Recent Court of Appeal Decisions Highlight Importance of Evidence on "Significant Threat"

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Two recent cases suggest that the Court of Appeal may be applying the *Winko* principles on significant threat more rigorously than it has historically.

Forensic mental health professionals are well-acquainted with the "significant threat" threshold. Under s. 672.54 of the Criminal Code, an accused who has been found not criminally responsible on account of mental disorder ("NCRMD") must be discharged absolutely from the jurisdiction of the Ontario Review Board (the "Board") if the Board cannot decide with certainty that the accused poses a significant threat to the safety of the public.

A recent amendment to the Criminal Code codified the judicial interpretation of significant threat, which is derived, in large part, from the leading Supreme Court of Canada case R. v.Winko.1 The main principles enunciated in Winko include:

- "Significant threat" means the accused poses a real risk of serious physical or psychological harm to members of the public;
- The conduct giving rise to the harm must be criminal in nature and must go beyond merely trivial or annoying conduct; and
- There must be evidence supporting the "significant threat", as there is no presumption that an NCRMD accused poses a significant threat to the safety of the public.
  NCRMD accused have an automatic right to appeal a Board's decision to the Court of Appeal for Ontario. The Board's decisions on "significant threat" are reviewed on the standard of "reasonableness" – i.e. the decision must fall within a range of conclusions that could be reasonably reached on the evidence.

Recently, the Court of Appeal twice overturned the Board's disposition on the basis that the evidence did not support a finding that the accused posed a significant threat. Accordingly, the court substituted its own decision for that of the Board's and granted the NCRMD accused an absolute discharge on the appeal. In light of these cases, which are discussed in more detail below, we recommend that forensic psychiatric facilities and physicians provide detailed evidence regarding their assessment of an accused's risk to public safety.

Wall (Re), 2017 ONCA 713

The NCRMD accused in (Re) Wall had a substantial history of mental illness and an extensive criminal record of 44 convictions, including robbery, assault and assault with a weapon. His index offence leading to the finding of NCRMD arose out of threats he made to two 9-1-1 call operators. At the time of his most recent hearing, the accused had developed good insight into his mental disorder and was capable of consenting to treatment. He had been living off and on in the community since 2013, requiring multiple re-admissions due to ongoing substance abuse.

On his last two admissions to hospital in 2016, the accused showed signs of cognitive impairment and hypomania. At the hearing, the accused's psychiatrist testified that he was "extremely dangerous" when hypomanic and that the recent rapid emergence of his symptoms provided clear evidence that his substance abuse was affecting his mental status, putting him at risk of a full manic episode.

The Board did not agree that the accused was "extremely dangerous", since he had not exhibited any signs of violence since 2014. However, the Board did accept that the accused's marijuana use was "potentially linked to problematic symptoms and [was] sufficient to support a finding of significant threat."

The Court of Appeal found this decision to be unreasonable and ordered an absolute discharge. As part of its reasons, the court explained that:

The risk that [the accused] will abuse marijuana and commit additional offences if he is given an absolute discharge is substantial. But he cannot be detained indefinitely on this account.

…

[A]t its highest, the Board could do no more than conclude that the appellant's marijuana use is potentially linked to problematic symptoms. It is not a reason to deny the appellant an absolute discharge on so general basis. [italics in original, bold added]

Pellett (Re), 2017 ONCA 753

In (Re) Pellett, the accused suffered from schizophrenia, with a recurring pattern of hospitalization, treatment, release, de-compensation, relapse and re-admission. In the early 2000s, the accused engaged in concerning behaviour while psychotic, such as diverting traffic on a busy street, crashing her car and throwing objects out a window. In 2011, she was found NCRMD for assaulting a five-year-old child who she believed was sending her telepathic messages. She had pushed the child to the ground on a public sidewalk beside the road.

At the time of her most recent Board hearing, the accused had poor insight into her illness, and her psychiatrist testified that she would likely become non-compliant with her medication if not supervised. She had lived in the community with minimal supervision since May 2015 and without incident. Her psychiatrist testified that medication non-compliance would likely result in psychosis, which would likely lead to aggressive behaviours and possible homelessness.

The Board concluded that the accused continued to present a real risk of serious injury to members of the public on the basis of her index offence. This conclusion was made notwithstanding the Board's comment that it did not have enough information to conclude that the index offence itself caused serious physical or psychological harm.

The Court of Appeal again overturned the Board's decision as being unreasonable and ordered that the appellant be absolutely discharged. The court noted that, at its highest, the evidence of the appellant's psychiatrist was that, "if the appellant stopped taking her medication, it will result in de-compensation, which could lead to 'aggressive behaviour' or cause the appellant to 'act out aggressively'." The court noted there was a failure to measure this possible aggressive behaviour against the legal standard of a “risk of serious physical or psychological harm." In this context, the finding was speculative and did not meet the legal test.

Discussion

In both (Re) Wall and (Re) Pellett, the Board relied on a dated history of aggressive or criminal behaviour to justify the finding of "significant threat". On appeal, the Court of Appeal made clear that more is needed, namely evidence of a real risk of serious harm. Notably, in (Re) Wall, the accused continued to exhibit active and serious signs of mental illness and was both verbally abusive and threatening towards others. However, as he had not shown signs of violence since 2004 and had not caused anyone psychological harm, the court found significant threat was not established by the evidence.

In the Wall and Pellett decisions, the Court of Appeal also reinforced the principle that an accused's best interests are irrelevant to the determination of significant threat under s. 672.54 of the Criminal Code.2 For example, in Re Pellett, while the evidence disclosed a possibility that the appellant would become homeless if granted an absolute discharge, the court was unwilling to consider this factor in making its decision. The same approach was taken in (Re) Wall, despite evidence about Mr. Wall's likely deterioration.

In our view, these two cases may signal that the Court of Appeal expects the Board to apply the Winko principles more rigorously than it has before.

That said, on October 17, 2017, the Court of Appeal released another decision which discussed the (Re) Wall decision, yet still dismissed the appeal and upheld a detention order.3 In (Re) Abdikarim, the accused had been under the Board's jurisdiction since 2004 for theft and robbery, for which there were no reports of serious harm. The court distinguished (Re) Wall as it dealt with an accused who had insight into his mental disorder and the need for medication. In contrast, the accused in (Re) Abdikarim had no insight and there was clear evidence of continual substance abuse that inevitably lead to problematic conduct, including at least one instance that caused psychological harm.

These recent decisions highlight the importance of ensuring that evidence is before the Board regarding the nature of the serious physical or psychological harm that is more than likely to occur without the Board's continued jurisdiction and, in addition, how that risk of harm arises from the accused's current mental condition and circumstances. A speculative conclusion that the accused remains a significant threat, without an

evidentiary basis, will not be sufficient to support a finding of significant threat.

1 *Winko v. British Columbia (Forensic Psychiatric Institute), [1999]* 2 S.C.R. 625; see also s. 672.5401 which defines significant threat to mean "a risk of serious physical or psychological harm to members of the public... resulting from conduct that is criminal in nature but not necessarily violent."

2 *R. v. Ferguson*, 2010 ONCA 810.

3 *Abdikarim (Re)*, 2017 ONCA 793.

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