

CANADA / JUDGMENT

R. v. Gautreau

2025 ONCA 873

COURT

Court of Appeal for Ontario

DECIDED

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gautreau, 2025 ONCA 873

DATE: 20251216

DOCKET: COA-24-CR-0375

Miller, Trotter and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Donald Gautreau

Appellant

Paul Socka, for the appellant

Amy Rose, for the respondent

Heard: October 6, 2025

On appeal from the disposition of Justice Pierre R. Bradley of the Ontario Court of Justice, dated April 5, 2023.

Trotter J.A.:

A. Introduction [1] The appellant was charged with attempted murder (Criminal Code, R.S.C. 1985, c. C-46, s. 239) and unlawful confinement (s. 279(2)) for his vicious attack on a woman living in a neighbouring apartment. The trial judge found that the appellant committed the offence of attempted murder, but not unlawful confinement. He found the appellant not criminally responsible on account of mental disorder (“NCRMD”): Criminal Code, s. 16. The appellant does not challenge this verdict.

[2] The trial judge also found the appellant to be a high risk accused (“HRA”), under s. 672.64 of the Criminal Code. A HRA finding triggers significant liberty consequences. A HRA must be ordered detained in a hospital under s. 672.54(c), with strict limitations on community access. The appellant appeals this finding. He submits that the process that resulted in the finding was unfair, the finding was predicated on an erroneous interpretation of s. 672.64, and the finding was unreasonable.

[3] The following reasons explain why I would dismiss the appeal.

B. Background (1) The Attack on the Victim [4] The appellant lived in an apartment in Sudbury, Ontario. On April 25, 2022, he knocked on the door of his 43-year-old neighbour, who lived across the hall. When she answered, the appellant asked her for a cigarette and stepped into her apartment. He quickly became angry with her and placed a comforter over her head and body. He pulled the victim into the kitchen, pinned her to the floor, grabbed a knife from a kitchen drawer, and inflicted serious wounds to her throat and mandible. The victim managed to get away from the appellant and run out of her apartment. The appellant followed her and pushed her down the stairs.

- [5] The victim's injuries were horrific. She required approximately 100 stitches to repair her neck and mandible, and another 50 stitches for injuries to her hand sustained in defending herself. The victim also had surgery to repair an artery.
- [6] The appellant was arrested almost immediately at the scene. He went down on his knees and then laid on his stomach, shouting "I'm cooperating, I did it" and "I'm not denying it, I did it." He had blood on his hands and mouth. The appellant later told a psychiatrist that the appearance and taste of the victim's blood led him to conclude that she was cloned from a sheep. While in police custody, the appellant made a number of utterances that reflected severely disordered thinking.
- (2) The Appellant and His Mental Health Status [7] The appellant was 48 years old at the time of the events. He has a criminal record, spanning from 1993 to 1998, involving property and drug offences. He had no previous record for violence. He has a long history of mental illness.
- [8] The appellant was initially found unfit to stand trial. He was admitted to hospital on a 60-day treatment order. During this time period, the appellant was treated and assessed by Dr. Gillian Munro, a psychiatrist at the North Bay Regional Health Centre. He was determined fit to stand trial on September 16, 2022.
- [9] Dr. Munro prepared a report, dated November 17, 2022, in which she addressed the appellant's mental state at the time of the offence. The appellant has suffered mental health challenges since his early teens. The appellant's primary diagnosis is schizophrenia, complicated by cocaine use disorder, cannabis use disorder, opiate use disorder, and anti-social personality disorder. He has had many hospitalizations over the years, most of them involuntary.
- [10] Dr. Munro discussed the appellant's progress during the time he was detained in the hospital. The appellant was resistant to being treated and took his medication reluctantly. He lacked insight into his illness. Although his mental state improved somewhat over the months, the delusions that caused him to attack the victim remained largely intact. At one point during his stay, the appellant's condition worsened and a Code White (signifying a psychiatric emergency) was called because the appellant was hostile and aggressive with a staff member. He was placed in seclusion for a brief period of time.
- [11] In her report, Dr. Gillian Munro concluded that the appellant was NCRMD when he attacked the victim. The appellant "was experiencing severe symptoms of psychosis, including disorganized thoughts and behaviours, intense paranoid, grandiose, and bizarre delusional beliefs, perceptual disturbances, and extremely poor insight." She attributed this situation to schizophrenia, which she described as very treatment-resistant and exacerbated by substance abuse. Although the appellant's symptoms did not impair his ability to appreciate the nature and quality of his actions, they significantly impaired his ability to make a rational decision about the wrongfulness of his actions.

- (3) The Trial Proceedings [12] The trial of the substantive charges proceeded on the basis of an Agreed Statement of Facts, supplemented by the evidence of a police officer. It was the appellant's position at trial that he was NCRMD at the time of the incident.
- [13] Dr. Munro testified at trial and confirmed her opinion. At the time of the offence, the appellant's thinking was severely disordered, involving persecutory delusions. The appellant told Dr. Munro that the victim was a clone who had been grown out of sheep's blood and that she was being remotely controlled. At the time of the trial, seven months after the offence, Dr. Munro testified that the appellant's mental state was improved through treatment, but remained significantly compromised. She testified that the appellant "felt and continues to feel" justified in having attacked the victim.
- [14] Dr. Munro agreed that the appellant had no history of aggression or violence. As for his recent offending, Dr. Munro said: "I would characterize it as being generally out of character for him."
- [15] Following Dr. Munro's testimony, the Crown joined the appellant in submitting that the appellant should be found NCRMD.
- [16] The issue of a HRA finding under s. 672.64 arose for the first time during the submissions of counsel. Defence counsel raised the issue initially, presumably based on an off-record conversation between him and the Crown. On the record, defence counsel informed the trial judge that he believed the Crown was seeking a HRA finding and that, while he could not consent to it, he did not oppose it as it "appear[ed] to be obvious on the evidence."
- [17] The Crown's submissions in support of the issue relied upon portions of Dr. Munro's report in which she addressed the appellant's aggressive behaviour towards staff at the hospital (the Code White incident), as well as the appellant's persistent delusions.
- [18] The trial judge found that the appellant committed the actus reus of attempted murder. However, the trial judge concluded that the appellant's actions in putting the blanket over the victim's head were momentary in nature and did not amount to a confinement under s. 279(2) of the Criminal Code, citing *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195. The appellant was found not guilty on this count.
- [19] The trial judge accepted the joint position of counsel that the appellant was NCRMD on the attempted murder charge. The trial judge was satisfied that, due to his mental disorder (i.e., schizophrenia), the appellant was incapable of making rational decisions concerning the wrongfulness of his actions.
- [20] The trial judge's HRA finding is addressed in more detail in the following section. In brief, he found that the appellant met the criteria in both ss. 672.64(1)(a) and (b) of the Criminal Code. He ordered that the appellant be detained in hospital: s. 672.54(c).

C. Discussion (1) A High-Risk Accused [21] The HRA concept was introduced into the Criminal Code in 2014 with the enactment of the Not Criminally Responsible Reform Act, S.C. 2014, c. 6. Section 672.64(1) of the Criminal Code provides:

672.64(1) On application made by the prosecutor before any disposition to discharge an accused absolutely, the court may, at the conclusion of a hearing, find the accused to be a high-risk accused if the accused has been found not criminally responsible on account of mental disorder for a serious personal injury offence, as defined in subsection 672.81(1.3), the accused was 18 years of age or more at the time of the commission of the offence and

- (a) the court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
- (b) the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person. [Emphasis added.]

[22] Section 672.64(2) outlines factors for courts to consider when conducting the HRA assessment:

- (2) In deciding whether to find that the accused is a high-risk accused, the court shall consider all relevant evidence, including
 - (a) the nature and circumstances of the offence;
 - (b) any pattern of repetitive behaviour of which the offence forms a part;
 - (c) the accused's current mental condition;
 - (d) the past and expected course of the accused's treatment, including the accused's willingness to follow treatment; and
 - (e) the opinions of experts who have examined the accused.

[23] The remaining subsections of s. 672.64 explain the effects of a HRA finding:

- (3) If the court finds the accused to be a high-risk accused, the court shall make a disposition under paragraph 672.54(c), but the accused's detention must not be subject to any condition that would permit the accused to be absent from the hospital unless
 - (a) it is appropriate, in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment, if the accused is escorted by a person who is authorized by the person in charge of the hospital; and
 - (b) a structured plan has been prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public.

- (4) A decision not to find an accused to be a high-risk accused is deemed to be a disposition for the purpose of sections 672.72 to 672.78.
- (5) For greater certainty, a finding that an accused is a high-risk accused is a disposition and sections 672.72 to 672.78 apply to it.
- [24] This court has stated that HRA findings are “exceptional in nature and should be imposed sparingly”: *R. v. Hadfield*, 2024 ONCA 46, 169 O.R. (3d) 622, at para. 18; *R. v. Teggart*, 2025 ONCA 431, at para. 7.
- [25] Section 672.64 contains both fixed and flexible requirements. In terms of the former, a HRA finding may only be made with respect to an accused who was 18 years or older at the time of the offence, and it applies exclusively to those found not criminally responsible under s. 16 of the Criminal Code. It has no application to accused persons who are found unfit to stand trial. It is only available when an accused has committed a serious personal injury offence, as defined in s. 672.81(1.3): see, generally, Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Toronto: Thomson Reuters Canada Ltd., 2024) (loose-leaf 2025-Rel. 3), at §§ 8:36-8:40.
- [26] There is no question that the fixed criteria in s. 672.64(1) were met in this case. The appellant was over the age of 18, he was found NCRMD, and attempted murder is obviously a “serious personal injury offence”.
- [27] This appeal focuses on the application of the disjunctive, flexible pathways to a HRA finding found in ss. 672.64(1)(a) and (b). Before designating someone to be a HRA, a judge must be:
- (a) ... satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
- (b) ... of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person. [Emphasis added.]
- [28] A key part of the HRA regime, and one that is relevant to the statutory interpretation issue on this appeal, is the reviewability of a HRA finding. Section 672.84 of the Criminal Code provides the Review Board with the power to refer a HRA finding to a superior court. That court may revoke the finding if it is “satisfied that there is not a substantial likelihood that the accused will use violence that could endanger of the life and safety of another person”: s. 672.84(3). This applies regardless of whether the HRA finding was made pursuant to ss. 672.64(1)(a) or (b).
- [29] In terms of appellate review, ss. 672.64(4) and (5) provide that the decision of a judge whether or not to make a HRA finding is a “disposition” for the purposes of ss. 672.72 to 672.78 of the Criminal Code. Accordingly, a HRA finding may only be set aside if it is unreasonable and cannot be supported by the evidence, based on a wrong decision on a question of law, or there was a miscarriage of justice. Being a discretionary decision, a HRA finding is entitled to deference on appeal: *Hadfield*, at paras. 28, 40.

- (2) Application to the Appellant The Appellant's Lack of Opposition to the Finding
- [30] As appellate counsel acknowledges, trial counsel's lack of opposition to the high-risk designation must be addressed. Mr. Socka submits trial counsel's position would appear to have been taken without instructions or any discussion of the matter with the appellant. He submits that we should give no weight to this factor. He contends that there was no tactical advantage to the appellant in not opposing the finding. In contrast to an accused person who invites or consents to a NCRMD verdict, which results in an exemption from criminal responsibility, there is no benefit whatsoever in an accused person consenting to a HRA finding.
- [31] The Crown submits that trial counsel's position is "an appropriate contextual consideration in this Court's assessment of the material before the trial judge and the degree of detail included in his analysis". Ms. Rose for the Crown points out that there is no suggestion that trial counsel was ineffective in his representation of the appellant. Although she acknowledges that the hearing was not procedurally "ideal", she submits that, as a matter of fairness, had the appellant opposed the finding, the Crown may have chosen to adduce further evidence in support of its application. In the NCRMD context, see *R. v. Guidolin*, 2011 ONCA 264, 280 O.A.C. 387, at paras. 12-13.
- [32] In the end, the trial judge appeared to place no weight on the appellant's lack of opposition to the HRA finding, nor would I. Just like a NCRMD finding, a HRA finding does not turn on the consent of the accused, but on the trial judge being satisfied that the criteria in s. 672.64(1) are met: *R. v. Quenneville*, 2010 ONCA 223, 261 O.A.C. 99, at para. 18, leave to appeal refused, [2010] S.C.C.A. No. 409. That is what the trial judge did in this case.
- [33] That said, the manner in which the issue came to fruition in this case was not ideal. Although there is no formal notice requirement in the Criminal Code or the rules of court, basic fairness dictates that proper notice of an application under s. 672.64 should be given to the accused and counsel. Had notice been given earlier in this case, and not left to the post-evidentiary stage of the proceedings, there would have been the opportunity to seek assistance on this issue from Dr. Munro. Proper notice may have alleviated the concern that the concession was made without instructions.
- [34] In cases when a NCRMD accused signals their consent to such a finding, depending on the circumstances, including whether the accused is represented by counsel, a trial judge may wish to inquire into the accused person's understanding of the consequences of such a finding: see *R. v. Laming*, 2022 ONCA 370, 413 C.C.C. (3d) 409, at paras. 58-59; *Mental Disorder in Canadian Criminal Law*, at § 4:26. This approach should also apply to HRA proceedings. However, in this case, given the unequivocal position taken by trial counsel, the trial judge cannot be faulted for not making any inquiry.

The Appropriate Level of Risk in s. 672.64 of the Criminal Code

[35] The operation of s. 672.64 must be located in the broader context of Part XX.1 of the Criminal Code. Once a case passes from a trial court to the Review Board, the Review Board's continued jurisdiction is dependent on the individual remaining a "significant threat to the safety of the public": s. 672.54. This provision is at the core of Part XX.1. In *Winko v. B.C. (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, McLachlin C.J. wrote, at para. 49: "To repeat, absent a finding that the NCR accused represents a significant risk to the safety of the public, there can be no constitutional basis for restricting his or her liberty" (emphasis added).

[36] A "significant risk" is not a mere possibility of future harm. In *R. v. Ferguson*, 2010 ONCA 810, 264 C.C.C. (3d) 451, Doherty J.A. described what the proper standard entails, at para. 8:

The meaning of the phrase "significant threat to public safety" has been authoritatively set down in [Winko]. The phrase refers to a foreseeable and substantial risk of physical or psychological harm to members of the public that is serious and beyond the trivial or annoying. A very small risk of even grave harm will not suffice. A high risk of relatively trivial harm will also not meet the substantial harm standard. While the conduct must be criminal in nature, not all criminal conduct will suffice to establish a substantial risk. There must be a risk that the NCR accused will commit a "serious criminal offence".

See also *Wheaton (Re)*, 2025 ONCA 26, at paras. 15, 22; *Wheeler (Re)*, 2024 ONCA 726, at para. 6.

[37] The meaning of this phrase was refined in the Not Criminally Responsible Reform Act with the enactment of s. 672.5401, which provides:

For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent.

[38] It is within this framework that the calibration of risk in ss. 672.64(1)(a) and (b) of the Criminal Code must be considered.

[39] The appellant challenges his HRA designation under both ss. 672.64(1)(a) and (b). I will respond to each challenge in turn.

Section 672.64(1)(a)

[40] For convenience, I reproduce the relevant language in s. 672.64(1)(a), which permits a court to make a HRA finding when:

the court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person... [Emphasis added]

- [41] The jurisprudence supports the proposition that a “substantial likelihood” is higher than the “significant threat” characterization in ss. 672.54(a) and 672.5401. In *R. v. Schoenborn*, 2017 BCSC 1556, 354 C.C.C. (3d) 393, Devlin J. wrote, at para. 42: “It would be illogical to ground these liberty deprivations in the same level of risk that is already required to maintain Review Board jurisdiction over a NCR accused in the pre-existing NCRMD regime, which already provides for custodial detention in a hospital where necessary.” In *Hadfield*, this court said, at para. 13: “The use of the words “substantial likelihood” denotes a high degree of probability that the accused will endanger either the life or safety of another” (emphasis added).
- [42] The inquiry under s. 672.64(1)(a) is not undertaken on the assumption that the accused person is subject to the restrictions of a disposition order under Part XX.1. Instead, the focus is on the “inherent or endemic risk of violence the accused currently poses”: see *Cousineau (Re)*, 2021 ONCA 760, at paras. 45, 50, leave to appeal refused, [2021] S.C.C.A. No. 450; *Hadfield*, at para. 11.
- [43] The appellant submits the trial judge erred in his articulation of the “substantial likelihood” standard. Mr. Socka points to language in the trial judge’s reasons that he says belies the application of the proper standard. I disagree.
- [44] At the beginning of his reasons addressing this issue, the trial judge said: “Pursuant to s. 672.64(1)(a) of the Code, the court is of the view that Mr. Gautreau is substantially likely to use violence that could endanger the life or safety of another person in the future” (emphasis added). As he explained:

This finding is based upon the fact that after the incident took place, the accused did obtain treatment at the Forensic Assessment Unit of the hospital and during that time, Mr. Gautreau did threaten and intimidate staff. At one point, a Code White (psychiatric emergency) was initiated because of Mr. Gautreau’s violent behaviour. Dr. Munro testified that Mr. Gautreau continues to express numerous bizarre paranoid, grandiose, and somatic delusions, although with decreasing intensity during the latter part of his admission to hospital.

- [45] The trial judge held that the appellant’s current diagnosis “creates a strong likelihood of recurring violence”. Finally, the trial judge stated:

Mr. Gautreau’s lack of insight as to the importance of continually obtaining psychiatric treatment and his historical behavior of not taking his medication also substantiates the court’s finding that Mr. Gautreau could endanger the life and safety of other people in the future. Dr. Munro did testify that if Mr. Gautreau stopped taking his medication, he would likely become psychotic and could become violent once again. [Emphasis added.]

The appellant seizes on the trial judge’s use of the word “could” in this passage.

- [46] In my view, when his reasons are read as a whole, the trial judge did not fail to identify the correct standard. It is true that the trial judge did not specifically refer to the standard of a “high degree of probability” referenced in Hadfield. However, Hadfield was decided after he made his decision.
- [47] I agree with the Crown that the trial judge’s expressions of “could endanger the life and safety of other people in the future” and “could become violent once again” do not reflect error; they are congruent with the language of s. 672.64(1)(a), which requires “a substantial likelihood that the accused will use violence that could endanger the life or safety of another person” (emphasis added).
- [48] I am satisfied that the trial judge applied the proper, elevated standard in his application of s. 672.64(1)(a).
- [49] The appellant further submits that the trial judge’s ultimate finding under s. 672.64(1)(a) was unreasonable. He advances three arguments in support of this submission.
- [50] First, the appellant submits that the evidence failed to establish a high degree of probability that the appellant could use violence that could endanger others. Although the appellant has struggled with his mental health for many years, he has not been violent. As noted above, Dr. Munro characterized the attack on the victim as being out of character.
- [51] Second, he submits that the finding was unreasonable because there was no expert evidence about the appellant’s risk.
- [52] Third, he submits that the trial judge’s finding was also unreasonable because of his reliance on the appellant’s behaviour during his pre-trial hospitalization.
- [53] I consider these submissions in the context of s. 672.64(2), which provides the following guidance to courts considering HRA applications:
- (2) In deciding whether to find that the accused is a high-risk accused, the court shall consider all relevant evidence, including
 - (a) the nature and circumstances of the offence;
 - (b) any pattern of repetitive behaviour of which the offence forms a part;
 - (c) the accused’s current mental condition;
 - (d) the past and expected course of the accused’s treatment, including the accused’s willingness to follow treatment; and
 - (e) the opinions of experts who have examined the accused. [Emphasis added.]

- [54] This section provides trial judges with a broad palette with which to make determinations under ss. 672.64(1)(a) and (b). The anchor of the provision is “all relevant evidence”, accompanied by a non-exhaustive list of factors, which are not ranked in order of importance. Section 672.64(2) guides a fact-specific inquiry that is entitled to deference on appeal. The trial judge referenced s. 672.64(2) in his reasons.
- [55] The factor that is most helpful to the appellant is found at s. 672.64(2)(b) – “any pattern of repetitive behaviour of which the offence forms a part of”. As Mr. Socka submits, there was no pattern leading up to the offence. It was out of character for the appellant.
- [56] However, other enumerated factors pull in the opposite direction. For instance, although the nature of the offence figures more prominently in s. 672.64(1)(b) (discussed below), it is also a relevant factor to the inquiry under s. 672.64(1)(a), as signified by s. 672.64(2)(a). The nature and circumstances of the offence in this case are grave, given the severity of the victim’s injuries, which could very well have ended her life.
- [57] It is true that there was no psychiatric evidence concerning the appellant’s risk. Dr. Munro was not tasked with assessing the appellant’s future risk of violence. Her mandate was to provide an opinion on whether the appellant was NCRMD. Nonetheless, her evidence spoke to a number of relevant factors favouring a HRA finding, particularly the appellant’s current mental condition (s. 672.64(2)(c)) and the past and expected course of the appellant’s treatment (s. 672.64(2)(d)).
- [58] It would have been preferable had the Crown tendered expert evidence on the HRA issue specifically. However, expert evidence is not mandatory to support a HRA finding. Even when expert evidence is tendered on a HRA application, it need not be determinative. For example, in *Teggart*, a HRA finding was made in the face of expert evidence that the appellant merely presented a “low to moderate” risk to offend: at para. 14. The court upheld the HRA finding, writing at para. 16:

It is clear from her reasons that the application judge considered the expert opinions and that her findings that the appellant “continues to suffer from delusions” and that his schizophrenia remains “treatment-resistant” were rooted in the record before her. Even Dr. Pearce observed that the appellant continued to harbour the belief that the person he had attacked in the index offence was not his mother, but an imposter.

- [59] Dr. Munro’s report and evidence speak to a similar situation. At the time of trial, the appellant continued to suffer under the same delusional system that led him to attack the victim. The appellant continued to believe he was justified in his actions. Dr. Munro explained in detail the appellant’s treatment-resistant illness, including his lack of insight into his condition and his history of substance abuse. Her description of the Code White incident illustrated the continuing challenges posed by the appellant’s mental state at the time of the assessment. This is the manner in which the trial judge relied upon this evidence.

[60] In all of the circumstances, the evidence supported the trial judge's conclusion that, at the time of the hearing, there was a substantial likelihood, an elevated risk, that the appellant will use violence that could endanger the life or safety of another person, the victim in particular.

[61] I would dismiss this ground of appeal.

Section 672.64(1)(b)

[62] A HRA finding may also be made under s. 672.64(1)(b) when:

the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person. [Emphasis added.]

[63] The trial judge's reasons on the application of this sub-section are found in the following paragraph:

Finally, pursuant to s. 672.64(1)(b), the court is also of the belief that the accused's acts of covering the complainant's head and body with a blanket and cutting [the victim's] neck and mandible with a knife were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.

[64] The appellant does not dispute that his acts were of a "brutal nature". However, he submits that the trial judge applied the wrong standard in his assessment of the level of risk under this provision. He submits the "substantial likelihood" standard in s. 672.64(1)(a) must also be applied to s. 672.64(1)(b), even though that provision simply makes reference to a "risk".

[65] In making this submission, the appellant relies principally on Schoenborn, a decision in which Devlin J. declined to make a HRA finding in relation to an individual who another judge determined was NCRMD for the first degree murders of his three children. In her lengthy reasons, Devlin J. addressed numerous issues of statutory interpretation. I focus only on that aspect of the judgment that addresses the level of risk in s. 672.64(1)(b).

[66] Devlin J. concluded that the "substantial likelihood" standard explicitly stated in s. 672.64(1)(a) is also applicable to s. 672.64(1)(b). This was based on a number of considerations, one being the overall purpose of the HRA regime. As she noted, the purpose of the HRA designation is to identify NCRMD accused who pose "an unacceptable risk to society", beyond the "significant threat" standard in s. 672.5401: at para. 26.

[67] More fundamentally, Devlin J. wrote that the standard must be interpreted in light of the review provision in s. 672.84. As noted above, a Review Board may refer a HRA to a superior court for consideration, and that court may revoke the finding, if it is proved that "there is not a substantial likelihood that the accused will use violence that could endanger the life and safety of another person": s. 672.84(3). For this reason, Devlin J. held, the same level of risk – substantial likelihood – must be applied regardless of what pathway is taken to the designation. She observed that, if this were not the case, a person found to be a HRA pursuant to a lower standard in s. 672.64(1)(b) – mere "risk" – would be immediately eligible

to have their finding set aside under s. 672.84: paras. 95-96.

- [68] Aspects of Schoenborn have been cited with approval by this court in Cousineau, Hadfield and Teggart, although not on the interpretation of s. 672.64(1)(b). However, Devlin J.'s interpretation of this provision has been followed by some trial judges in this province: see *R. v. Ochelebe*, 2025 ONSC 5261, at paras. 141-150; *R. v. Caines*, 2023 ONSC 5482, at para. 55.
- [69] The Crown relies on the decision of the Court of Appeal of Quebec in *Lafrenière c. R.*, 2022 QCCA 96, leave to appeal refused, [2022] S.C.C.A. No. 86. That court rejected the Schoenborn approach in favour of an interpretation more in keeping with the plain language of s. 672.64(1)(b), which requires "a risk of grave physical or psychological harm to another person."
- [70] At the outset, the court in *Lafrenière* observed that ss. 672.64(1)(a) and (b) are different. Section 672.64(1)(b) is less demanding as a result of the brutal nature of the offending. In this context, all that is required is a "risk" of serious harm, physical or psychological, to another person: at para. 11. Still, the court was prepared to allow that the risk must approach the degree of risk required under s. 672.54 of the Code. As the court said, at para. 19, the prosecution must "demonstrate a risk of grave harm ... a real risk (and therefore not hypothetical), which is more than 'minimal' / 'miniscule', that this harm will occur" (translation from French).[1]
- [71] The court in *Lafrenière* acknowledged the observation of Devlin J. in *Schoenborn* that a HRA under s. 672.64(1)(b) may be immediately entitled to have the designation removed through the review process in s. 672.84. However, this possibility does not render the provision frivolous in the circumstances. The court pointed to the different roles of the courts and Review Boards under Part XX.1 of the Criminal Code. It characterized the designation as an emergency provision, at para. 25, furnishing judges with the power to protect the public by imposing enhanced liberty restrictions until the case comes before the Review Board. At that time, the Board, with its specialized expertise, may be better equipped to assess the nature of the risk posed by a HRA and determine whether the case should be referred to the superior court under s. 672.84: *Lafrenière*, at para. 23.
- [72] With respect, I agree with the approach in *Lafrenière*. The differential phrasing and language in ss. 672.64(1)(a) and (b) demonstrate that Parliament was well aware of the distinction it created. The *Lafrenière* approach is faithful to the modern framework for statutory interpretation, privileging the grammatical and ordinary meaning of the text, in the context of the Parliament's public protection goal: see *R. v. Guerrier*, 2024 ONCA 838, 174 O.R. (3d) 675, at paras. 21-23; *R. v. Kloubakov*, 2025 SCC 25, 450 C.C.C. (3d) 34, at para. 61.

- [73] The subsections do not simply exchange one level of risk for another; rather, they are calibrated to different apprehended harms. Section 672.64(1)(a) demands a higher level risk of lesser harm, whereas s. 672.64(1)(b) permits a lower level risk of grave harm. Failing to recognize this distinction between ss. 672.64(1)(a) and (b) would render the subsections redundant.
- [74] I accept the Crown's submission, consistent with Lafrenière, that s. 672.64(1)(b) permits a court to intervene quickly to prioritize public safety (by blocking unsupervised access to the community) where an NCRMD accused has committed a brutal offence at a time when the Crown may not be in a position to establish a high degree of probability of re-offending. This may arise in a situation where an accused person is in the early stages of a mental illness, with little if any treatment history. It will then be for the Board to subsequently assess the HRA's risk.
- [75] I should note that the Crown does not submit that the standard under s. 672.64(1)(b) should be any lower than the "significant risk" test that the Supreme Court of Canada in Winko held was required to maintain the constitutionality of s. 672.54 (and, now, s. 672.5401). I agree – the level of "risk" referred to in s. 672.64(1)(b) must be subject to the same constitutional threshold. As McLachlin C.J. wrote: "[t]here must be evidence of a significant risk to the public before the court or Review Board can restrict the NCR accused's liberty": para. 49. This minimal threshold must apply to s. 672.64(1)(b) with equal weight, as it too restricts the liberty of the NCR accused.
- [76] Having reached this conclusion, there is no reason to challenge the trial judge's alternate HRA finding under s. 672.64(1)(b). The brutality of the appellant's actions speaks for itself. In the wake of this brutality, in combination with his highly treatment-resistant mental illness, the trial judge did not err in finding that, left to his own devices and without any conditions, there is a significant risk that the appellant will cause grave harm to another person, just as he intimated while under pre-trial psychiatric care.
- [77] I would dismiss this ground of appeal.

D. Conclusion [78] The trial judge did not err in finding that the appellant is a HRA. I would dismiss the appeal.

Released: December 16, 2025 "B.W.M."

"Gary Trotter J.A."

"I agree. B.W. Miller J.A."

"I agree. M. Rahman J.A."

- [1] Official French version: "démontrer un risque de préjudice grave ... un risque réel (et donc pas hypothétique), qui est plus que «minime» / «minuscule», que ce préjudice se produira."

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