Winko *v*. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625

Joseph Ronald Winko *Appellant*

v.

The Director, Forensic Psychiatric Institute, and the Attorney General of British Columbia *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Canadian Mental Health Association, Kenneth Samuel Cromie on behalf of the Queen Street Patients' Council and Kevin George Wainwright *Interveners*

Indexed as: Winko *v*. British Columbia (Forensic Psychiatric Institute)

File No.: 25856.

1998: June 15, 16; 1999: June 17.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Fundamental justice -- Vagueness -- Improper onus -- Overbreadth -- Criminal Code providing for verdict of not criminally

responsible on account of mental disorder -- Not criminally responsible accused can be absolutely discharged, conditionally discharged or detained -- Whether provisions infringe principles of fundamental justice -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C., 1985, c. C-46, s. 672.54.

Constitutional law -- Charter of Rights -- Equality rights -- Mental disability -- Criminal Code providing for verdict of not criminally responsible on account of mental disorder -- Not criminally responsible accused can be absolutely discharged, conditionally discharged or detained -- Whether provisions infringe right to equality -- Canadian Charter of Rights and Freedoms, s. 15 -- Criminal Code, R.S.C., 1985, c. C-46, s. 672.54.

The appellant has a long history of mental illness and hospitalization, and has been diagnosed with chronic residual schizophrenia. In 1983 he was arrested for attacking two pedestrians on the street with a knife and stabbing one of them behind the ear. Prior to this incident he had been hearing voices. He was charged with aggravated assault, assault with a weapon, and possession of a weapon for purposes dangerous to the public peace. He was tried and found not criminally responsible ("NCR"). Under s. 672.54 of the *Criminal Code*, where a verdict of NCR on account of mental disorder has been rendered, the court or Review Board may direct that the accused be discharged absolutely, discharged subject to conditions or detained in custody in a hospital. The Review Board considered the appellant's status in 1995 and, in a majority decision, granted him a conditional discharge. A majority of the Court of Appeal upheld the decision. The appellant subsequently challenged the constitutionality of the provisions of the *Criminal Code* dealing with the review of NCR accused before a different panel of the Court of Appeal. A majority of the panel found that the provisions did not violate s. 7 or s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be dismissed.

Per Lamer C.J. and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.: In the spirit of supplanting the old stereotypes about mentally ill offenders, Part XX.1 of the *Criminal Code* supplements the traditional guilt-innocence dichotomy of the criminal law with a new alternative for NCR accused -- an alternative of individualized assessment to determine whether the person poses a continuing threat to society coupled with an emphasis on providing opportunities to receive appropriate treatment. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused.

Properly read, s. 672.54 does not create a presumption of dangerousness and does not, in its effect, impose a burden of proving lack of dangerousness on the NCR accused. The introductory part of s. 672.54 requires the court or Review Board to consider the need to protect the public from dangerous persons, together with the mental condition of the accused, his or her reintegration into society, and his or her other needs. The court or Review Board must then make the disposition "that is the least onerous and least restrictive to the accused". Under s. 672.54(*a*), the court or Review Board must direct that the accused be discharged absolutely if it is of the opinion that "the accused is not a significant threat to the safety of the public". This provision must be read with the preceding instruction that the court or Review Board must make the order that is the least onerous and least restrictive to the accused, and in light of the principle that the only constitutional basis on which the criminal law may restrict the liberty of an NCR accused is the protection of the public from significant threats to its safety. Read in this way, it becomes clear that unless it makes a positive finding on the evidence that the NCR accused poses a significant threat to the safety of the public, the court or Review

Board must order an absolute discharge. This interpretation is supported by the principle that a statute should be read in a manner that supports compliance with the *Charter*.

On this interpretation of Part XX.1, the duties of a court or Review Board that is charged with interpreting s. 672.54 may, for practical purposes, be summarized as follows:

1. The court or Review Board must 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. 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 in such circumstances 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 recourse 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. This list is not exhaustive.

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 where it is relevant to identifying a pattern of behaviour, and hence 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.

Section 672.54 does not violate the principles of fundamental justice guaranteed by s. 7 of the *Charter*. The phrase "significant threat to the safety of the public" satisfies the test of providing sufficient precision for legal debate and is therefore not unconstitutionally vague. Neither does s. 672.54, as interpreted, improperly shift the burden to the NCR accused to prove that he or she does not pose a significant threat to public safety. Finally, the scheme is not overbroad, since it ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety. In addition to the safeguards of the NCR accused's liberty found in s. 672.54, Part XX.1 further protects his or her liberty by providing for, at minimum, annual consideration of

the case by the Review Board and by granting the NCR accused a right to appeal to the Court of Appeal a disposition made by a court or Review Board. If a court or Review Board fails to interpret and apply s. 672.54 correctly and unduly impinges on the NCR accused's liberty, the NCR accused therefore has an appropriate remedy.

Section 672.54 of the *Code* does not infringe s. 15(1) of the *Charter*. A reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant, would not find these provisions to be discriminatory. They promote, rather than deny, the claimant's right to be considered as an individual, equally entitled to the concern, respect and consideration of the law. While Part XX.1 of the *Code* may be seen as treating NCR accused differently from other accused persons on the basis of mental illness at the time of the criminal act, and the distinction is made on the basis of an enumerated ground, namely mental disability, the purported differential treatment is not discriminatory in that it does not reflect the stereotypical application of presumed group or personal characteristics, or otherwise violate s. 15(1)'s guarantee that every individual is equally entitled to the law's concern, respect, and consideration. The jurisprudence recognizes that discrimination may arise either from treating an individual differently from others on the basis of group affiliation, or from failing to do so. Different legal treatment reflecting the particular needs and circumstances of an individual or group not only may be justified, but may be required in order to fulfill s. 15(1)'s purpose of achieving substantive equality. In its purpose and effect, Part XX.1 reflects the view that NCR accused are entitled to sensitive care, rehabilitation and meaningful attempts to foster their participation in the community, to the maximum extent compatible with the individual's actual situation. Any restrictions on the liberty of NCR accused are imposed to protect society and to allow the NCR accused to seek treatment, not for penal

purposes. This renders inapposite a mechanistic comparison of the duration of time for which criminally responsible and NCR accused may be confined.

Per L'Heureux-Dubé and Gonthier JJ.: Section 672.54 of the *Criminal Code* reflects the proper exercise by Parliament of its criminal law jurisdiction. Following *Swain*, the preventive jurisdiction of criminal law is triggered by the existence of a threat to public safety. Danger is the threshold, not significant danger. The opening paragraph of s. 672.54 sets out the rule governing the disposition to be made. First, the court or Review Board must take into consideration the need to protect the public from dangerous persons, the mental condition of the accused and the reintegration of the accused into society and the other needs of the accused. Second, the disposition is to be the least onerous and least restrictive possible to the accused. Section 672.54(*a*) mandates absolute discharge if it is found that the NCR accused is "not a significant threat to the safety of the public" even though he or she is dangerous. The wording of the introductory paragraph and of s. 672.54(*a*) on its face leads clearly to the conclusion that the test set out is a negative one. While the *Criminal Code*, like all legislation, ought to be interpreted in light of the *Charter* and the values it enshrines, courts ought not to depart from the "plain meaning" of the text in the absence of ambiguity.

While the need to protect the public from danger is an essential condition for imposing any restriction on the liberty interests of NCR accused and must be established, Parliament does not require a positive finding that the NCR accused is a significant threat to public safety to maintain some protective measures and justify a disposition that is the least onerous and restrictive to the accused other than absolute discharge. Section 672.54(*a*) is phrased in such a way that the requirement for an absolute discharge only arises when the court or Review Board is of the opinion that the accused is not a significant threat. Parliament has envisaged two levels of dangerousness: dangerousness

and significant threat to public safety. The court or Review Board must first make a positive finding of dangerousness, i.e., that the NCR accused is indeed a threat to public safety. If the court or Review Board finds that the accused is dangerous, it will then have to determine whether the accused is or is not a significant threat to public safety. A positive finding of such significant dangerousness need not be made as a condition precedent to ordering some measures of protection. Parliament has expressed, through the negative wording of s. 672.54(*a*), that if the court or Review Board is unable to reach an opinion as to whether or not the threat posed by the accused is a significant one, it may maintain some protective measures pending further review of the case, by issuing the order that is the least onerous and least restrictive to the accused consistent with the evidence.

The impugned provisions do not violate s. 7 of the *Charter*. The process is inquisitorial, as opposed to adversarial, and therefore does not cast a burden on the NCR accused to prove his or her lack of dangerousness. Nor does s. 672.54 create a presumption of dangerousness. If the court or Review Board fails to conclude positively that the NCR accused is dangerous, it must grant an absolute discharge. While the principles of fundamental justice require a positive finding of dangerousness, they allow that uncertainties with respect to the extent of the threat posed by the accused be resolved in favour of the safety of the public. Public concern that an NCR accused not be free of all supervision until it is established that he or she is not a significant threat to the safety of the public is obvious and legitimate. While the making of dispositions pursuant to s. 672.54 affects individual liberty interests so as to engage s. 7 of the *Charter*, a closer consideration of the legislation reveals the minimal effect of s. 672.54 on the liberty interests of the NCR accused as well as the existence of solid procedural safeguards. The court or the Review Board engages in a risk-management exercise. Detention or confinement will constitute the appropriate disposition only when that will

be the least onerous disposition possible. Section 672.54 is not overbroad precisely because it is tailored to fit the particular situation of the NCR accused. If punishment clearly cannot be one of the objectives of Part XX.1, then the correlative principle of proportionality cannot apply either. Part XX.1 adapts the criminal system to the mentally ill who are not responsible for their criminal acts. NCR accused are not sentenced because a sentence is appropriate neither for the NCR accused nor for the safety of the public. The sentence is replaced by the least onerous and restrictive disposition to the NCR accused which is appropriate to protect the public against NCR accused who are dangerous persons. Section 7 of the *Charter* allows for such a measured restriction on liberty in the interest of the public.

With respect to s. 15 of the *Charter*, McLachlin J.'s analysis was agreed with as equally applicable to the above reading of s. 672.54(*a*). Part XX.1 of the *Code* does not violate the equality rights of NCR accused. When viewed as a whole, NCR accused are not disadvantaged as compared to dangerous offenders. Rather, Part XX.1 provides for the least restrictive intrusion with the liberty interests of the accused consistent with protecting public safety. No negative message is sent about the worth or value of NCR accused. On the contrary, Parliament acknowledges that the needs of the NCR accused ought to be addressed by the criminal law system and that traditional sentencing principles cannot apply to them. Parliament has sent a message that the assessment of the NCR accused is to be dealt with the utmost consideration and prudence. Numerous procedural safeguards are provided. Part XX.1 is the legislative expression of a careful reconciliation of the interests of the NCR accused and society.

Cases Cited

By McLachlin J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **disapproved:** *R. v. Hoeppner*, [1999] M.J. No. 113 (QL); **referred to:** *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722; *Orlowski v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 733; *R. v. LePage*, [1999] 2 S.C.R. 744; *Orlowski v. British Columbia (Attorney-General)* (1992), 75 C.C.C. (3d) 138; *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 E.R. 718; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Swain*, [1991] 1 S.C.R. 933; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154; *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *R. v. Osolin*, [1993] 4 S.C.R. 595; *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL); *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Peckham* (1994), 19 O.R. (3d) 766; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

By Gonthier J.

Disapproved: *R. v. Hoeppner*, [1999] M.J. No. 113 (QL); **referred to:** *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. LePage* (1997), 119 C.C.C. (3d) 193; *R. v. Hebert*, [1990] 2 S.C.R. 151; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Attorney-General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138; *R. v. Parks*, [1992] 2 S.C.R. 871; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *L'Hirondelle v. Forensic Psychiatric Institute (B.C.)* (1998), 106 B.C.A.C. 9; *R. v. Peckham* (1994), 19 O.R. (3d) 766, leave to appeal denied, [1995] 1 S.C.R. ix; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Orlowski v. British Columbia (Attorney-General)* (1992), 75 C.C.C. (3d) 138; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378; *R. v. Barnier*, [1980] 1 S.C.R. 1124; *Winko v. Forensic Psychiatric Institute (B.C.)* (1996), 79 B.C.A.C. 1; *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269; *R. v. Lewis* (1999), 132 C.C.C. (3d) 163; *British Columbia (Forensic Psychiatric Institute) v. Johnson*, [1995] B.C.J. No. 2247 (QL); *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Oommen*, [1994] 2 S.C.R. 507; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

Statutes and Regulations Cited

Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof, S.C. 1991, c. 43.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1).

Criminal Code, R.S.C., 1985, c. C-46 [am. 1991, c. 43], ss. 16(1), 614(2) [(formerly 542(2)) rep. *idem*], Part XX.1, 672.16, 672.17, 672.34, 672.38 [am. 1997, c. 18, s. 83], 672.39, 672.4(1), 672.41(1), 672.43, 672.45, 672.46, 672.47, 672.5, 672.54, 672.55, 672.63, 672.72, 672.81, 672.82(1), 718.1 [ad. c. 27 (1st Supp.), s. 156], Part XXIV, 761.

Inquiries Act, R.S.C., 1985, c. I-11, ss. 4, 5.

Authors Cited

Canada. House of Commons. Standing Committee on Justice and the Solicitor General. *Minutes of Proceedings and Evidence*, Issue No. 7, October 9, 1991.

Canada. Law Reform Commission. Working Paper 14. *The Criminal Process and Mental Disorder*. Ottawa: Information Canada, 1975.

Cocozza, Joseph J., and Henry J. Steadman. "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence" (1976), 29 *Rutgers L. Rev*. 1084.

Colvin, Eric. "Exculpatory Defences in Criminal Law" (1990), 10 *Oxford J. Legal Stud*. 381.

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1992.

Davis, Simon. "Assessing the 'Criminalization' of the Mentally Ill in Canada", *Can. J. Psychiatry*, 37(8) (October 1992): 532-38.

Dictionnaire de la langue française - Lexis. Paris: Larousse, 1992.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Ennis, Bruce J., and Thomas R. Litwack. "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom" (1974), 62 *Cal. L. Rev*. 693.

Ferguson, G. "A Critique of Proposals to Reform the Insanity Defence" (1989), 14 *Queen's L.J*. 135.

Harris, Grant T., Marnie E. Rice and Catherine A. Cormier. "Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders" (1991), 14 *Int'l J. L. & Psy*. 223.

Hart, Stephen D., Christopher D. Webster and Robert J. Menzies. "A Note on Portraying the Accuracy of Violence Predictions" (1993), 17 *Law & Hum. Behav*. 695.

Hodgins, Sheilagh, ed. *Mental Disorder and Crime*. Newbury Park: Sage Publications, 1993.

Hogg, Peter W. *Constitutional Law of Canada*, loose-leaf ed., vol. 1. Scarborough, Ont.: Carswell, 1992 (updated 1998, release 1).

Laberge, Danielle, and Daphné Morin. "The Overuse of Criminal Justice Dispositions: Failure of Diversionary Policies in the Management of Mental Health Problems" (1995), 18 *Int'l J. L. & Psy*. 389.

Menzies, Robert J. "Psychiatry, Dangerousness and Legal Control". In *The Social Dimensions of Law*. Scarborough, Ont.: Prentice-Hall Canada, 1986, 182.

Menzies, Robert J., Christopher D. Webster and Diana S. Sepejak. "Hitting the forensic found barrier: predictions of dangerousness in a pretrial psychiatric clinic". In Neil Boyd, ed., Webster, Mark H. Ben-Aron and Stephen J. Hucker, eds. *Dangerousness: Probability and prediction, psychiatry and public policy*. New York: Cambridge University Press, 1985, 115.

Menzies, Robert J., Christopher D. Webster and Diana S. Sepejak. "The Dimensions of Dangerousness" (1985), 9 *Law & Hum. Behav*. 49.

Mullen, Paul E. "The Dangerousness of the Mentally Ill and the Clinical Assessment of Risk". In Warren Brookbanks, ed., *Psychiatry and the Law: Clinical and Legal Issues*. Wellington: Brooker's Legal Information, 1996, 93.

Nadin-Davis, R. Paul. *Sentencing in Canada*. Toronto: Carswell, 1982.

Nouveau Petit Robert, Dictionnaire alphabétique et analogique de la langue française. Montréal: Dicorobert Inc., 1996.

Ogloff, James R. P., et al. "Empirical Research Regarding the Insanity Defense: How Much Do We Really Know?". In James R. P. Ogloff, ed., *Law and Psychology: The Broadening of the Discipline*. Durham, N.C.: Carolina Academic Press, 1992, 171.

Prins, Herschel A. *Dangerous Behaviour, the Law, and Mental Disorder*. London; New York: Tavistock Publications, 1986.

Random House Dictionary of the English Language, 2nd ed. Toronto: Random House, 1987.

Rennie, Ysabel Fisk. *The Search for Criminal Man: A Conceptual History of the Dangerous Offender*. Lexington, Mass.: Lexington Books, 1978.

Rice, Marnie E., et al. "Recidivism Among Male Insanity Acquittees" (1990), 18 *J. Psychiatry & Law* 379.

Roth, Martin, Sir. "Modern Psychiatry and Neurology and the Problem of Responsibility". In Stephen J. Hucker, Christopher D. Webster and Mark H. Ben-Aron, eds., *Mental Disorder and Criminal Responsibility*. Toronto: Butterworths, 1981, 91.

Ruby, Clayton C. *Sentencing*, 4th ed. Toronto: Butterworths, 1994.

Schiffer, Marc E. *Mental Disorder and the Criminal Trial Process*. Toronto: Butterworths, 1978.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*. Toronto: Butterworths, 1992.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 3rd ed. Scarborough, Ont.: Carswell, 1995.

Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Webster's Third New International Dictionary of the English Language. Springfield, Mass.: Merriam-Webster Inc., 1986.

APPEAL from a judgment of the British Columbia Court of Appeal (1996), 84 B.C.A.C. 44, 137 W.A.C. 44, 112 C.C.C. (3d) 31, 4 C.R. (5th) 376, 40 C.R.R. (2d) 122, [1996] B.C.J. No. 2262 (QL), finding s. 672.54 of the *Criminal Code* to be constitutional. Appeal dismissed.

David Mossop, for the appellant.

Harvey M. Groberman and *Lisa J. Mrozinski*, for the respondents.

Kenneth J. Yule and *George G. Dolhai*, for the intervener the Attorney General of Canada.

Eric H. Siebenmorgen and *Riun Shandler*, for the intervener the Attorney General for Ontario.

Pierre Lapointe, for the intervener the Attorney General of Quebec.

Janet L. Budgell and *Jennifer August*, for the intervener the Canadian Mental Health Association.

Paul Burstein and *Leslie Paine*, for the intervener Kenneth Samuel Cromie.

Malcolm S. Jeffcock, for the intervener Kevin George Wainwright.

The judgment of Lamer C.J. and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ. was delivered by

//*McLachlin J.*//

MCLACHLIN J. --

I. Introduction

1 In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.

2 In 1991 Parliament provided its answer to this challenge: Part XX.1 of the *Criminal Code*, R.S.C., 1985, c. C-46. The appellant Winko submits that Part XX.1

violates his rights to liberty, security of the person and equality under the *Canadian Charter of Rights and Freedoms*. The same issue is raised in the companion appeals of *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722, *Orlowski v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 733, and *R. v. LePage*, [1999] 2 S.C.R. 744.

3 I conclude that Part XX.1 of the *Criminal Code* protects the liberty, security of the person, and equality interests of those accused who are not criminally responsible ("NCR") on account of a mental disorder by requiring that an absolute discharge be granted unless the court or Review Board is able to conclude that they pose a significant risk to the safety of the public. It follows that Part XX.1 does not deprive mentally ill accused of their liberty or security of the person in a manner contrary to the principles of fundamental justice. Nor does it violate their right to equal treatment under the law.

II. Facts

4 At the time of the Review Board disposition under appeal, Mr. Winko was a 47-year-old, single, unemployed man living at the Hampton Hotel in downtown Vancouver, British Columbia. He had been diagnosed with the mental illness of chronic residual schizophrenia. Indeed, the appellant has a long history of mental illness and hospitalization. On July 6, 1983, when Mr. Winko was 35, he was arrested for attacking two pedestrians on the street with a knife and stabbing one of them behind the ear. Prior to this incident, Mr. Winko had been hearing voices which he thought were coming from pedestrians saying, "why don't you go and grab a woman and do her some harm?", "you are going to the West End to kill someone", "you know you can't kill a woman", and "you are a coward". Winko was charged and taken to the Forensic Psychiatric Institute

("FPI"), where he continued to report auditory and visual hallucinations. In due course he was charged with aggravated assault, assault with a weapon, and possession of a weapon for purposes dangerous to the public peace. He was tried and found not criminally responsible.

5 From the NCR verdict in 1984 until August 7, 1990, Mr. Winko was held at the FPI. He was considered institutionalized. After his release, he lived in a series of hotels in the downtown eastside area of Vancouver. On June 1, 1994, he failed to appear at his Review Board hearing at the appointed time. However, he came to the Review Board Office later in the day, dirty, malodorous and complaining of being harassed by people on the street. He was readmitted to the FPI on June 6, 1994. He was cooperative, took his medication, and recovered rapidly.

6 Mr. Winko was returned to the community on July 5, 1994. This time, he went to live at the Hampton Hotel, run by the Mental Patients Association. The hotel is staffed by professional mental health workers who encourage residents to live independently. They also encourage residents to take their medication and communicate any concerns to the treatment team assigned to the patient.

7 In September 1994, Mr. Winko once again missed a medication injection, due in part to the failure of his doctor to keep track of the injections (which resulted in no one reminding Mr. Winko of the need for treatment). This led to a recurrence of the voices, and Mr. Winko voluntarily returned to the FPI in October 1994. He recovered rapidly and soon returned to the Hampton Hotel, where he has resided ever since.

8 Mr. Winko's residence at the Hampton Hotel has never presented any particular problems. In general he interacts well with the other residents at the hotel.

Despite occasional supervised breaks from medication due to side-effects (the most recent break of 18 months occurring in 1994), he has never been physically aggressive to anyone since the offences of 1983.

9 Mr. Winko's case illustrates many features often faced by a court or Review Board considering the status of an NCR accused: a concern, often based on events long past, requiring consideration of public safety before full release into society; a countervailing record of peaceful behaviour in more recent years; a medical record that indicates difficulties staying on medication and the possibility of recurrence of illness when lapses occur; and the fact that for most of his adult life, Mr. Winko has been subject to constraints on his liberty with no immediate prospect of release. This said, different cases present different scenarios. Sometimes the harm that leads to NCR status is as trivial as shoplifting. Sometimes it is as serious as homicide. Sometimes the accused has a record of perfect compliance with medication and medical directives. Sometimes compliance is a problem. Justice requires that the NCR accused be accorded as much liberty as is compatible with public safety. The difficulty lies in devising a rule and a system that permits this to be accomplished in each individual's case.

III. Judgments Below

10 The Review Board considered Mr. Winko's status on May 29, 1995. The Review Board consisted of three people: N. J. Prelypchan, who acted as chairperson, Susan Irwin, and Dr. A. Marcus, a psychiatrist. By a vote of two to one, the Review Board granted Mr. Winko a conditional discharge. Dr. Marcus voted in favour of an absolute discharge. The majority expressed the opinion that Mr. Winko could become a significant risk to public safety in "certain circumstances", and suggested that a conditional discharge was consistent with the British Columbia Court of Appeal's

decision in *Orlowski v. British Columbia (Attorney-General)* (1992), 75 C.C.C. (3d) 138 ("*Orlowski No. 1*"). Ms. Irwin added: "I clearly acknowledge that there haven't been any incidents of threat to other people." Dr. Marcus, noting the absence of any evidence that Mr. Winko had been a danger to anyone since the index offence, concluded that there was "no indication . . . that he would relapse and continue to be or again commit an act which one could call a significant threat".

11 On July 29, 1996, a majority of the British Columbia Court of Appeal upheld on its merits the Review Board's decision to grant Mr. Winko a conditional discharge: (1996), 79 B.C.A.C. 1. Mr. Winko subsequently challenged the constitutionality of the provisions of the *Criminal Code* dealing with the review of NCR accused before a different panel of the Court of Appeal. A majority of that panel found that the provisions were constitutional and did not violate the *Charter*: (1996), 84 B.C.A.C. 44. Williams J.A., dissenting, found that the legislation imposed a burden of proof on the applicant contrary to s. 7 of the *Charter* that was not justified under s. 1. Mr. Winko appeals to this Court seeking a declaration that the *Criminal Code* provisions are unconstitutional and an order that he be granted an unconditional release.

IV. The Statutory Provisions

12 The following provisions of the *Criminal Code* are at issue:

> **16.** (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> **672.34** Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall

render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

672.38 (1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

(2) A Review Board shall be treated as having been established under the laws of the province.

(3) No member of a Review Board is personally liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions.

672.39 A Review Board must have at least one member who is entitled under the laws of a province to practise psychiatry and, where only one member is so entitled, at least one other member must have training and experience in the field of mental health, and be entitled under the laws of a province to practise medicine or psychology.

672.4 (1) Subject to subsection (2), the chairperson of a Review Board shall be a judge of the Federal Court or of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office.

672.41 (1) Subject to subsection (2), the quorum of a Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practise psychiatry, and any other member.

672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.
>
> **672.81** (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).
>
> (2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(*b*) or (*c*) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend
>
> (*a*) has increased the restrictions on the liberty of the accused significantly for a period exceeding seven days; or
>
> (*b*) requests a review of the disposition.

13 Mr. Winko and his co-appellants on the companion appeals submit that s. 672.54 infringes their rights to liberty and security of the person guaranteed by s. 7 and their equality rights guaranteed by s. 15(1) of the *Charter*. They argue that neither infringement is justified under s. 1 of the *Charter*. The relevant provisions of the *Charter* are as follows:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

V. Issues

14 The following three constitutional questions were stated by the Chief Justice on September 16, 1997:

1. Does s. 672.54 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it discriminates against people with a mental disorder, including people with a mental disability, who have been found not criminally responsible on account of mental disorder?

2. Does s. 672.54 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprives persons found not criminally responsible on account of mental disorder of their right to liberty and security of the person contrary to the principles of fundamental justice?

3. If so, can these infringements be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

VI. Analysis

A. *What Section 672.54 of the Criminal Code Requires*

15 The appellant argues that s. 672.54 infringes his rights to liberty, security of the person, and equality as guaranteed by the *Charter*. Before these arguments can be considered, we must ascertain precisely how s. 672.54 affects those rights. In a very real sense, the dispute on this appeal focuses not on the *Charter*, so much as on how s. 672.54 should be read. The appellant and his co-appellants contend that the section creates a presumption of dangerousness and improperly shifts the burden of proving the contrary to the NCR accused, introducing the possibility that he or she may remain under liberty constraints indefinitely. They argue that, in the past, courts and Review Boards have interpreted these provisions of the *Criminal Code* as creating such a presumption.

16 Regardless of what courts and Review Boards may have done in the past, I cannot accept the interpretation of s. 672.54 proposed by the appellants. The history, purpose and wording of s. 672.54 of the *Code* indicate that Parliament did not intend NCR accused to carry the burden of disproving dangerousness. Rather, Parliament intended to set up an assessment-treatment system that would identify those NCR accused who pose a significant threat to public safety, and treat those accused appropriately while impinging on their liberty rights as minimally as possible, having regard to the particular circumstances of each case. I conclude that this scheme fulfills these goals in a manner that does not infringe the appellants' rights under either s. 7 or s. 15(1) of the *Charter*.

1. The History, Structure and Purpose of Part XX.1

17 Historically at common law, those who committed criminal acts while mentally ill were charged and required to stand trial like other offenders. At the end of the trial, they were either acquitted or convicted and sentenced accordingly. The common law permitted no special verdict or disposition. The only concession made to the illness that induced the offence was the accused's right to raise the defence that he or she was unable to understand the nature and quality of the act, the *M'Naghten Rules*: see *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.). The law held that such incapacity deprived the mentally ill accused person of the criminal intent or *mens rea* required for the offence. Sanity, however, was presumed; it was up to the accused to demonstrate the contrary.

18 Until 1990, the provisions of the *Criminal Code* dealing with criminal acts committed as a result of mental illness reflected the common law approach of treating those offences like any others, subject to the special defence of not understanding the

nature and quality of the act. The only verdicts available under the *Criminal Code* were conviction or acquittal. However, even where the accused was acquitted on the basis of mental illness, he or she was not released, but was automatically detained at the pleasure of the Lieutenant Governor in Council: *Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3).

19 The first *Charter* challenge against this system came in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, where a majority of this Court ruled that the requirement that the accused prove an inability to understand the nature and quality of his or her act violated the accused's right to be presumed innocent, but that the burden was constitutionally saved under s. 1. A second *Charter* challenge came in *R. v. Swain*, [1991] 1 S.C.R. 933, where this Court struck down the provision for automatic, indefinite detention of an NCR accused on the basis that it violated the accused's s. 7 liberty rights.

20 In response to *Swain*, Parliament introduced sweeping changes by enacting Part XX.1 of the *Criminal Code* in 1991: *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, S.C. 1991, c. 43. Part XX.1 reflected an entirely new approach to the problem of the mentally ill offender, based on a growing appreciation that treating mentally ill offenders like other offenders failed to address properly the interests of either the offenders or the public. The mentally ill offender who is imprisoned and denied treatment is ill-served by being punished for an offence for which he or she should not in fairness be held morally responsible. At the same time, the public facing the unconditional release of the untreated mentally ill offender was equally ill-served. To achieve the twin goals of fair treatment and public safety, a new approach was required.

21 Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a special stream. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions, or unconditionally discharged. The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.

22 Daniel Préfontaine, then an Assistant Deputy Minister at the Department of Justice, summarized the objectives of Part XX.1 before the Standing Committee on Justice and the Solicitor General:

> The legislative proposals continue the long-standing objective of protecting the public from presently dangerous people who have committed offences, and the long-standing principle of fundamental fairness we have had in our laws that we do not convict people who are incapable of knowing what they are doing.
>
> The aim of the bill is twofold: to improve protection for society against those few mentally disordered accused who are dangerous; and to recognize that mentally disordered offenders need due process, fundamental fairness and need the rights accorded to them for their protection when they come into conflict with the criminal law.
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, Issue No. 7, October 9, 1991, at p. 6.)

23 Part XX.1 of the *Criminal Code* rests on the characterization of the person who commits an offence while mentally ill as "not criminally responsible", or NCR: s. 16. Under the new regime, once a judge or jury enters a verdict of "not criminally responsible on account of mental disorder", the person found NCR becomes subject to

the provisions of Part XX.1. The court may, either on its own motion or on application by the prosecutor or the NCR accused, hold a disposition hearing: s. 672.45(1). At such a hearing, the court may make an immediate disposition with respect to the accused if it is satisfied that a disposition should be made without delay and that it can do so readily in the circumstances: s. 672.45(2). If the court does not make a disposition, the custodial provisions in force at the time of the verdict continue until a hearing is held by the Review Board of the province, established under s. 672.38 of the *Code*: s. 672.46(1).

24 The Review Board is chaired by a judge of the Federal Court, a judge of a superior, district or county court of a province, or a person who is qualified for appointment to or has retired from such a judicial office: s. 672.4(1). At least one member must be a psychiatrist, and where only one member is a psychiatrist, at least one other member must have training and experience in the field of mental health and be entitled to practice medicine or psychology: ss. 672.39 and 672.41.

25 If the court has <u>not</u> made a disposition with respect to the accused after the NCR verdict, the Review Board must hold a hearing and make a disposition as soon as practicable, but not later than 45 days after the verdict is rendered (although the court may extend this time period to 90 days in exceptional circumstances): ss. 672.47(1) and 672.47(2). If the court has made any disposition other than an absolute discharge, the Review Board must hold a hearing and make a disposition before that disposition expires and, in any event, within 90 days after the court's initial order: ss. 672.47(3) and 672.55(2).

26 Whether the hearing is held by the court after the NCR verdict is rendered or by the Review Board at a later date, the proceedings are conducted in accordance with s. 672.5. The procedure at the hearing is informal. The Crown does not necessarily

appear. The court or Review Board may designate as a party any person who has a substantial interest in protecting the rights of the NCR accused: s. 672.5(4). The NCR accused has a right to counsel and is entitled to be present throughout, except in certain specified circumstances: s. 672.5(7), (9), (10). Any party may present evidence, make oral or written submissions, call witnesses, cross-examine any witnesses called by another party and, on application, cross-examine any person who has submitted a written assessment report to the court or Review Board: s. 672.5(11). If the hearing is being held by a Review Board, that body has all the powers conferred on a commissioner by ss. 4 and 5 of the *Inquiries Act*, R.S.C., 1985, c. I-11: ss. 672.43 and 672.5. Finally, any party may request that the court or Review Board compel the attendance of witnesses: s. 672.5(12).

27 Any disposition regarding an NCR accused must be made in accordance with s. 672.54. The court or Review Board may order that the NCR accused be discharged absolutely, that he or she be discharged on conditions, or that he or she be detained in a hospital and subject to the conditions the court or Review Board considers appropriate. Although the court or Review Board has a wide latitude in determining the appropriate conditions to be imposed, it can only order that psychiatric or other treatment be carried out if the NCR accused consents to that condition, and the court or Review Board considers it to be reasonable and necessary: s. 672.55(1).

28 The Review Board must hold a further hearing within 12 months of making any disposition other than an absolute discharge and further reviews must be conducted at least every 12 months thereafter: s. 672.81(1). A further hearing also must be held as soon as practicable when the restrictions on the liberty of the NCR accused are increased significantly, or upon the request of the person in charge of the place where the accused is detained or directed to attend: s. 672.81(2). Apart from these mandatory

reviews, the Review Board may review any of its dispositions at any time, on the request of the accused or any other party: s. 672.82(1). Any party may appeal against a disposition by a court or the Review Board to the Court of Appeal on a question of law or fact or a question of mixed law and fact: s. 672.72(1).

29 Part XX.1 thus places obligations on both the court that enters the NCR verdict, and which may then consider making an appropriate disposition immediately, and the Review Board that will eventually assume continuing responsibility for the NCR accused. I acknowledge that the provisions clearly emphasize the role to be played by the specialized Review Board in the ongoing assessment and management of the NCR accused and, indeed, it is likely that most inquiries will be conducted by the Review Board in practice. This appeal, however, is primarily concerned with the interpretation of s. 672.54, which sets out the dispositions available to the court or the Review Board. To be consistent with the language used in the *Criminal Code*, these reasons will therefore continue to refer to the decision-maker as the "court or Review Board".

30 These procedures and the principles underlying them represent a fundamental departure from the common law approach to those who commit offences while mentally ill. Instead of the stark alternatives of guilt or innocence, leavened only by the *M'Naghten Rules*, Part XX.1 offers a new alternative. The NCR accused is to be treated in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. Under the new approach, the mentally ill offender occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public.

31 The verdict of NCR under Part XX.1 of the *Criminal Code*, as noted, is not a verdict of guilt. Rather, it is an acknowledgement that people who commit criminal acts under the influence of mental illnesses should not be held criminally responsible for their acts or omissions in the same way that sane responsible people are. No person should be convicted of a crime if he or she was legally insane at the time of the offence: *Swain*, *supra*, at p. 976. Criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong: *Chaulk*, *supra*, at p. 1397; G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989), 14 *Queen's L.J.* 135, at p. 140. For this reason, s. 16(1) of the *Criminal Code* exempts from criminal responsibility those suffering from mental disorders that render them incapable either of appreciating the nature and quality of their criminal acts or omissions, or of knowing that those acts or omissions were wrong.

32 Nor is the verdict that a person is NCR a verdict of acquittal. Although people may be relieved of criminal responsibility when they commit offences while suffering from mental disorders, it does not follow that they are entitled to be released absolutely. Parliament may properly use its criminal law power to prevent further criminal conduct and protect society: *Swain*, at p. 1001. By committing acts proscribed by the *Criminal Code*, NCR accused bring themselves within the criminal justice system, raising the question of what, if anything, is required to protect society from recurrences. As Professor Colvin in "Exculpatory Defences in Criminal Law" (1990), 10 *Oxford J. Legal Stud.* 381, at p. 392, puts it:

> When insanity provides an exculpatory defence, the actor remains very much the concern of the criminal law. The insanity rules identify special mental conditions under which persons cannot be expected to ensure that their conduct conforms to the requirements of law; and therefore the general law of criminal culpability is unsuited. The actor is formally acquitted because mental impairment has made the standard penal sanctions inappropriate. Alternative coercive measures may, however, be taken because of the potential dangerousness of the condition.

33 The preventative or protective jurisdiction exercised by the criminal law over NCR offenders extends only to those who present a significant threat to society. As Lamer C.J. stated in *Swain*, at p. 1008: "As the individual becomes less of a threat to society, the criminal law progressively loses authority". The only justification there can be for the criminal law detaining a person who has not been found guilty (or is awaiting trial on an issue of guilt) is maintaining public safety. Once an NCR accused is no longer a significant threat to public safety, the criminal justice system has no further application.

34 This raises a terminological point. Under the old provisions of the *Criminal Code* based on the common law rule, the accused relieved of criminal responsibility by reason of insanity was referred to as an NCR "acquittee". This was because, as explained, the person was viewed as acquitted for want of *mens rea* or criminal intent: *Chaulk*, *supra*; *Swain*, *supra*. Under Part XX.1, by contrast, the NCR offender is not acquitted. He or she is simply found to be not criminally responsible. People who fall within the scope of Part XX.1 are more appropriately referred to as simply NCR accused, the terminology in fact employed by the *Code*, and which has been used in these reasons.

35 If the NCR verdict is not a verdict of guilt or an acquittal, neither is it a verdict that the NCR accused poses a significant threat to society. Part XX.1 does not presume the NCR accused to pose such a threat. Rather, it requires the court or the Review Board to assess whether such a threat exists in each case. Part XX.1 thus recognizes that, contrary to the stereotypical notions that some may still harbour, the mentally ill are not inherently dangerous. The mentally ill have long been subject to negative stereotyping and social prejudice in our society based on an assumption of dangerousness: *Swain*, *supra*, at p. 994; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, at p. 586. As Dr. Paul Mullen writes:

> There is a widely held belief in our culture that the mentally ill are predisposed to act in a violent and dangerous manner. . . . This prejudice has deep roots. In Greek and Roman writings the defining characteristics of madness were violence in combination with being out of touch with reality and having a tendency to wander. . . . The origins of such beliefs probably lie in the unease which acutely mentally disturbed individuals produce in those around them. Their unpredictable, strange and often inappropriately intrusive behaviours easily produce a reaction of fear. When we experience fear, we all too readily attribute that fear to dangerousness in the exciting object, rather than considering whether our reactions may not be excessive or misplaced. The more frightened we become, the more dangerous we assume that which excites the fear is.
>
> ("The Dangerousness of the Mentally Ill and the Clinical Assessment of Risk", Chapter 4 in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks, ed. (1996), 93, at p. 93.)

36 In 1975, the Law Reform Commission of Canada recognized that these negative stereotypes of the mentally ill had found their way into the criminal justice system:

> This widely held fear of the mad criminal makes acceptable the confinement and lengthy detention of mentally disordered accused or offenders in circumstances which their "sane" counterpart would be either less severely sanctioned or released outright. These attitudes are reflected in the element of preventive detention implicit in the remand and dispositional provisions of the Criminal Code and in the choice of procedures of the personnel dealing with the mentally ill in the criminal process.
>
> (Working Paper 14, *The Criminal Process and Mental Disorder*, at p. 14.)

37 As the stereotype of the "mad criminal" has been undermined by research, we have learned that only a few mental disorders are associated with increased rates of violent behaviour: J. Cocozza and H. Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence" (1976), 29 *Rutgers L. Rev*. 1084, at pp. 1088-89; S. Hodgins, *Mental Disorder and Crime* (1993); Law Reform Commission, *supra*, at p. 19. And for these disorders, it is not clear whether the increased rates of violent behaviour result from the illness itself or from the socially marginalizing side-

effects of the illness. To quote Dr. Mullen, *supra*, at p. 100, discussing violent behaviour among those suffering from severe schizophrenia:

> . . . the social dislocation and economic decline which accompany the more disabling forms of schizophrenia put sufferers at risk of being forced into the ranks of the dispossessed. Homelessness, poverty, and social isolation all too often accompany schizophrenia. These increase the risks of conflict with others and with the police. The chances of confrontation with others are amplified by the common presence of alcohol and drug abuse, which those with schizophrenia often resort to for relief from their disease and their plight. Thus increased rates of violent behaviour could be in part a product of a drift into a disturbed and disrupted lifestyle consequent upon a failure to adequately support those with schizophrenia.

Research shows that NCR accused are no more likely than their convicted counterparts to commit any offence, let alone a violent offence, upon release: M. E. Rice, et al. "Recidivism Among Male Insanity Acquittees" (1990), 18 *J. Psychiatry & Law* 379, at pp. 393-95; G. T. Harris, M. E. Rice and C. A. Cormier, "Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders" (1991), 14 *Int'l J. L. & Psy*. 223, at p. 234; J. R. P. Ogloff et al., "Empirical Research Regarding the Insanity Defense: How Much Do We Really Know?", Chapter 6, in J. R. P. Ogloff, ed., *Law and Psychology: The Broadening of the Discipline* (1992), 171, at p. 184.

38 In *Swain*, *supra*, at p. 1015, this Court, *per* Lamer C.J., recognized that the NCR accused cannot be presumed to be dangerous:

> [W]hile the assumption that persons found not guilty by reason of insanity pose a threat to society may well be rational, I hasten to add that I recognize that it is not always valid. While past violent conduct and previous mental disorder may indicate a greater possibility of future dangerous conduct, this will not necessarily be so. Furthermore, not every individual found not guilty by reason of insanity will have such a personal history. [Emphasis in original.]

39 In the spirit of supplanting the old stereotypes about mentally ill offenders, Part XX.1 supplements the traditional guilt-innocence dichotomy of the criminal law with a new alternative for NCR accused -- an alternative of assessment to determine whether the person poses a continuing threat to society coupled with an emphasis on providing opportunities to receive appropriate treatment. The twin branches of the new system -- assessment and treatment -- are intimately related. Treatment, not incarceration, is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition. As Macfarlane J.A. stated regarding the predecessor scheme in *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154 (B.C.C.A.), at p. 171, quoted with approval by Lamer C.J. in *Swain*, at p. 1004:

> The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. The objective is to be achieved by treatment of the patient in a hospital, rather than in a prison environment. [Emphasis added by Lamer C.J.]

40 Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour -- the mental illness. It cannot content itself with locking the ill offender up for a term of imprisonment and then releasing him or her into society, without having provided any opportunities for psychiatric or other treatment. Public safety will only be ensured by stabilizing the mental condition of dangerous NCR accused.

41 Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response. As Goldie J.A. stated in *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269 (B.C.C.A.), at p. 277:

> [T]he treatment of one unable to judge right from wrong is intended to cure the defect. It is not penal in purpose or effect. Where custody is imposed on such a person, the purpose is prevention of antisocial acts, not retribution.

See generally D. Laberge and D. Morin, "The Overuse of Criminal Justice Dispositions: Failure of Diversionary Policies in the Management of Mental Health Problems" (1995), 18 *Int'l J. L. & Psy*. 389, at p. 389. The need for treatment rather than punishment is rendered even more acute by the fact that the mentally ill are often vulnerable and victimized in the prison setting, as well as by changes in the health system that many suggest result in greater numbers of the mentally ill being caught up in the criminal process. See S. Davis, "Assessing the 'Criminalization' of the Mentally Ill in Canada", *Can. J. Psychiatry*, 37(8) (October 1992), at pp. 532-38.

42 By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.

43 In summary, the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate

treatment. Under Part XX.1, the NCR accused is neither convicted nor acquitted. Instead, he or she is found not criminally responsible by reason of illness at the time of the offence. This is not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender's possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused.

2. The Wording and Function of Section 672.54

44 The specific wording of s. 672.54 indicates that the provision seeks to further the aims of Part XX.1 of protecting the public while preserving maximum liberty of the NCR accused through the assessment-treatment model. The question is whether, despite this goal, its effect is to inappropriately place the burden of disproving dangerousness on the NCR offender.

45 The appellants concede that s. 672.54 does not expressly place the burden on the accused to demonstrate lack of dangerousness. They argue, however, that this is its effect. They submit that the section imposes a false presumption of dangerousness, which the NCR accused must overcome if he or she is to regain freedom. In support of this argument, they argue that the British Columbia Court of Appeal in *Orlowski No. 1*, *supra*, at p. 146, held that the section does not oblige the court or Review Board to come to a conclusion on whether the accused is a significant threat to public safety. If it cannot or does not resolve that issue, the NCR accused remains subject to constraints on his or her liberty. This means, in effect, that unless the NCR accused can mount a convincing case that he or she is not a danger to public safety, he or she will be subject to restraints. This hurdle is made more difficult by the fact that the NCR accused in

many cases is less able than others, by reason of illness, confinement or poverty, to organize and present a convincing case for absolute discharge. Citing literature suggesting a tendency among clinicians to over-predict dangerousness, the appellants submit that this practical burden is further heightened by the human tendency of courts and Review Board members to err on the side of caution.

46 I do not share the view that s. 672.54 should be interpreted this way. In my view, properly read, the section does not create a presumption of dangerousness and does not, in its effect, impose a burden of proving lack of dangerousness on the NCR accused.

47 The introductory part of s. 672.54 requires the court or Review Board to consider the need to protect the public from dangerous persons, together with the mental condition of the accused, his or her reintegration into society, and his or her other needs. The court or Review Board must then (the operative verb is "shall") make the disposition -- absolute discharge, conditional discharge, or detention in a hospital -- "that is the least onerous and least restrictive to the accused". As this Court noted in *Swain*, *supra*, the only constitutional basis for the criminal law restricting liberty of an NCR accused is the protection of the public from significant threats to its safety. When the NCR accused ceases to be a significant threat to society, the criminal law loses its authority: *Swain*, *supra*, at p. 1008. Part XX.1, as noted, is founded on this assumption. It follows that if the court or Review Board fails to positively conclude, on the evidence, that the NCR offender poses a significant threat to the safety of the public, it must grant an absolute discharge. Any doubt on this score is removed by the injunction that the court or Review Board shall make the order that is the least onerous and least restrictive to the accused, consistent with the evidence.

48 The wording of para. (*a*), which deals with the court or Review Board's power to order an absolute discharge, is consistent with this interpretation of the initial paragraph of s. 672.54. It stipulates that the court or Review Board must direct that the accused be discharged absolutely if it is of the opinion that "the accused is not a significant threat to the safety of the public". Paragraph (*a*) must be read with the preceding instruction that the court or Review Board must make the order that is the least onerous and least restrictive to the accused. It must also be read against the constitutional backdrop that public safety is the only basis for the exercise of the criminal law power, absent a conviction. Read in this way, it becomes clear that absent a positive finding on the evidence that the NCR accused poses a significant threat to the safety of the public, the court or Review Board must order an absolute discharge. This interpretation is supported by the principle that a statute should be read in a manner that supports compliance with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

49 Section 672.54, read thus, does not create a presumption of dangerousness. There must be evidence of a significant risk to the public before the court or Review Board can restrict the NCR accused's liberty. Nor does s. 672.54 permit the court or Review Board to refuse to grant an absolute discharge because it harbours doubts as to whether the NCR accused poses a significant threat to the safety of the public. Since there must be a positive finding of a significant risk to the safety of the public to engage the provisions of the *Code* and support restrictions on liberty, something less -- i.e., uncertainty -- cannot suffice. It follows that I do not share the view attributed to *Orlowski No. 1*, *supra*, that if the court or Review Board cannot resolve the question of whether the NCR accused constitutes a significant threat to public safety, it can continue to restrain the liberty of the accused through an order for a conditional discharge or detention. If the court or Review Board cannot resolve the issue, it must grant an

unconditional discharge. 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.

50 Since drafting these reasons I have had the opportunity to review the reasons of Justice Gonthier. My colleague prefers a two-step interpretation of s. 672.54 that would draw a distinction between a threshold finding of "dangerousness" and a subsequent finding that an NCR accused is not "a significant threat to the safety of the public". In my view, both phrases denote the same concept: "dangerousness" is tantamount to "a significant threat to the safety of the public". Absent dangerousness amounting to a significant threat to public safety, there is no constitutional basis for the criminal law to restrict the liberty of an NCR accused.

51 This interpretation does not expose the community to undue threats to its safety and well-being. The task of the court or Review Board is to determine whether the evidence discloses a "significant" or real risk to the community should the NCR accused be released. If that risk exists, the NCR accused remains under supervision, either subject to conditions while living in the community or detained in a hospital. It does mean, though, that however difficult the task, the court or Review Board cannot avoid the responsibility of making that determination. Just as a jury is obliged to come to a conclusion on an accused's guilt or innocence, so is the court or Review Board required to determine whether or not releasing the NCR accused would pose a "significant risk" to public safety. If, at the end the day, the court or Review Board cannot so conclude, the legal justification for confinement is absent and the NCR accused must be released.

52 This interpretation of s. 672.54 eliminates any need for the NCR accused to prove lack of dangerousness and relieves him or her of any legal or evidentiary burden. If the evidence does not support the conclusion that the NCR accused is a significant risk, the NCR accused need do nothing; the only possible order is an absolute discharge. Section 672.54 is remarkable among provisions in the Canadian *Criminal Code* in that it does not place burdens of proof on either party. It is not adversarial in the usual sense: *Davidson*, *supra*, at p. 277.

53 The highest the case for the appellants can be put is that if the evidence supports the conclusion that the NCR accused is a significant risk, it may be in the NCR accused's interest to adduce further evidence to convince the court or Review Board otherwise. However, this tactical incentive to adduce evidence is not properly described as a shifting of the legal or evidentiary burden to the accused. "It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant": *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 329-30, *per* Sopinka J. See also J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at pp. 77-78. This tactical burden exists in every legal proceeding and does not violate the presumption of innocence guaranteed by the *Charter*: see *R. v. Osolin*, [1993] 4 S.C.R. 595.

54 The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of Part XX.1 play within the criminal justice system. The Crown may often not be present at the hearing. The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and

consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair, given that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain, Part XX.1 provides for resolution by way of default in favour of the liberty of the individual.

55 As a practical matter, it is up to the court or Review Board to gather and review all available evidence pertaining to the four factors set out in s. 672.54: public protection; the mental condition of the accused; the reintegration of the accused into society; and the other needs of the accused. The court and the Review Board have the ability to do this. They can cause records and witnesses to be subpoenaed, including experts to study the case and provide the information they require. Moreover, with particular reference to the Review Board that may assume ongoing supervision of the NCR accused, Parliament has ensured that its members have special expertise in evaluating fully the relevant medical, legal and social factors which may be present in a case: s. 672.39. If the court or Review Board, after reviewing all the relevant material, cannot or does not conclude that the NCR accused poses a significant threat to public safety, it must order an absolute discharge. If it concludes that the NCR accused does represent such a threat, then it must order the least restrictive of the two remaining alternatives of conditional discharge or detention consistent with its analysis of the four mandated factors.

56 This is not to suggest that the determination of whether an NCR offender poses a significant threat to the safety of the public is a simple matter. Dangerousness

has been described as a "protean concept": Y. Rennie, *The Search for Criminal Man: A Conceptual History of the Dangerous Offender* (1978), at p. xvii. It concerns probabilities, not facts, and involves estimations based on moral, interpersonal, political and sometimes arbitrary criteria (R. J. Menzies, C. D. Webster and D. S. Sepejak, "The Dimensions of Dangerousness" (1985), 9 *Law & Hum. Behav.* 49, at p. 67).

57 To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given "dangerousness" a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". To engage these provisions of the *Criminal Code*, the threat posed must be more than speculative in nature; it must be supported by evidence: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL) (C.A.), at para 21. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature: *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406 (B.C.C.A.), at p. 413. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty.

58 Even with the benefit of this somewhat restricted definition of dangerousness, it may be extremely difficult even for experts to predict whether a person will offend in the future: R. J. Menzies, "Psychiatry, Dangerousness and Legal Control", in Neil Boyd,

ed., *The Social Dimensions of Law* (1986), at p. 189; B. J. Ennis and T. R. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom" (1974), 62 *Cal. L. Rev.* 693. The documented tendency to overestimate dangerousness must also be acknowledged and resisted: Menzies, *supra*, at p. 199; R. J. Menzies, C. D. Webster and D. S. Sepejak, "Hitting the forensic sound barrier: predictions of dangerousness in a pretrial psychiatric clinic", in C. D. Webster, M. H. Ben-Aron and S. J. Hucker, eds., *Dangerousness: Probability and prediction, psychiatry and public policy* (1985), 115, at p. 138; H. A. Prins, *Dangerous Behaviour, the Law, and Mental Disorder* (1986), c. 4, at p. 88; S. D. Hart, C. D. Webster and R. J. Menzies, "A Note on Portraying the Accuracy of Violence Predictions" (1993), 17 *Law & Hum. Behav.* 695.

59 It may be surmised that it is precisely because of this difficulty and context-specificity that Parliament has seen fit to replace the categorical common law approach to the mentally ill accused with a flexible scheme that is capable of taking into account the specific circumstances of the individual NCR accused. Moreover, although it has allowed courts to make an initial determination, Parliament has created a system of specialized Review Boards charged with sensitively evaluating all the relevant factors on an ongoing basis and making, as best it can, an assessment of whether the NCR accused poses a significant threat to the safety of the public. This assessment is not a guarantee, but it is unrealistic to expect absolute certainty from a regime charged with evaluating the impact of individual, human factors on future events. As La Forest J. wrote in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 364, in the context of the dangerous offender provisions of the *Code*:

> . . . the life of the law has not been logic: it has been experience. The criminal law must operate in a world governed by practical considerations rather than abstract logic and, as a matter of practicality, the most that can be established in a future context is a likelihood of certain events occurring.

60 When making this difficult assessment of whether an NCR accused poses a significant threat to the safety of the public, a court or Review Board may be expected to be aware not only of the need for public protection, but of the fact that a past offence committed under the influence of mental illness may often bear little connection to the likelihood of reoffending, particularly when the NCR accused is successfully following a treatment program. At the same time, the commission of an offence in the past may in some circumstances constitute a link in a chain of events that demonstrates a propensity to commit harm, albeit unintentionally. The specific situation of each NCR accused must always be examined carefully.

61 It follows that the inquiries conducted by the court or Review Board are necessarily broad. They will closely examine a range of evidence, including but not limited to the circumstances of the original offence, 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, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. The broad range of evidence that the court or the Review Board may properly consider is aimed at ensuring that they are able to make the difficult yet critically important assessment of whether the NCR accused poses a significant threat to public safety. At all times, this process must take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system. Appellate courts reviewing the dispositions made by a court or Review Board should bear in mind the broad range of these inquiries, the familiarity with the situation of the specific NCR accused that the lower tribunals possess, and the difficulty of assessing whether a given individual poses a "significant threat" to public safety.

62 On this interpretation of Part XX.1 of the *Code*, the duties of a court or Review Board that is charged with interpreting s. 672.54 may, for practical purposes, be summarized as follows:

1. The court or Review Board must 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. 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 in such circumstances 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 recourse 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. This list is not exhaustive.

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 where it is relevant to identifying a pattern of behaviour, and hence 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.

63 This brings us to the question of whether s. 672.54, properly interpreted, violates the NCR accused's rights under the *Charter*.

B. *Does Section 672.54 of the Criminal Code Infringe Section 7 of the Charter?*

64 The provisions of Part XX.1 of the *Criminal Code* permit the State, through a court or Review Board, to deprive the NCR accused of his or her liberty. Any law that does this must conform to the principles of fundamental justice pursuant to s. 7 of the *Charter*.

65 I begin with certain general observations. Every humane system of justice must provide for the disposition of cases where the perpetrator of the alleged crime is not criminally responsible. The question under s. 7 is whether the Canadian scheme conforms to the principles of fundamental justice. Where the regime involves a comprehensive administrative and adjudicatory structure, as here, it is appropriate to look at the regime

as a whole. One must consider the special problem to which the scheme is directed. The problem of how to deal with mentally ill people who commit crimes for which they cannot in justice be held responsible, while protecting public safety, is a unique and difficult one. It is quite a different problem from how to deal with people who commit crimes for which they can and should be held responsible. In judging whether the system Parliament has imposed violates the fundamental principles of justice, these differences must be borne in mind.

66 A related general observation is that the requirements of fundamental justice are not immutable; they vary according to the context in which they are invoked: *Lyons*, *supra*, at p. 361. In this context, the principles of fundamental justice necessarily involve balancing the interests of the NCR accused against countervailing societal interests. What is required is that the balance be one that is reasonable and justifiable.

67 The appellants submit that s. 672.54 violates the principles of fundamental justice in three ways: vagueness, improper onus and overbreadth. In my view, correctly read and viewed in their entirety, the NCR provisions violate none of these maxims.

68 The first submission is that the standard of "significant threat to the safety of the public" in s. 672.54 is too vague. A law will only be found to be unconstitutionally vague if it so lacks precision that it does not give sufficient guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 638-40. As this Court has acknowledged, this is a relatively high threshold. Laws must of necessity cover a variety of situations. Given the infinite variability of conduct, it is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges, aided by precedent and considerations like the text and purpose of a statute, to interpret laws of general application and decide whether they apply to the facts before the court in a

particular case. This process is not in breach of the principles of fundamental justice; rather, it is in the best tradition of our system of justice.

69 The phrase "significant threat to the safety of the public" satisfies the test of providing sufficient precision for legal debate. The standard of "public safety" was found not unconstitutionally vague in *R. v. Morales*, [1992] 3 S.C.R. 711. "Significant threat" has been applied by lower courts without difficulty: *Davidson*, *supra*; *R. v. Peckham* (1994), 19 O.R. (3d) 766 (C.A.). Without purporting to define the term exhaustively, the phrase conjures a threat to public safety of sufficient importance to justify depriving a person of his or her liberty. As I stated earlier, there must be a foreseeable and substantial risk that the NCR accused would commit a serious criminal offence if discharged absolutely. It is impossible to predict or catalogue in advance all the types of conduct that may threaten public safety to this extent. It must be left for the court or the Review Board to determine whether the conduct in the case it is assessing meets this standard. In discharging this task, the court or Review Board will bear in mind the high value our society places on individual liberty, as reflected in the *Charter*. It will also bear in mind the need to protect society from significant threats. The final determination is made after hearing evidence and considering the need to protect individual liberty as much as possible as well as the need to protect society. This process, as I have outlined it above, does not violate the principles of fundamental justice.

70 The second contention is that s. 672.54 improperly shifts the burden to the NCR accused to prove that he or she will not pose a significant threat to public safety, in violation of the basic maxim that it is for the State, which is depriving a person of liberty, to justify that deprivation. On the interpretation of s. 672.54 proposed earlier, this submission must also fail. Section 672.54 does not create a presumption that an NCR accused poses a significant threat to public safety. Rather, the court or Review Board

must have a hearing upon the rendering of an NCR verdict to determine whether the NCR accused actually does, in fact, pose such a threat. Nor does the section require the NCR accused to prove the absence of a significant threat to public safety. It is for the court or Review Board, acting in an inquisitorial capacity, to investigate the situation prevailing at the time of the hearing and determine whether the accused poses a significant threat to the safety of the public. If the record does not permit it to conclude that the person constitutes such a threat, the court or Review Board is obliged to make an order for unconditional discharge. If the court or Review Board finds that the person does pose such a threat, it must proceed to make an order discharging the NCR accused on conditions or detaining him or her in a hospital. In all cases, the court or Review Board must make the disposition that is the least restrictive of the NCR accused's liberty possible. This process does not violate the principles of fundamental justice.

71 The third way s. 672.54 is argued to violate s. 7 of the *Charter* is through overbreadth. The question is whether the means chosen by the State are broader than necessary to achieve the State objective: *R. v. Heywood*, [1994] 3 S.C.R. 761. The dual objectives of Part XX.1, and s. 672.54 in particular, are to protect the public from the NCR accused who poses a significant threat to public safety while safeguarding the NCR accused's liberty to the maximum extent possible. To accomplish these goals, Parliament has stipulated (on the interpretation of s. 672.54 set out above) that unless it is established that the NCR accused is a significant threat to public safety, he must be discharged absolutely. In cases where such a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition of the accused must be selected. In my view, this scheme is not overbroad. It ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety. It follows that I cannot agree with the contrary decision of the Manitoba Court of Appeal in *R. v. Hoeppner*, [1999] M.J. No. 113 (QL).

72 In addition to the safeguards of the NCR accused's liberty found in s. 672.54, Part XX.1 further protects his or her liberty by providing for, at minimum, annual consideration of the case by the Review Board: s. 672.81. The NCR accused has the right to appeal to the Court of Appeal a disposition made by a court or Review Board: s. 672.72. If a court or Review Board fails to interpret and apply s. 672.54 correctly and unduly impinges on the NCR accused's liberty, the NCR accused therefore has an appropriate remedy.

73 For these reasons, I conclude that the legislative scheme Parliament has established to deal with persons found not criminally responsible for offences does not infringe s. 7 of the *Charter*.

C. *Does Section 672.54 of the Criminal Code Infringe Section 15 of the Charter?*

74 The *Charter*'s equality guarantee forbids, among other things, laws or other government actions that treat an individual unequally on the basis of stereotypical group-based distinctions. Such actions are repugnant to our constitutional order because instead of treating an individual as equally deserving of concern, respect, and consideration, they disadvantage that individual arbitrarily and stereotypically.

75 The central purpose of the guarantee in s. 15(1) is to protect an individual's right to be treated with dignity. Our Court has recently re-affirmed this principle in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, where Iacobucci J. had occasion to discuss "human dignity" this way, at para. 53:

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the

> *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

The effect of a law on the dignity of the claimant is to be assessed from the perspective of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant": *Law*, at para. 60, *per* Iacobucci J. All the circumstances must be considered when answering this fundamental question. What is relevant in a particular case will vary with the situation.

76 Although there is no requirement to adhere to a strict formula, this Court indicated in *Law* that there are three central issues to be addressed in the course of a purposive application of s. 15(1). In its analysis, a court should consider, first, whether a law imposes differential treatment between the claimant and others. Differential treatment may occur where a formal distinction is drawn between the complainant and others on the basis of one or more personal characteristics, or where the impugned law fails to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantively different treatment between the claimant and others based on one or more personal characteristics.

77 Differential treatment only engages the s. 15(1) guarantee when it is discriminatory in a substantive sense, however. To demonstrate discrimination, a claimant must show (1) that the differential treatment is based on one or more of the grounds enumerated in s. 15(1) or one or more grounds that are analogous thereto, and (2) that the differential treatment imposes a burden or withholds a benefit in a manner that fails to recognize s. 15(1)'s purpose of maintaining the claimaint's essential dignity as an individual member of Canadian society: *Law*, *supra*, at para. 88. See also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, *M. v. H.*, [1999] 2 S.C.R. 3.

78 The first requirement of s. 15(1), differential treatment on the basis of a personal characteristic, is not usually difficult to establish: *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 531, *per* La Forest J. Here, Part XX.1 may be seen as treating NCR accused differently from other accused persons on the basis of mental illness at the time of the criminal act. More particularly, it may be seen as denying NCR accused benefits and imposing burdens on NCR accused that are not denied to or imposed upon convicted persons. Chief among these suggested burdens is what is claimed to be the "indeterminate sentence" mandated by Part XX.1. This submission rests on the view that the constraints imposed by the State on an NCR accused may be compared to those imposed on a non-NCR convicted person. I agree that s. 15(1) requires a court to compare the State's treatment of two or more individuals or groups. Equality is a comparative concept: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164; *Law*, *supra*, at para. 24.

79 It is far from clear to me that the State's treatment of an NCR accused and its treatment of a convicted person are readily comparable for the purposes of identifying differential treatment, given the very different circumstances of an NCR accused and the unique purpose and effects of the provisions contained in Part XX.1. Nonetheless, in *Law*

this Court held that, at this initial stage, "[i]t is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge" (para. 58). The court must then consider whether any differential treatment by the State arising from that comparison is discriminatory. Only then does the question become whether that comparison reveals a violation of essential human dignity and freedom. Although this Court cautioned in *Law* that a court is not bound by a claimant's characterization of the appropriate comparison, I am willing to accept the appellants' submission and proceed on the assumption that a comparison between the State's treatment of an NCR accused and its treatment of a convicted person would indicate the existence of differential treatment on the basis of a personal characteristic, namely mental illness.

80 The second inquiry -- and the more substantial one -- is whether the purported differential treatment is discriminatory. The first consideration at this stage is whether the distinction is made on the basis of an enumerated or analogous ground. In the case at bar, it is. Mental disability is a ground enumerated in s. 15(1). The special treatment mandated by Part XX.1 is founded on the presence of a particular type of mental disability at the time of commission of the criminal act.

81 The second consideration at this stage is whether any such differential treatment on the basis of an enumerated or analogous ground reflects the stereotypical application of presumed group or personal characteristics, or otherwise violates s. 15(1)'s guarantee that every individual is equally entitled to the law's concern, respect, and consideration. Denial of equal benefit of the law on the basis of an enumerated or analogous ground obviously raises the very real possibility that the denial may be discriminatory. Such denials are suspect. They are the sorts of denials that have

historically led to discrimination. As stated in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, "[w]here the denial [of equal benefit] is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions" (para. 69). In *Law*, this Court recently found one of these exceptions.

82 This case, in my view, is also one of those exceptions. An analysis of these provisions of the *Criminal Code* and their effect upon NCR accused reveals them to be the very antithesis of discrimination and hence not to engage the protections of s. 15(1). Part XX.1 does not reflect the application of presumed group or personal characteristics. Nor does it perpetuate or promote the view that individuals falling under its provisions are less capable or less worthy of respect and recognition. Rather than denying the dignity and worth of the mentally ill offender, Part XX.1 recognizes and enhances them.

83 As this Court recently recognized in *Law*, it has long been held that s. 15(1) guarantees more than the formal equality of like treatment; it guarantees substantive equality. See also *Andrews*, *supra*; *Vriend*, *supra*; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. To this end, the jurisprudence recognizes that discrimination may arise either from treating an individual differently from others on the basis of group affiliation, or from failing to treat the individual differently from others on the basis of group affiliation.

84 Consider the example of the hearing impaired, recently reviewed by this Court in *Eldridge*, *supra*. If a law stated that hearing impaired people did not have the right to public medical treatment, it would treat the hearing impaired individual differently from others. It would likely be characterized as discriminatory, in the sense that concept is understood in our s. 15(1) jurisprudence. But as is clear from *Eldridge*, a law that treats

the hearing impaired like others may also deny equal medical treatment, by failing to recognize the special situation of hearing impaired people which requires that they be provided with translation services in order to communicate with medical personnel. In the first case, the law discriminates by treating the individual differently on the basis of a group characteristic; in the second, the law discriminates by failing to take account of a group characteristic when the special position of the individual mandates that it should do so. See also *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 66. Regardless of how the discrimination is brought about, the effect is the same -- to deny equal treatment on the basis of an unfounded assumption. It follows that different legal treatment reflecting the particular needs and circumstances of an individual or group may not only be justified, but may be required in order to fulfill s. 15(1)'s purpose of achieving substantive equality.

85 The question here is whether s. 672.54 is discriminatory in the substantive sense denoted by our s. 15(1) jurisprudence. It will be apparent from the earlier discussion of the legislative history of Part XX.1 that it was adopted for the purpose of eliminating the stereotyping and stigmatization that mentally ill accused had historically suffered. The stereotype of the "mad offender" too often led to the institutionalization of an acquitted accused or worse, incarceration in prisons where they were denied the medical attention they required and were subjected to abuse. By forcing an accused to face indefinite detention at the pleasure of the Lieutenant Governor in Council, on the assumption that such confinement was necessary for purposes of public safety, it encouraged the characterization of mentally ill people as quasi-criminal and contributed to the view that the mentally ill were always dangerous, a view we now know to be largely unfounded. In many cases, indeed, it treated people who had committed no crime and indeed were not capable of criminal responsibility worse than true criminals, sometimes using jails as the

places of detention. For all these reasons and more, Parliament enacted Part XX.1 of the *Criminal Code*.

86 It is thus clear that it was not the intention of Parliament to discriminate against NCR accused in enacting Part XX.1 of the *Criminal Code*. Rather, it was Parliament's intention to combat discrimination and treat individuals who commit criminal acts which they cannot know are wrong in a way appropriate to their true situation. But good intentions, while important, are not enough to establish lack of discrimination. We must go further and ask whether in its effect Part XX.1 reflects a stereotypical application of presumed group characteristics or otherwise denies the essential dignity of NCR accused.

87 As Iacobucci J. pointed out in *Law*, *supra*, "[t]here is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation has the effect of demeaning his or her dignity, as dignity is understood for the purpose of the *Charter* equality guarantee" (para. 62). Although Iacobucci J. considered four factors in *Law*, he was careful to note that each case may raise different considerations (at para. 62). However, a key factor is the operation of stereotypical assumptions and the impact of those assumptions on the dignity of the individual, particularly where the claimant is a member of a group that could, in a general sense, be said to suffer from pre-existing disadvantages. The sad history of our society's treatment of vulnerable mentally disordered offenders makes this a particularly important consideration in the context of this case.

88 The essence of stereotyping, as mentioned above, lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group: *Andrews*, *supra*, at pp. 174-75; *Law*, *supra*, at para. 61. The question is whether Part

XX.1 in effect operates against individual NCR accused in this way. In my view, it does not. At every stage, Part XX.1 treats the individual NCR accused on the basis of his or her actual situation, not on the basis of the group to which he or she is assigned. Before a person comes under Part XX.1, there must be an individual assessment by a trial judge based on evidence with full access to counsel and other constitutional safeguards. A person falls under Part XX.1 only if the judge is satisfied that he or she was unable to know the nature of the criminal act or that it was wrong. The assessment is based on the individual's situation. It does not admit of inferences based on group association. More importantly, the disposition of the NCR accused is similarly tailored to his or her individual situation and needs, and is subject to the overriding rule that it must always be the least restrictive avenue appropriate in the circumstances. Finally, the provision for an annual review (at a minimum) of the individual's status ensures that his or her actual situation as it exists from time to time forms the basis of how he or she is to be treated.

89 This individualized process is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned. As this Court recognized in *Law*, at para. 70:

> As a general matter, as stated by McIntyre J. in *Andrews*, *supra*, and by Sopinka J. in *Eaton*, *supra*, and referred to above, legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity.

The individualized scheme of Part XX.1, therefore, does not readily permit a finding of discrimination, as that term is understood in our s. 15(1) jurisprudence.

90 But individual treatment, by itself, cannot defeat a s. 15(1) claim: *Law*, at para. 70. A court must go further and assess the actual impact of the differential treatment

on the claimant's dignity, always from the perspective of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" (para. 60). From this perspective, the key feature of Part XX.1 -- treating every NCR accused having appropriate regard to his or her particular situation -- far from being a denial of equality, constitutes the essence of equal treatment from a substantive point of view. It does not disadvantage or treat unequally the NCR accused, but rather recognizes the NCR accused's disability, incapacity and particular personal situation and, based upon that recognition, creates a system of individualized assessment and treatment that deliberately undermines the invidious stereotype of the mentally ill as dangerous. It treats NCR accused more appropriately and more equally.

91 Earlier in these reasons, I rejected the view that Part XX.1 perpetuates the view that all NCR are dangerous, or even presumptively dangerous. On the contrary, in neither its purpose nor its effect does the differential treatment mandated by Part XX.1 send a negative message to society about the NCR accused. Nor can it reasonably be understood to demean their dignity as individual human beings. Rather, the process it lays down and the treatment options for which it provides embody the message that every NCR accused is equally entitled to all protections available to other people, subject only to such constraints as may be required as a result of his or her illness in the interest of public safety. In its purpose and effect, it reflects the view that NCR accused are entitled to sensitive care, rehabilitation and meaningful attempts to foster their participation in the community, to the maximum extent compatible with the individual's actual situation.

92 Other arguments for a violation of s. 15(1) are equally unavailing. It is argued that petty acts can lead to lengthy restrictions. But this argument essentially reiterates the s. 7 challenge, which, in light of the preferred reading of the statute set out above, fails.

Moreover, even if this argument were viewed as sounding under s. 15(1), it is unpersuasive. Undesirable or even erroneous detention is possible under any system. Part XX.1, properly applied, avoids undue confinement or restrictions on liberty by its emphasis on individual, ongoing assessment and the terms of s. 672.54 mandating the imposition of the least restrictive terms consistent with the circumstances. Similarly, the argument that the NCR accused does not enjoy the procedural advantages of the general criminal system fails when one takes into account the specific additional procedural safeguards embodied in Part XX.1, including the affirmative duty on the Board to consider the accused's personal needs and to impose the least restrictive order compatible with the circumstances.

93 The appellants also emphasize the "infinite" potential of supervision of an NCR accused. As alluded to earlier, this argument overlooks the fundamental distinction between the State's treatment of an NCR accused and its treatment of a convicted person. One purpose of incarcerating a convicted offender is punishment. The convicted offender is morally responsible for his or her criminal act and is told what punishment society demands for the crime. The sentence is thus finite (even if not fixed, i.e., a "life" sentence). By contrast, it has been determined that the NCR offender is not morally responsible for his or her criminal act. Punishment is morally inappropriate and ineffective in such a case because the NCR accused was incapable of making the meaningful choice upon which the punishment model is premised. Because the NCR accused's liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude. The purposes of any restriction on his or her liberty are to protect society and to allow the NCR accused to seek treatment. This requires a flexible approach that treats the length of the restriction as a function of these dual aims, and renders a mechanistic comparison of the duration of confinement inapposite.

94 In asserting that NCR accused must be treated "the same" as criminally responsible offenders who commit the same criminal act, the appellants assume that the infringement of their liberty is meant to serve the same function that it does for those found guilty of criminal offences. As I noted, this is mistaken. Any restrictions on the liberty of NCR accused are imposed for essentially rehabilitative and not penal purposes. In the words of Taylor J.A., unlike the sanctions faced by a convicted person, the scheme that addresses NCR accused "exacts no penalty, imposes no punishment and casts no blame": *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412 (B.C.C.A.), at p. 433. Accordingly, a formalistic comparison of the "sentences" imposed on these two types of individuals belies a purposive understanding of the statutory provisions in issue.

95 These considerations satisfy me that Part XX.1 does not discriminate against NCR accused. Another way of making the same point might have been to hold that because of the focus on appropriate treatment in accordance with the individual's situation mandated by Part XX.1, there is no real imposition of a burden on or withholding of a benefit from NCR accused. Indeed, read properly, it is difficult to conclude that the NCR regime inflicts an adverse impact on the NCR accused at all. Each person receives the treatment his or her actual situation demands, and each person is restrained only to the extent required to protect the public. Part XX.1 does not further the belief that NCR accused are less deserving of equal respect, consideration, or value. On the contrary, in its purpose and effect, Part XX.1 advances the opposite view.

96 I acknowledge that if s. 672.54 were read as raising a presumption of dangerousness and as permitting courts and Review Boards to restrict the liberty of the NCR accused in the absence of a considered conclusion that he or she posed a significant threat to the safety of the public, as may regrettably sometimes have happened in the past, one could argue that it would serve to disadvantage NCR offenders in a discriminatory

manner. Applied as suggested in these reasons, however, s. 672.54 serves to ensure that each NCR accused is treated appropriately, having regard to his or her particular situation and in a way that is minimally onerous and restrictive. All of this promotes the view that, whatever may have been the situation in the past, s. 672.54 recognizes that NCR accused are equally deserving of the law's concern, respect and consideration.

97 I conclude that Part XX.1 of the *Criminal Code* does not infringe s. 15(1) of the *Charter*. A reasonable person, fully apprised of all the circumstances and the characteristics of the claimant, would not find these provisions to be discriminatory. They promote, rather than deny, the claimant's right to be considered as an individual, equally entitled to the concern, respect and consideration of the law. It is therefore unnecessary to consider the justification arguments under s. 1.

VII. Conclusion

98 I conclude that s. 672.54 does not infringe s. 7 or s. 15(1) of the *Charter*. It is valid legislation, carefully crafted to protect the liberty of the NCR accused to the maximum extent compatible with the person's current situation and the need to protect public safety. It is not discriminatory, in the sense that that term is understood by our s. 15(1) jurisprudence.

99 Mr. Winko did not appeal the July 29, 1996 decision of the British Columbia Court of Appeal upholding the conditional discharge ordered by the Review Board on May 29, 1995. Before this Court, Mr. Winko based his argument and claim for relief entirely on the alleged unconstitutionality of s. 672.54. It is therefore unnecessary to consider whether the Court of Appeal erred in refusing to overturn the decision of the Review Board. However, I would observe that it appears that the majority of the Review

Board on its May 29, 1995 hearing may have proceeded on the basis that if it was not satisfied that the appellant Mr. Winko did not constitute a significant risk to public safety, it was required to continue restrictive conditions. Such an interpretation would not be in accordance with the interpretation of s. 672.54 set out in these reasons.

100 Finally, since the hearing of this appeal, it appears that Mr. Winko may have been granted an absolute discharge by the Board, which would render this decision academic. This Court has discretion to decide such appeals, however (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342), and in the circumstances of this case, I would do so.

101 I would dismiss the appeal and answer the constitutional questions as follows:

1. Does s. 672.54 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it discriminates against people with a mental disorder, including people with a mental disability, who have been found not criminally responsible on account of mental disorder?

   No.

2. Does s. 672.54 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprives persons found not criminally responsible on account of mental disorder of their right to liberty and security of the person contrary to the principles of fundamental justice?

   No.

3. If so, can these infringements be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

   The answers to the preceding questions make it unnecessary to answer this question.

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

//*Gonthier J.*//

GONTHIER J. --

I. Introduction

102 This appeal requires us to consider whether Part XX.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringes s. 7 or s. 15 of the *Canadian Charter of Rights and Freedoms*, and if so, whether it can be upheld under s. 1. I have read the reasons of McLachlin J. I adopt her statement of the facts. I fully agree with her description and statement of the purpose of Part XX.1 of the *Criminal Code*. I substantially agree with her analysis as well as with her conclusion that the impugned provisions of the *Criminal Code* violate neither s. 7 nor s. 15 of the *Charter*, and consequently, that the appeal should be dismissed.

103 However, I reach that conclusion by adopting a different interpretation of the impugned legislation, an interpretation that both reflects the plain wording of the law and implements the legitimate intent of Parliament. By its very wording, s. 672.54(*a*) of the *Criminal Code* clearly requires the court or the Review Board to find that the not criminally responsible ("NCR") accused is "not a significant threat to the safety of the public" (emphasis added) before it directs that he or she be absolutely discharged.

104 In my view, the threshold triggering the preventive jurisdiction of criminal law over the NCR accused is the existence of a threat to the safety of the public. Section 672.54(*a*) mandates that the court or the Review Board first make a positive finding of dangerousness. If, however, it cannot form the opinion that the NCR accused

is not a significant threat to the safety of the public, it may deny the granting of an absolute discharge. Dangerousness is one thing. A significant threat to the safety of the public is another.

105 Consequently, I disagree with McLachlin J.'s conclusion that Part XX.1 requires that NCR accused be granted an absolute discharge unless the court or the Review Board is able to conclude positively that they pose a significant risk to the safety of the public. In my opinion, such an interpretation unduly and needlessly interferes with the intent of Parliament. The negative test set out by s. 672.54 violates neither s. 7 nor s. 15 of the *Charter*. NCR accused are not deprived of their liberty contrary to the principles of fundamental justice and they are not denied a right to equal treatment under the law. As a result, I would dismiss the appeal.

II. Analysis

A. *Description and Purpose of Part XX.1 of the Criminal Code*

106 It is a principle of fundamental justice that the criminal justice system not convict a person who was not criminally responsible at the time of the offence (*R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 976 and 995). My colleague aptly sets out the history and the purpose of Part XX.1. As she states, at para. 20, Part XX.1 reflects Parliament's intent to adopt a new approach towards mentally ill offenders, an approach "based on a growing appreciation that treating mentally ill offenders like other offenders failed to address properly the interests of either the offenders or the public". In this respect, I agree with the comments of Doherty J.A. in *R. v. LePage* (1997), 119 C.C.C. (3d) 193 (Ont. C.A.), at pp. 203-4:

> The appropriate response to those who engage in criminal activity, while incapable because of mental disorder of conforming to the criminal law, has always posed a conundrum for the criminal law. Any criminal law response must recognize the absence of criminal culpability, but at the same time offer adequate protection for the community from those who engage in criminal activity while mentally incapable of conforming to the criminal law. The present *Criminal Code* attempts to meet those two goals. . . .

107 Less than 20 years ago, prison sentences, unaccompanied by any particular recommendation for treatment, were common practice: see M. E. Schiffer, *Mental Disorder and the Criminal Trial Process* (1978), at pp. 244 *et seq*. As my colleague rightly states, "Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative" (para. 21).

108 The NCR verdict is neither a verdict of guilty nor an acquittal. Nor is an NCR verdict a verdict of dangerousness. On the contrary, Part XX.1 requires the court or the Review Board to assess whether the NCR accused is dangerous.

109 There is a community of interests between society and the NCR accused inasmuch as preventing the future commission of dangerous crimes through treatment benefits both society and the NCR accused.

110 The goal of the impugned provisions of the *Criminal Code* is to protect the public from dangerous persons who have engaged in conduct proscribed by the *Criminal Code* through the prevention of such acts in the future. Inducement to treatment constitutes the means by which to achieve this end of public protection. As Lamer C.J. noted in *Swain*, *supra*, at p. 1007, "no one disputes that criminal law sentencing may deal with considerations of rehabilitation. . . . If Parliament chooses to respond to conduct

proscribed by the *Criminal Code* in a manner more sensitive to rehabilitation concerns, it does not thereby lose its legislative competence."

111 The goals of rehabilitation and protection of the public are intertwined and, as discussed below, they infuse the selection of the least onerous and restrictive disposition for the NCR accused found to be dangerous. In short, in the words of McEachern C.J.B.C.: "The purpose of the legislation, is to humanely treat those suffering mental disorder, and to limit their liberty only to the extent necessary to ensure public safety" (*Winko v. British Columbia (Forensic Psychiatric Institute)* (1996), 112 C.C.C. (3d) 31 (B.C.C.A.), at p. 60).

B. *Interpretation of Section 672.54 of the Criminal Code*

112 The fundamental issue in this appeal is whether Parliament has struck the right balance between the interests of the NCR accused and the interests of the State in ensuring the safety of the public, as was considered in *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 180; *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at pp. 461 and 471-72. It is well established that the principles of fundamental justice must not be developed from the sole perspective of the claimant: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 589-90. It is reasonable that the liberty interests of the NCR accused be limited by the protection of the safety of the public. This echoes Lamer C.J.'s observation in *Swain*, *supra*, at p. 1008, that "Parliament surely may balance individual rights against the interests of protecting society and provide for some system of review."

113 In order to determine whether there is a violation of s. 7 of the *Charter*, the Court must take into account the context, including the nature of the decision which must

be made under the impugned provision: *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 833, *per* La Forest J., and at p. 848, *per* McLachlin J.; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, at p. 98. It is axiomatic that there is both a public interest in safety and a general sentencing interest in developing the most appropriate penalty for the particular offender. As I noted for the majority in *R. v. Jones*, [1994] 2 S.C.R. 229, at pp. 290-91, "[t]he concern for societal interests is neither new nor is it limited to the dangerous offender proceedings. It has always been present in our general sentencing system. . . . The sentencing stage places a stronger emphasis on societal interests". See also *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329; C. C. Ruby, *Sentencing* (4th ed. 1994), at pp. 16-17. There is a confluence of the interest in public safety and the interest of NCR accused to be dealt with by the criminal law system in a way that addresses their particular situation.

114 Obviously, the instant case is not about traditional sentencing. It rather deals with the appropriate disposition or order to be issued with respect to an accused who has been declared not criminally responsible. NCR offenders are sufficiently different that the criminal law must craft, and has crafted, a different regime for them. However, the two processes, be it sentencing or disposition, bear one crucial aspect in common. They both determine when and how the offender will return to the community or more generally be in contact with the public. Therefore, balanced against the interests of NCR accused are societal interests in the safety of the public of strong importance. While in some respects they may seem at odds, they are largely congruent and call for a common resolution.

115 It is in this context that s. 672.54 is to be read. I will reproduce the impugned provision for ease of reference.

> **672.54** Where a Court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the

need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

> (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

116 The French version reads:

> **672.54** Pour l'application du paragraphe 672.45(2) ou de l'article 672.47, le tribunal ou la commission d'examen rend la décision la moins sévère et la moins privative de liberté parmi celles qui suivent, compte tenu de la nécessité de protéger le public face aux personnes dangereuses, de l'état mental de l'accusé et de ses besoins, notamment de la nécessité de sa réinsertion sociale:
>
> *a*) lorsqu'un verdict de non-responsabilité criminelle pour cause de troubles mentaux a été rendu à l'égard de l'accusé, une décision portant libération inconditionnelle de celui-ci si le tribunal ou la commission est d'avis qu'il ne représente pas un risque important pour la sécurité du public;
>
> *b*) une décision portant libération de l'accusé sous réserve des modalités que le tribunal ou la commission juge indiquées;
>
> *c*) une décision portant détention de l'accusé dans un hôpital sous réserve des modalités que le tribunal ou la commission juge indiquées.

117 In my opinion, this provision reflects the proper exercise by Parliament of its criminal law jurisdiction. Parliament is not so constrained by the *Charter* or otherwise that it cannot set up a system whereby the NCR accused is made subject to the least onerous and least restrictive order to him or her unless a court or Review Board is of the opinion

that he or she is a not significant threat to the public. I believe that s. 672.54(*a*) meets the criterion expressed in *Swain*, *supra*, at p. 1008:

> As the individual becomes less of a threat to society, the criminal law progressively loses authority and the coercive aspects of the warrant are loosened until a point is reached at which the individual is free from any supervision provided under the *Criminal Code*. [Emphasis added.]

118 Following *Swain*, the threshold triggering the jurisdiction exercised by criminal law over the NCR accused is the existence of a threat that they pose to public safety. As Lamer C.J. noted in *Swain*, at p. 999, "it has long been recognized that there also exists a preventative branch of the criminal law power". See also *Attorney-General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.); *R. v. Parks*, [1992] 2 S.C.R. 871, at pp. 892-95, *per* Lamer C.J., dissenting in part, at p. 909, *per* La Forest J., and at p. 911, *per* Sopinka J.; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at pp. 18-19 and 18-20.

119 The threshold is not the existence of a "significant" threat to public safety. I therefore disagree with McLachlin J.'s reading of *Swain*, *supra*, and her statement, at para. 47, that "the only constitutional basis for the criminal law restricting liberty of an NCR accused is the protection of the public from significant threats to its safety" (emphasis added).

120 In order for the safety of the public to be maintained, the preventive jurisdiction of criminal law over the NCR accused must extend to those who present a threat to public safety and not only a significant threat to public safety. The difference between my interpretation of s. 672.54 and that of McLachlin J. therefore relates to the threshold triggering the jurisdiction under criminal law over NCR accused.

121 The opening paragraph of s. 672.54 sets out the rule governing the disposition to be made. First, the court or the Review Board must take into consideration the need to protect the public from dangerous persons, the mental condition of the accused and the reintegration of the accused into society and the other needs of the accused. Second, the disposition is to be the least onerous and least restrictive possible to the accused.

122 If the opening paragraph stood alone, I do not see that it could be faulted for infringing s. 7 of the *Charter*. Paragraph (*a*) provides additional protection to the accused by mandating absolute discharge if it is found that the NCR accused is "not a significant threat to the safety of the public" even though he or she is dangerous.

123 A cardinal principle of statutory interpretation is that words ought to be given their ordinary meaning in harmony with the goal of the legislation. Cory and Iacobucci JJ. stated recently for this Court in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25: "the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament". See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at pp. 40-41; P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 219; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131.

124 The interpretation of an impugned provision must begin by reading its words. The wording of the introductory paragraph and of s. 672.54(*a*) on its face leads one clearly to the conclusion that the test set out is a negative one. There is nothing in either the section or the rest of Part XX.1 which indicates that the negative wording strays from the meaning it bears in common parlance, i.e., that it is meant to require an affirmative opinion

of a negative, namely, an opinion that the accused is not a significant threat: *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 400. This interpretation is consistent with the decisions of the courts below in the present appeal as well as in the companion appeals, and with the case law in general. See, e.g., *L'Hirondelle v. Forensic Psychiatric Institute (B.C.)* (1998), 106 B.C.A.C. 9; *R. v. Peckham* (1994), 19 O.R. (3d) 766 (Ont. C.A.), leave to appeal denied, [1995] 1 S.C.R. ix.

125 Of course, the *Criminal Code*, like all legislation, ought to be interpreted in light of the *Charter* and the values it enshrines. However, courts ought not to depart from the "plain meaning" of the text in the absence of ambiguity. This is not a case where the legislation is open to two different interpretations. There is no ambiguity. The Court is therefore not called upon to choose one interpretation over another that would render the legislation invalid, following the principle that courts prefer an interpretation of legislation that respects constitutional norms (Sullivan, *supra*, at p. 322). Lamer J., as he then was, made it clear in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. In the absence of ambiguity, there is no leeway to alter or recast the meaning of the words: "[T]his Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*" (emphasis added). In the case at bar, not only has Parliament spoken, it has spoken clearly.

126 Nor is this case one where the Court needs to read the impugned provision down to exclude applications that are grammatically possible but constitutionally impermissible: Sullivan, *supra*, at p. 327. The negative test set out by s. 672.54(*a*) is limited to the existence of a significant threat to public safety and is legitimate for the reasons detailed below. Therefore, the impugned provisions can be given their plain meaning, a meaning that is constitutionally valid.

127 Clearly, the need to protect the public from danger is an essential condition for imposing any restriction on the liberty interests of NCR accused and it must be established. However, Parliament does not require a positive finding that the NCR accused is a significant threat to public safety to maintain some protective measures and justify a disposition that is the least onerous and restrictive to the accused other than absolute discharge. In the words of McEachern C.J.B.C., in *Orlowski v. British Columbia (Attorney-General)* (1992), 75 C.C.C. (3d) 138 (B.C.C.A.), at p. 146:

> The question of "significant threat", however, is a most important question because Parliament has left the board with no alternative other than absolute discharge, if it has the opinion that the accused is not a significant threat.
>
> . . . [Section] 672.54(*a*) is phrased in such a way that the requirement for an absolute discharge only arises when the board does have the opinion that the accused is *not* a significant threat. If the board does not have that opinion then it need not order an absolute discharge.
>
> . . . The board must affirmatively have an opinion that the accused is not a significant threat before s. 672.54(*a*) applies. [Italics in original; underlining added.]

See also *Peckham*, *supra*.

128 It is well recognized that determinations of dangerousness are difficult. See para. 57 of the reasons of McLachlin J.; Schiffer, *supra*, at pp. 229-35 and 255; M. Roth, "Modern Psychiatry and Neurology and the Problem of Responsibility" in S. J. Hucker, C. D. Webster and M. H. Ben-Aron, eds., *Mental Disorder and Criminal Responsibility* (1981), at pp. 104-9.

129 Parliament has addressed the difficulty of predicting dangerousness. As McLachlin J. writes: "it is unrealistic to expect absolute certainty from a regime charged with evaluating the impact of individual, human factors on future events" (para. 59).

Lamer C.J.'s comments on the bail system, in *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 738-39, are equally apposite:

> While it is undoubtedly the case that it is impossible to make exact predictions about recidivism and future dangerousness, exact predictability of future dangerousness is not constitutionally mandated. . . .
>
> The bail system has always made an effort to assess the likelihood of future dangerousness while recognizing that exact predictions of future dangerousness are impossible. [Emphasis added.]

130 Section 7 of the *Charter* simply cannot provide NCR accused with a constitutional entitlement to something medical science does not offer. The role of Parliament is to balance carefully the interests of NCR accused, in light of the current achievements of medical science, with the societal interest in the protection of public safety.

131 The centrality of the notion of dangerousness calls for a closer analysis of that concept. What does the expression "significant threat to the safety of the public" mean? The *Concise Oxford Dictionary of Current English* (9th ed. 1995), defines "threat" as a "declaration of an intention to punish or hurt" or "an indication of something undesirable coming". The word "safety" is defined as "being safe; freedom from danger or risks". The word "danger" is defined as "liability or exposure to harm". The word "dangerous" is defined as "involving or causing danger". *Webster's Third New International Dictionary* (1986) defines "threat" as "an indication of something impending and usu. undesirable or unpleasant" or "an expression of an intention to inflict evil, injury, or damage on another" or "something that by its very nature or relation to another threatens the welfare of the latter". "Safety" is described as "the condition of being safe; freedom from exposure to danger; exemption from hurt, injury or loss [. . .]; the quality or state of not presenting risks". The word "danger" is given the following definition: "the state of

being exposed to harm; liability to injury, pain, or loss; peril, risk" with the additional comment: "Danger, the general term, implies the contingent evil". In the *Random House Dictionary of the English Language* (2nd ed. 1987), under the word "danger", it is stated that "danger, hazard, peril, jeopardy imply harm that one may encounter. Danger is the general word for liability to all kinds of injury or evil consequences, either near at hand and certain, or remote and doubtful" (emphasis added). "Dangerous" is defined as "able or likely to cause physical injury".

132 In *Le Nouveau Petit Robert* (1996), "dangereux" is defined as "[q]ui constitue un danger, présente du danger, expose à un danger" and "danger" is defined as "[c]e qui menace ou compromet la sûreté, l'existence de qqn ou de qqch; situation qui en résulte". The word "risque" is defined as "[d]anger éventuel plus ou moins prévisible". Finally, the definition of "sécurité" is "[é]tat d'esprit confiant et tranquille d'une personne qui se croit à l'abri du danger" or "[s]ituation, état tranquille qui résulte de l'absence réelle de danger (d'ordre matériel ou moral)". In Larousse's *Dictionnaire de la langue française - Lexis* (1992), "dangereux" is described as "[s]e dit de choses ou d'êtres animés qui constituent un danger", "danger" being "[c]irconstances où l'on est exposé à un mal, à un inconvénient; ce qui légitime une inquiétude". The word "risque" is defined as "[d]anger, inconvénient plus ou moins prévisible". The expression "sécurité" refers to a "[s]ituation où l'on n'a aucun danger à craindre".

133 It follows from the review of the above definitions that insofar as the protection of the public is concerned, which is the purpose of s. 672.54, "dangerous" and "threat to the safety of the public" are synonyms. A dangerous NCR accused is a threat to public safety. However, an NCR accused who is dangerous may not constitute a "significant" threat to the safety of the public.

134 Parliament uses both expressions in s. 672.54. It follows logically that they are not interchangeable pursuant to yet another basic rule of interpretation whereby it is presumed that Parliament uses language carefully and consistently. Hence, within a statute, the same words are taken to have the same meaning and different words have different meanings: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, at p. 1387; *R. v. Barnier*, [1980] 1 S.C.R. 1124, at pp. 1135-36; Côté, *supra*, at p. 279; Sullivan, *supra*, at pp. 163-65.

135 Reading the words of s. 672.54, one readily finds that Parliament has envisaged two levels of dangerousness: dangerousness and significant threat to public safety. In choosing the appropriate disposition, the court or the Review Board must take into consideration the "need to protect the public from dangerous persons". However, courts and Review Boards are only entitled to grant an absolute discharge to NCR accused who do not constitute a significant threat to the public.

136 The negative wording of s. 672.54(*a*) cannot be ignored, nor can the fact that Parliament uses different expressions corresponding to different levels of dangerousness for different purposes be overlooked. I respectfully disagree with McLachlin J. when she states that "Parliament in Part XX.1 has given 'dangerousness' a specific, restricted meaning" (para. 57).

137 There is an important distinction to be made between a threat to public safety and a significant threat to public safety. As McEachern C.J.B.C. ruled in *Orlowski*, *supra*, at p. 147:

> [T]here is a distinction between a threat to public safety and a "significant" threat under s. 672.54(*a*), and the right of an accused to an absolute discharge cannot be foreclosed just because he may be a threat to public safety. Instead, the section grants this entitlement even if the board has the opinion that he is

> a threat to public safety but is not a significant threat. This distinction is a most important one to accused and may arise for consideration in many cases.

138 Even if the court or the Review Board comes to the conclusion that the NCR accused is a dangerous person, it is possible that it may need an opportunity to investigate further, i.e., more time to make a more complete assessment of the condition of the NCR accused, before it can form the opinion that the NCR accused does not pose a significant threat to public safety: *Winko*, *supra*, *per* McEachern C.J.B.C., at p. 54.

139 Part XX.1 mandates the absolute discharge of an NCR accused if he or she is found not to constitute a significant threat to the safety of the public, even if he or she is dangerous and constitutes a threat to public safety. However, as the denial of an absolute discharge must be the least restrictive and least onerous disposition in the circumstances, in order for the court or the Review Board to refuse an absolute discharge, not only must it find dangerousness, but there also must be a reason for it being unable to reach an opinion that the accused is not a significant threat. In other words, the dangerousness of the accused must be of such a nature as to raise the question whether the accused is a significant threat to public safety and, in addition, render the court or Review Board unable to reach the opinion that the accused is not a significant threat to the safety of the public.

140 I agree with McLachlin J.'s comments on the definition of a "significant" threat (para. 57). In short, there must be a real risk of serious physical or psychological harm to individuals in the community.

141 I agree with McLachlin J.'s comments, at paras. 60-61, on the relevant considerations for the court or the Review Board in its assessment of whether the NCR

accused is a significant threat to the safety of the public. These include: the nature of the harm that may be expected; the degree of risk that the particular behaviour will occur; the period of time over which the behaviour may be expected to manifest itself and the number of people who may be at risk. On the whole, the threat to public safety must be significant.

142 Often the critical question is whether or not the NCR accused should remain subject to the authority of the Board and be provided with treatment for his or her mental illness.

143 Some NCR accused respond well to medication. It may be that an NCR accused's symptoms can be controlled and stabilized by the administration of medication and that he or she needs to continue taking that medication in order to prevent a deterioration in mental condition. The Review Board must assess the risk of failure to take medication and determine whether a psychiatric relapse would mean that the appellant could become a threat to public safety.

144 In the case at bar, for instance, the Review Board and the Court of Appeal found that Mr. Winko is relatively stable when he takes his medication. However, he was found not to be able to recognize his need for medication, and when he was without medication he heard voices again. When Mr. Winko committed aggravated assault with a weapon on two pedestrians, he had been hearing voices which he thought were coming from the pedestrians saying, "why don't you go and grab a woman and do her some harm?", "you are going to the West End to kill someone", "you know you can't kill a woman", and "you are a coward". *Winko v. Forensic Psychiatric Institute (B.C.)* (1996), 79 B.C.A.C. 1, at p. 4.

145 In short, the proper understanding of s. 672.54(*a*) is that the court or the Review Board must first make a positive finding of dangerousness, i.e., that the NCR accused is indeed a threat to public safety. There is no presumption of dangerousness.

146 If the court or the Review Board finds that the accused is not a threat to public safety, the inquiry ends there and the NCR accused will be absolutely discharged.

147 If it finds that the accused is dangerous, it will then have to determine whether the accused is or is not a significant threat to public safety. A positive finding of such significant dangerousness need not be made as a condition precedent to ordering some measures of protection. Parliament has expressed, through the negative wording of s. 672.54(*a*), that if the court or the Review Board is unable, after having found that the NCR accused is indeed a threat to public safety, to reach an opinion as to whether or not the threat posed by the accused is a significant one, it may maintain some protective measures awaiting further review of the case, by issuing the order that is the least onerous and least restrictive to the accused consistent with the evidence.

148 In conclusion, with respect to the interpretation of the legislation, I substantially agree with McLachlin J.'s summary, found at para. 62 of her reasons, on the description of the duties of a court or a Review Board that is charged with applying s. 672.54 (subparas. 1, 4, 5, 6, 7, 9 of para. 62). However, consistent with my reading of s. 672.54, I disagree with the statements she makes at subparas. 3 and 8. I would also rephrase subpara. 2, which does not appear to reflect accurately my colleague's own position, as developed in her analysis at para. 57. I would replace subparas. 2, 3 and 8 and slightly amend subpara. 9 so that the summary would read:

1.The court or Review Board must 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. 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 serious physical or psychological harm to members of the public. Relevant factors include the nature of the harm that may be expected; the degree of risk that the particular behaviour will occur; the period of time over which the behaviour may be expected to manifest itself and the number of people who may be at risk.

3. There is no presumption that the NCR accused is a dangerous person. No restriction whatsoever on his or her liberty interests can be ordered without a positive finding that the NCR accused is indeed, a dangerous person. Furthermore, the court or the Review Board must direct an absolute discharge if it can form the opinion that the NCR accused is not 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 in such circumstances 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 the Review Board may have recourse 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. This list is not exhaustive.

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 threat 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 where it is relevant to identifying a pattern of behaviour, and hence 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 finds that the NCR accused is a significant threat to the safety of the public or if, after having found that the NCR accused is indeed a dangerous person, it is unable to reach an opinion with respect to the significance of the danger posed by the NCR accused, it has two alternatives. It may order that the NCR accused be discharged subject to such conditions as it considers appropriate (s. 672.54(*b*)) or it may order that the NCR accused be detained in custody in a hospital, subject to such conditions it considers appropriate (s. 672.54(*c*)).
>
> 9. When deciding whether to make an order for a conditional discharge or for detention in a hospital and when crafting the appropriate conditions, if any, 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.

C. *Section 7 of the Charter*

149 It is with the preceding interpretation of s. 672.54 in mind that I turn to consider the appellant's contentions under s. 7 of the *Charter*. There are essentially three submissions. First, the appellant contends that s. 672.54 imposes a burden of proof on NCR accused. Second, it is alleged that a presumption of dangerousness is created by the impugned provision. Third, it is argued that the regime is overbroad and goes beyond what is needed to accomplish the objectives of Parliament.

150 The appellant concedes that the legislature did not expressly cast a burden of proof upon them. However, he alleges that such a burden of proof exists *de facto*. I fully agree with McLachlin J.'s conclusion in the present appeal that the process is inquisitorial, as opposed to adversarial, and therefore, that it does not cast a burden on the NCR accused to prove his or her lack of dangerousness (paras. 53-55 and 70). As McLachlin J. states, at para. 52, s. 672.54 is "remarkable among provisions in the Canadian *Criminal Code* in that it does not place burdens of proof on either party. It is not adversarial in the usual sense". Rather, Parliament imposes upon the court or the

Review Board the duty to gather evidence and it has granted powers accordingly: *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra*, at p. 57, *per* McEachern C.J.B.C.

151 If one recognizes the inquisitorial nature of the hearing before the court or the Review Board, the suggestion that the NCR accused bears a burden of proof does not withstand analysis. This is consistent with the case law: see *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269 (B.C.C.A.); *Peckham*, *supra*; *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra*; *LePage*, *supra*; *R. v. Lewis* (1999), 132 C.C.C. (3d) 163 (C.A.). The wording in the negative of s. 672.54(*a*) becomes irrelevant. The finding, alone, that the process is inquisitorial leads to the dismissal of the argument that there is, *de facto*, a burden of proof cast upon NCR accused. Therefore, there is no need to read s. 672.54(*a*) as requiring a positive finding of significant dangerousness in order to conclude that the NCR accused are under no obligation to discharge a burden of proof.

152 The appellant also argues that s. 672.54 creates a presumption of dangerousness. He urges this Court to acknowledge that the problem created by the negative test set out in s. 672.54 is that, in the absence of any evidence on future dangerousness, the court or the Review Board could decide not to grant an absolute discharge.

153 Neither according to my reading of s. 672.54, nor according to McLachlin J.'s interpretation, does that section create a presumption of dangerousness. The court or the Review Board must determine whether the NCR accused is a dangerous person. If it fails to positively conclude that the NCR accused is dangerous, it must grant an absolute

discharge. Consequently, s. 672.54 creates no presumption of dangerousness whatsoever.

154 The only NCR accused who will have their liberty interests curtailed, even to the least onerous and restrictive extent possible, are dangerous NCR accused. While the principles of fundamental justice require a positive finding of dangerousness, they allow that uncertainties with respect to the extent of the threat posed by the accused, as opposed to its very existence, be resolved in favour of the safety of the public, in setting a threshold for ordering protective measures that are the least onerous and restrictive to the accused. Public concern that an NCR accused not be free of all supervision until it is established that he or she is not a significant threat to the safety of the public is obvious and legitimate.

155 Section 672.54 provides a set of internal balancing factors. Section 7 of the *Charter* does not mandate otherwise. Obviously, an NCR accused who is not dangerous must be absolutely discharged because the societal interest in the protection of the public is absent. If the NCR accused is dangerous, the criminal law preventive power will operate in relation to the NCR accused unless and until the threat to public safety is found to be not significant. On the other hand, until such time, limits on the NCR accused's liberty are kept to a minimum level, that is the least onerous and restrictive to the accused. Section 672.54 strikes a careful balance between the interests of the NCR accused and the protection of public safety.

156 McLachlin J. dismisses the argument that s. 672.54(*a*) creates a presumption of dangerousness by reading into the section the requirement of a positive finding of significant dangerousness. In my view, this interpretation unduly departs from the law

which in its wording complies with the *Charter*, and restricts its effectiveness in achieving its purpose. This constitutes an unnecessary interference with the intent of Parliament.

157 An analysis under s. 7 of the *Charter* calls for a consideration of the actual effects of Part XX.1 on the liberty interests of NCR accused. While the making of dispositions pursuant to s. 672.54 affects individual liberty interests so as to engage s. 7 of the *Charter*, a closer consideration of the legislation, however, reveals the minimal effect of s. 672.54 on the liberty interests of the NCR accused as well as the existence of solid procedural safeguards.

158 The existing regime is fundamentally different from the regime in force at the time of this Court's decision in *Swain*, *supra*. Under former s. 542(2), the accused was deprived of his s. 7 right to liberty by being detained in strict custody until the pleasure of the Lieutenant Governor was known, without a hearing. This Court held in *Swain* that this was contrary to the principles of fundamental justice.

159 Today, like any other accused, a person found NCR will have had a bail hearing in the course of the proceedings. Under Part XX.1, there is no automatic detention. If an assessment order is made, it takes precedence over an interim detention or release order (s. 672.17). Section 672.16 provides for a presumption against custody unless it is necessary to assess the accused or the Crown shows that the detention of the accused is justified on either of the grounds set out at s. 515(10) (bail hearing). Therefore, at the time of the verdict, the accused may be at large on bail or in custody on the authority of a detention order.

160 The accused has a full opportunity to challenge any proposed restraint on his or her liberty at the initial bail hearing and at any subsequent application by the Crown

to vary the bail. Also, if the accused is dissatisfied with the bail or detention order in effect at the time of the verdict, he or she may move to vary that order.

161 McLachlin J. aptly describes the other procedural safeguards established by Part XX.1 at paras. 23-29. They are characterized by several protections for the NCR accused. His or her case must be dealt with promptly within set delays. Mandatory reviews are provided for on a periodic basis as well as following any increased restrictions upon the liberty of the NCR accused. There are also very broad review and appeal rights available to the NCR accused as well as to persons in charge of his or her treatment and any other interested person designated by the court or the Review Board.

162 A review of the relevant legislative provisions, having regard to the proper interpretation of s. 672.54, shows the appellant's submissions, that individual dangerousness need not be proven to support a restriction of the liberty interests of NCR accused, to be inaccurate.

163 Also, it is incorrect and misleading to approach the issue of constitutional validity from the perspective of a simple dichotomy between "detention" on one hand, and "absolute discharge" on the other. As Goldie J.A. noted in *Davidson*, *supra*, at p. 278, "[u]nlike the polar opposites of conviction and acquittal the options open to the Board where absolute discharge is not an acceptable alternative cover a wide spectrum."

164 A wide array of dispositions is available ranging from complete community release with the only requirement being to attend a hearing once a year, or reporting periodically to an out-patient clinic and attending counselling, or living in the community under strict supervision, or having unsupervised community visits, to living in an open

hospital ward, or living in a single-locked ward, or a medium or maximum-security detention hospital at the other end of the spectrum.

165 Dangerous NCR accused can be subjected only to the disposition and the conditions that are the least onerous and restrictive upon them, taking into account the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused: *British Columbia (Forensic Psychiatric Institute) v. Johnson*, [1995] B.C.J. No. 2247 (QL) (C.A.), at para. 50.

166 The court or the Review Board engages in a risk-management exercise. Detention or confinement will constitute the appropriate disposition only when that will be the least onerous disposition possible, i.e., the only way to prevent the threat to public safety from becoming a reality. I fail to see how the imposition of the disposition that is the least onerous and restrictive possible is overbroad or otherwise does not conform to the principles of fundamental justice.

167 The appellant argues that s. 672.54 is overbroad because it includes minor offences. A related argument is that in the absence of capping provisions there is no measure of proportionality between the seriousness of the offence and the potential period of lost liberty. Therefore, the means chosen, it is argued, are not reasonably tailored to effect the desired purpose.

168 First, it must be noted that there is no such thing as an indeterminate disposition, *simpliciter*, under Part XX.1, since periodic *de novo* review of the case of NCR accused is mandatory: *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412 (B.C.C.A.), at p. 433; see *a pari*, *Lyons*, *supra*, at p. 341. Also, the

disposition may be expressly time-limited by order of the court or Review Board: s. 672.63.

169 At any rate, the appellant's submissions ultimately fail because they are based on a mistaken understanding of the nature of the situation of NCR accused and the *sui generis* criminal law regime adapted to them. This incorrect appreciation appears to be the basis for the reasons of the Manitoba Court of Appeal in *R. v. Hoeppner*, [1999] M.J. No. 113 (QL), where Scott C.J.M. accepted the submission that s. 672.54 is overbroad and ruled for the court: "Some legal justification must be found to restrict the liberty of a person once the criminal law regime has run its legitimate course" (para. 54).

170 Criminal law simply "runs its legitimate course" differently for NCR accused than for convicted persons. Section 672.54 is not overbroad precisely because it is tailored to fit the particular situation of the NCR accused. One must look at Part XX.1 as a whole if any comparison is to be made with the situation of other offenders under the *Criminal Code*. Offenders, other than NCR accused, who are convicted will be deprived of their liberty whether they are still dangerous or not. By contrast, if the NCR accused is not dangerous, he or she will be absolutely discharged.

171 The sentence of sane convicted offenders is determined in accordance with well-established principles including proportionality with the gravity of the offence committed and the degree of responsibility of the offender (s. 718.1 of the *Criminal Code*): Ruby, *supra*, at pp. 23 *et seq.*; D. Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995), at pp. 60-63. It is useful to recall the words of Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 40 and 79:

> Indeed, the principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the

> criminal sanction may only be imposed on those actors who possess a morally culpable state of mind. . . .
>
> It is this mental state which gives rise to the "moral blameworthiness" which justifies the state in imposing the stigma and punishment associated with a criminal sentence. . . . [I]t is this same element of "moral blameworthiness" which animates the determination of the appropriate quantum of punishment for a convicted offender as a "just sanction". [Emphasis added.]

172 The very statement of the principle demonstrates that it cannot apply in the case of NCR accused. It must be acknowledged that a fixed-term sentence is just that: a sentence. Capping provisions belong to the sentencing system and are not suited for NCR accused. The notion of proportionality cannot be applied to NCR accused because they did not rationally commit the criminal act in question. As Lamer C.J. held in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1320:

> While the state of insanity and the state of childhood cannot be equated, the connection between these two situations for the purpose of criminal law is apparent. What these two situations have in common is that they both indicate that the individual in question does not accord with some basic assumptions of our criminal law model: that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong. [Emphasis added.]

See also *R. v. Oommen*, [1994] 2 S.C.R. 507; *LePage*, *supra*, at p. 203. No "moral blameworthiness" can be imposed upon NCR accused. This is the very reason for which they have been declared not criminally responsible.

173 If punishment clearly cannot be one of the objectives of Part XX.1, then the correlative principle of proportionality cannot apply either. As R. P. Nadin-Davis, in *Sentencing in Canada* (1982), wrote at p. 15: "Common sense dictates that, in dealing with an offender suffering from mental disorder, special handling is needed. Any notion of commensurate punishment strikes one as unjust for a person who commits a criminal act by reason of an affliction of the mind". Part XX.1 is an integrated scheme, the

constitutional validity of which must be determined by considering the system as a whole.

174 Part XX.1 adapts the criminal system to the mentally ill who are not responsible for their criminal acts. NCR accused are not sentenced because a sentence is appropriate neither for the NCR accused nor for the safety of the public. The sentence is replaced by the least onerous and restrictive disposition to the NCR accused which is appropriate to protect the public against NCR accused who are dangerous persons. Section 7 of the *Charter* allows for such a measured restriction on liberty in the interest of the public.

175 I respectfully disagree with my colleague that a positive conclusion of significant threat to the safety of the public, as distinguished from a positive conclusion of dangerousness to the public, is, as a principle of fundamental justice, the necessary threshold for imposing even the least restrictive and onerous measures to the accused for the protection of the public as well as for defining the extent of the federal criminal law power. To hold the latter would introduce an uncalled for qualification to the teachings of this Court in *Swain*, *supra*. I cannot accept that the preventive powers of Parliament under its criminal law jurisdiction are so limited and that principles of fundamental justice require that the risks arising from uncertainties in assessing the degrees of dangerousness must be entirely borne by the public to the point that even the least onerous and restrictive measures to the accused who is found to be dangerous cannot be ordered as provided by s. 672.54.

176 For these reasons, I conclude that s. 7 of the *Charter* is not violated by Part XX.1 of the *Criminal Code*.

Summary

177 The plain wording of s. 672.54 must be given effect while considering its actual effects. On its face, s. 672.54 makes a distinction between "dangerous persons" and NCR accused who are "a significant threat to the safety of the public". Section 672.54(*a*) clearly provides that an absolute discharge is to be granted only to the NCR accused who is not a significant threat to the safety of the public.

178 Following *Swain*, the preventive jurisdiction of criminal law is triggered by the existence of a threat to public safety. Danger is the threshold and not significant danger. Hence, and as provided for by s. 672.54, a positive finding of dangerousness must necessarily be made by the court or the Review Board. It follows that there is no presumption of dangerousness. The process is inquisitorial: it is incumbent upon the court or the Review Board to gather the relevant evidence. None of the parties bears a burden of proof. The negative test set out by s. 672.54(*a*) of the *Criminal Code* is limited to the non-existence of a significant threat to public safety and is legitimate.

179 It is only if the court or the Review Board is unable to form the opinion that the NCR accused is not a significant threat to the safety of the public that it may deny the granting of an absolute discharge. In that event, the court or Review Board must choose, from a whole range of dispositions, the order that is the least onerous and least restrictive to the accused, having regard to the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused.

180 While the principles of fundamental justice require that a positive finding of dangerousness be made and that interferences with the accused's liberty interests be kept

to a minimum, they do not require that the public bear the risk posed by a dangerous NCR accused who cannot be determined not to be a significant threat to the safety of the public.

181 Given the fact that there is neither a burden of proof on the accused nor a presumption of dangerousness, that any restriction on the liberty interests of the NCR accused must be the least onerous and least restrictive possible, and considering the many procedural safeguards provided, I conclude that s. 672.54 complies with the principles of fundamental justice. Therefore, the appellant's argument that it violates s. 7 must fail.

D. *Section 15 of the Charter*

182 I agree with McLachlin J.'s analysis and her conclusion that the appellant's right to equal treatment under the law is not violated. As the appellant has placed great emphasis on the comparison of the regime for NCR accused with that for dangerous offenders, I wish to address this argument more specifically and add that the conclusions of my colleague are supported by a closer review of the two regimes viewed as integrated schemes.

183 Upon determining that a person is a "dangerous offender", the court may impose a sentence of detention in a penitentiary for an indeterminate period. The purpose is both preventive and punitive. Reviews for parole occur at the end of seven years and every two years thereafter. A dangerous offender can be released on parole (s. 761), but never receives an absolute discharge. Moreover, the release on parole is a privilege and not a right: *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 593.

184 On the other hand, under Part XX.1, an NCR accused, with respect to whom the court or the Review Board could not come to the conclusion that he or she is not a

significant threat to public safety, may be detained, but only if that constitutes the least onerous and least restrictive disposition possible under the circumstances. The court or the Review Board can choose from a whole range of dispositions that allow for the treatment of the NCR accused and lead to the most successful and complete reintegration into the community possible. He must be absolutely discharged as soon as the court or the Review Board is of the opinion that he or she is not a significant threat to public safety. Moreover, reviews of the situation of the NCR accused must take place on request at any time and in any event annually and whenever a greater restriction on his liberty is imposed.

185 It is true, as the appellant argues, that under Part XXIV, the burden is cast upon the Crown to establish beyond a reasonable doubt all the necessary elements contained in the dangerous offender provisions, whereas under Part XX.1, the Crown does not bear the burden of proving that the NCR accused poses a significant threat to the safety of the public. However, this argument misses the mark for two reasons. First, the burden imposed upon the Crown is tied to the fact that a sentence is sought as a punishment that is far more severe and constraining than the regime designed to meet the needs of NCR accused. Second, the whole process before the court or the Review Board is inquisitorial and not adversarial. There are no parties. There is no burden of proof. This system, in the interest of the NCR accused, protects the integrity of the professional relationships involved. It allows for a better assessment of the condition of the NCR accused which, in turn, leads to a more accurate determination of the disposition that will best serve the needs of the NCR accused and his or her reintegration into society and be the least onerous and restrictive upon the NCR accused while protecting the safety of the public.

186 Therefore, when viewed as a whole, under the scheme of Part XX.1 of the *Criminal Code* NCR accused are not disadvantaged as compared to dangerous offenders. Rather, Part XX.1 provides for the least restrictive intrusion with the liberty interests of the accused consistent with protecting public safety.

187 The analysis and the reasoning of McLachlin J. are equally applicable to my interpretation of s. 672.54(*a*). Like McLachlin J., I have reached the conclusion that there is no presumption of dangerousness. This is so pursuant to the plain meaning of s. 672.54. Parliament has envisaged two different levels of dangerousness, namely dangerousness and significant threat to public safety. A positive finding of dangerousness is required to deny an NCR accused an absolute discharge. The NCR accused is also entitled to an absolute discharge even though he or she is dangerous, if he or she is found not to be a significant threat to the safety of the public.

188 Contrary to McLachlin J.'s comment at para. 96, there is no need to read down s. 672.54(*a*) as requiring a positive finding of significant dangerousness as a condition for refusing an absolute discharge. My colleague's analysis is equally appropriate to a threshold of dangerousness or threat to public safety. Any constraints on the liberty interests of the NCR accused are to be geared to his or her individual circumstances, as my colleague explains.

189 Whatever the threshold, be it dangerousness or significant threat to the safety of the public, the measures must be geared thereto and in all cases be the least onerous and least restrictive to the accused having regard to his or her condition as known.

190 Such measures benefit public safety and each NCR accused as well, as they will allow such treatment and supervision as are least onerous and least restrictive to him

or her and are called for to meet his or her needs and facilitate reintegration into society. Whatever the threshold, the correspondence between protection measures and need is maintained. Uncertainties in assessment of risk are an unavoidable element of risk itself. Applied to either threshold, my colleague's reasons for concluding to an absence of burden and discrimination, with which I agree, are equally valid.

191 No negative message is sent about the worth or value of NCR accused. On the contrary, Parliament acknowledges that the needs of the NCR accused ought to be addressed by the criminal law system and that traditional sentencing principles cannot apply to them. Parliament has sent a message that the assessment of the NCR accused is to be dealt with with the utmost consideration and prudence. Numerous procedural safeguards are provided. Part XX.1 is the legislative expression of a careful reconciliation of the interests of the NCR accused and society.

192 Section 672.54 mandates the consideration of all the needs of an NCR accused, including specifically his or her interest in being reintegrated into society. Inducement to treatment is the favoured solution. Parliament insists that, if measures of protection need to be imposed, given the dangerousness posed by an NCR accused, they are to be carefully designed as the least onerous and restrictive possible. In short, Parliament sends the key positive message that NCR accused are, as much as possible, to be reintegrated into society.

193 For the above reasons, I conclude that Part XX.1 does not violate the equality rights of NCR accused as guaranteed by s. 15 of the *Charter*.

III. Conclusion

194 Parliament has crafted a careful scheme designed to address the particular situation of the mentally ill in the criminal justice system. No burden of proof is cast upon NCR accused. There is no presumption that NCR accused are dangerous.

195 The court or the Review Board must make a positive finding of dangerousness. If it believes that the NCR accused is not a significant threat to public safety, it must order an absolute discharge. If, however, it cannot form the opinion that the NCR accused is not a significant threat to public safety, it is entitled to deny an absolute discharge. It must then order the disposition that will be the least restrictive and onerous possible upon the NCR accused, taking into account the need to protect the public, the mental condition of the accused, his or her reintegration into society as well as his or her other needs.

196 Neither s. 7 nor s. 15 of the *Charter* is violated. It is not necessary for this Court to deny the existence of the negative test set out in s. 672.54 in order to reach that conclusion. The previous system was declared unconstitutional by this Court in *Swain*. In my opinion, the existing legislation is the result of constitutionally permissible choices.

197 With respect to the disposition of the case at bar, I agree with McLachlin J. that this Court should exercise its discretion to decide the appeal, despite the fact that Mr. Winko has been absolutely discharged (para. 100 of McLachlin J.'s reasons). Since Mr. Winko based his argument exclusively on the constitutionality of the impugned provisions, this Court need not determine whether the Court of Appeal erred in refusing to overturn the decision of the Review Board. However, consistent with my interpretation of s. 672.54, I do not subscribe to McLachlin J.'s comment on the apparent interpretation of s. 672.54 by the Review Board. It could and should have proceeded on the basis that no absolute discharge was to be granted unless it was satisfied that Mr. Winko was <u>not</u> a <u>significant</u> threat to the safety of the public.

198 For all of the above reasons, I would dismiss the appeal and adopt the answers of McLachlin J. to the constitutional questions.

Appeal dismissed.

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