve insight due to their illness.

Re Kassa, 2019 ONCA 313: A review board must do more than consider whether an NCR accused would engage in activity that "could" result in significant harm. The risk must be "real" and not merely hypothetical.

Re Sim, 2019 ONCA 719: A review board is entitled to consider an accused's insight, but it cannot dominate an analysis of potential threat. A lack of insight is relevant when it is tied to the risk of harm to the public. (See also: *Re Yunus-Ali,* 2020 ONCA 669)

Re Abdulle, 2019 ONCA 812: The risk of relapse alone is not sufficient to establish significant risk, unless it is tied to a risk of committing serious crimes.

Re Murray, 2020 ONCA 547: If there is a foundation demonstrating the need for further evidence, it is the review board's obligation to seek that evidence out, whether that evidence is in favour of the NCR accused or is related to restricting the accused. The duty is the board's to make the enquiry and is not incumbent on a party to request it.

R. v. Bharwani, 2023 ONCA 203:

1. There is one fitness test for all accused, whether represented by counsel or not. This test is applied contextually.

2. The test for fitness is set out in the statutory definition of "unfit to stand trial" in s. 2 of the *Criminal Code*.

3. A person is unfit to stand trial if, on account of mental disorder, the person is unable to conduct a defense or to instruct counsel to do so.

4. The purpose of the s. 2 fitness test is to ensure that the accused can be meaningfully present and can meaningfully participate at their trial. These touchstones inform a purposive interpretation and application of the s. 2 fitness test and do not themselves constitute a stand-alone test.

5. The *Taylor* test questions are not a sufficient surrogate for assessing fitness but are helpful in providing insights into an accused's abilities in relation to the s. 2 criteria. Applying the fitness test is more nuanced than the questions recognize.

6. The accused must have a reality-based understanding of the nature and object and possible consequences of the proceedings.

7. The accused must have the ability to make decisions. This involves the ability to understand available options, the ability to select from those options, the ability to understand the basic consequences arising from those options, and the ability to intelligibly communicate to either counsel, or the court, the decision arrived upon.

8. The accused need not have the capacity to engage in analytical thinking in the sense that the accused need not be capable of making decisions in their own best interests. [From paragraph 167 of the decision]

Re Cooper, 2024 ONCA 484: A review board is required to consider the principles set out in *Gladue* for Indigenous accused in considering the factors under s.672.54.