COURT OF APPEAL OF YUKON

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| Citation: | *McGinty v. Yukon (Director of Mental Wellness and Substance Use Services)*, |
|  | 2024 YKCA 15 |

Date: 20241125

Docket: 24-YU915

Between:

**Desmond Delmar McGinty**

Appellant

And

**The Director of Mental Wellness and Substance Use Services,**

**Ontario Shores Centre for Mental Health Sciences, and**

**the Attorney General of Canada**

Respondents

And

**Yukon Review Board**

Intervenor

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| Before: | The Honourable Justice Griffin  The Honourable Justice Charlesworth  The Honourable Mr. Justice Butler |

On appeal from: A disposition of the Yukon Review Board, dated  
November 17, 2023, with reasons for disposition provided on February 16, 2024.

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| Counsel for the Appellant: | G. Johannson-Koptyev  E. Arcand |
| Counsel for the Respondent, Director of  Mental Wellness and Substance Use  Services: | K. McGill  S. Bailey |
| Counsel for the Respondent, Ontario  Shores Centre for Mental Health Sciences: | J. Szabo |
| Counsel for the Respondent, Attorney  General of Canada: | A. Ferguson |
| Counsel for the Intervenor, Yukon Review Board: | S. Stikeman |
| Place and Date of Hearing: | Whitehorse, Yukon  September 9 and 10, 2024 |
| Place and Date of Judgment: | Whitehorse, Yukon  November 25, 2024 |

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| **Written Reasons by:** |
| The Honourable Mr. Justice Butler |
| **Concurred in by:** |
| The Honourable Justice Griffin  The Honourable Justice Charlesworth |

***Summary:***

*The appellant challenges a disposition order made by the Yukon Review Board detaining him in a forensic psychiatric hospital in Ontario under Part XX.1 of the Criminal Code. He argues that the Yukon Review Board erred by misapprehending the evidence relating to his risk to public safety, by failing to meaningfully incorporate Gladue principles in its analysis, and by naming the Director of Mental Wellness and Substance Use Services as a party to the proceedings. Held: Appeal dismissed. The Yukon Review Board’s risk analysis was not unreasonable. While the Board’s application of Gladue principles had shortcomings, they were not enough to render its decision unreasonable on the facts of this case. The issue of the Director of Mental Wellness and Substance Use Service’s party status was a fresh issue on appeal, and it was not in the interests of justice to hear it for the first time before this Court.*

**Reasons for Judgment of the Honourable Mr. Justice Butler:**

# Overview

1. On November 24, 2023, the Yukon Review Board (the “Board”) made a disposition order, under the provisions of Part XX.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, detaining Desmond McGinty in custody at the Ontario Shores Centre for Mental Health, a designated forensic psychiatric hospital in Whitby, Ontario (the “2023 Order”).[[1]](#footnote-1) Mr. McGinty appeals that disposition, arguing that the Board misapprehended evidence, failed to meaningfully incorporate *Gladue* principles in the proceedings, and erred in naming the Director of Mental Wellness and Substance Use Services (the “Yukon Director”) as a party to the proceedings.
2. The alleged misapprehension of evidence relates to the Board’s conclusions about Mr. McGinty’s mental condition and risk to public safety, as well as its disposition. The Board’s conclusions on these matters are afforded considerable deference on appeal. In my view, Mr. McGinty is unable to establish that the decision was unreasonable or unsupported by the evidence, nor can he demonstrate a miscarriage of justice.
3. I would conclude that the alleged failure to meaningfully incorporate *Gladue* factors has some merit. The Board’s reasons fail to indicate how it considered those factors in relation to the four criteria that must inform a disposition. Nevertheless, I am of the view that Mr. McGinty is unable to demonstrate any basis for this Court to set aside the 2023 Order.
4. The challenge to the Yukon Director’s party status raises a question of statutory interpretation that was not argued before the Board at the November 2023 disposition hearing. In light of the particular circumstances and the importance of the Yukon Director’s role in review hearings, I would not permit Mr. McGinty to raise this issue for the first time on appeal.

# Background

## Part XX.1 of the *Code*

1. The *Code* was amended in 1991 to add Part XX.1, the comprehensive scheme dealing with accused persons found to be not criminally responsible by reason of mental disorder (“NCRMD”). Under this scheme, review boards were established in each province and territory to make and review dispositions concerning individuals found to be NCRMD (“NCR accused”): *Code*, s. 672.38(1).
2. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 1999 CanLII 694, the Supreme Court found s. 672.54 of Part XX.1—which deals with review boards issuing disposition orders for NCR accused—to be *Charter* compliant. The Court noted the unique role that the provisions of Part XX.1 play in the criminal justice system, as the process review boards undertake is inquisitorial and no party is assigned a burden of proof. Instead, the legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety remains with the review board or the court: *Winko* at para. 54.
3. Section 672.54 of the *Code* sets out three possible disposition orders, as well as the relevant considerations a court or review board must undertake in making a disposition:

672.54When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, 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 necessary and appropriate in the circumstances:

(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.

1. The court or review board must make the order that is the least onerous and least restrictive to the NCR accused, while being consistent with public safety: *Gibson v. British Columbia (Adult Forensic Psychiatric Services)*, 2024 BCCA 241 at para. 9. This is always an absolute discharge unless the accused is found to pose a significant threat to the safety of the public: *Winko* at para. 47. For the purpose of s. 672.54, “a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public … resulting from conduct that is criminal in nature but not necessarily violent”: s. 672.5401.
2. Review boards are, by design, specialized tribunals. They are required to have at least one member qualified to practice psychiatry and the chairperson must have legal expertise: see ss. 672.39; 672.4.
3. The *Code* requires review boards to conduct further hearings every 12 months to review existing disposition orders, except where the board has ordered an absolute discharge: s. 672.81(1). Accordingly, an NCR accused has an ongoing right to have the terms of their disposition reconsidered at least once a year, although the board can allow extensions in some circumstances, and any party has the ability to request an earlier hearing: ss. 672.81–672.82.
4. Hearings conducted by a review board must be held in accordance with the procedure set out in s. 672.5, which includes the following provisions:

(2) The hearing may be conducted in as informal a manner as is appropriate in the circumstances.

(3) On application, the court or Review Board shall designate as a party the Attorney General of the province where the disposition is to be made and, where an accused is transferred from another province, the Attorney General of the province from which the accused is transferred.

(4) The court or Review Board may designate as a party any person who has a substantial interest in protecting the interests of the accused, if the court or Review Board is of the opinion that it is just to do so.

…

(11) Any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application, cross-examine any person who made an assessment report that was submitted to the court or Review Board in writing.

1. A party, “in relation to proceedings of a court or review board to make or review a disposition”, is defined in s. 672.1(1) to mean:

(a) the accused,

(b) the person in charge of the hospital where the accused is detained or is to attend pursuant to an assessment order or a disposition,

(c) an Attorney General designated by the court or Review Board under subsection 672.5(3),

(d) any interested person designated by the court or Review Board under subsection 672.5(4), or

(e) where the disposition is to be made by a court, the prosecutor of the charge against the accused…

1. Appeals of disposition orders are governed by ss. 672.72 to 672.78. The powers of an appellate court are set out in s. 672.78. A court of appeal may allow an appeal and set aside an order where it is unreasonable or unsupported by evidence, based on a wrong decision on a question of law, or there was a miscarriage of justice: s. 672.78(1). A court of appeal may also dismiss an appeal where it concludes that the review board based its decision on an error of law if it finds that no substantial wrong or miscarriage of justice occurred: s. 672.78(2). Where an appeal is allowed, the court may make its own disposition or placement decision, refer the matter back to the review board, or “make any other order that justice requires”: s. 672.78(3).

## Factual Background

1. Mr. McGinty was charged with uttering a death threat, breach of a probation order by possessing a weapon, and carrying a weapon for the purpose of committing an offence. These charges arose out of an incident that occurred on May 25, 2020. He was tried in the Yukon Territorial Court on February 15, 2021, and was found NCRMD: *R. v. McGinty*, 2021 YKTC 3.
2. The court referred Mr. McGinty to the Board following the NCRMD verdict, and he has remained under the jurisdiction of the Board since that referral. As required by s. 672.47, the Board held a disposition hearing over February and June of 2021. After the hearing, the Board found Mr. McGinty was a significant threat to public safety, and discharged him on conditions that required the Yukon Director to provide supervised residential accommodation for Mr. McGinty in Whitehorse.
3. The Board has held three further disposition hearings concerning Mr. McGinty since the initial disposition order. On December 14, 2021 he was, again, conditionally discharged into community care in Whitehorse. That order only remained in place for five weeks because the Board found that Mr. McGinty breached multiple conditions of the disposition order by engaging in alcohol and substance use, refusing prescribed medication, being absent from the placement facility without authorization, and engaging in threatening or abusive behaviour. At a subsequent hearing on January 20, 2022, the Board concluded that Mr. McGinty’s mental disorder could no longer be managed in a community setting and ordered that he be detained in custody in a forensic psychiatric hospital (“2022 Order”). As there are no such hospitals in the Yukon, the Board ordered that he be detained at the Ontario Shores Centre for Mental Health Sciences (“Ontario Shores”) in Whitby, Ontario.
4. The 2022 Order contained terms providing, among other things, that:

* The Yukon Director and the director of Ontario Shores “shall be parties to this proceeding”, and shall be referred to collectively as the Directors.
* The Directors, in consultation with Mr. McGinty, shall “develop, implement, and modify from time to time, as necessary, a specific plan … for Mr. McGinty’s assessment, counselling, treatment, rehabilitation, vocational training, and his eventual reintegration into society.”
* The Yukon Director may delegate to the director of Ontario Shores “such of her authority under this Disposition as the Directors deem reasonably necessary and expedient” for the management of Mr. McGinty.
* The director of Ontario Shores has the discretion to allow Mr. McGinty such privileges as deemed appropriate, including indirect or unsupervised grounds privileges, escorted or unescorted outings, placement into a supervised residential facility, or travel between the hospital and Whitehorse.
* For the purpose of the next annual review, the director of Ontario Shores shall prepare a written report “addressing the mental condition of Mr. McGinty, the degree of risk that Mr. McGinty may continue to pose to the safety of the public, and such other matters” as considered appropriate.

1. The next hearing was scheduled to take place by January 20, 2023, but was delayed by a number of procedural issues, two of which are relevant to this appeal.

### Selkirk First Nation’s Application for Party Status

1. First, Selkirk First Nation (“Selkirk”), which Mr. McGinty is a member of, applied to the Board for party standing pursuant to s. 672.5(4) of the *Code*. In its formal application dated June 27, 2023, Selkirk noted that it is a government with jurisdiction in the Yukon in relation to Mr. McGinty’s health and well-being, and argued that it had a substantial interest in protecting his interests. It submitted that the issues regarding Mr. McGinty’s reintegration and placement required the Board to examine the unique circumstances of Indigenous NCR accused and to consider *Gladue* factors.
2. The Board heard the application and issued reasons for decision on October 4, 2023. The Board noted at the outset that it welcomed the participation of Selkirk, regardless of its party status:

3. The Board wishes to make clear at the outset of these reasons that, as a matter of general policy, it welcomes and even encourages the participation and support offered by First Nations of which its [I]ndigenous clientele are members and citizens. Such participation offers an avenue by which reconciliation with [I]ndigenous communities, as recommended by the Truth and Reconciliation Commission, can be manifested. Thus, in the context of this proceeding, there is no question as to the appropriateness of Selkirk’s participation in some form. The issue to be resolved is what is the best form for that involvement to take in the current circumstances.

1. In considering the “best form” for Selkirk’s involvement, the Board considered whether the grant of party status would be just in all the circumstances. It noted that Selkirk sought to provide information to the Board regarding “Mr. McGinty’s [I]ndigenous heritage and associated social and cultural values, as well as evidence regarding his fetal alcohol spectrum disorder (FASD)”. The Board observed that:

while these proposed contributions would likely benefit the Board’s consideration of Mr. McGinty’s circumstances, they are not dependent on Selkirk having full party status, as Mr. McGinty’s counsel could elicit such evidence with Selkirk’s mere cooperation in support of his case if he considered it appropriate to do so.

The Board also observed that there was a potential for Selkirk and Mr. McGinty to find themselves in a position of conflict about evidence to be tendered or the appropriateness of a disposition. The Board was of the view that by granting Selkirk intervenor status, Selkirk could provide the contributions it wished to make to the review process while reducing the possibility for a conflict of interest between parties.

1. The Board granted Selkirk intervenor status and ordered that Selkirk was entitled to receive all disposition orders and reasons for disposition. In addition, it ordered:

Subject to any directions from this Board, Selkirk may attend all hearings in this matter and present evidence and submissions relevant to Mr. McGinty’s status as an [I]ndigenous person and a citizen of Selkirk First Nation, including information pertaining to his [I]ndigenous heritage, traditions, cultural values and perspectives, community reintegration, and such other information as may reasonably inform the Board’s consideration of the disposition criteria set out under section 672.54 of the *Criminal Code*…

### The Yukon Director’s Party Status

1. The second relevant procedural issue which arose after the 2022 Order was whether the Yukon Director should have party status at the review hearing. Initially, Mr. McGinty’s counsel raised this issue through correspondence with counsel for the other parties and with the Board. On October 10, 2023, Mr. McGinty’s counsel indicated he was content to deal with the issue through written submissions to the Board before the disposition hearing.
2. On October 24, 2023, the Board requested that Mr. McGinty’s counsel provide a formal application setting out Mr. McGinty’s objections to the Yukon Director’s party status and any legal argument in support.
3. On October 30, 2023, counsel for Mr. McGinty delivered a “Notice of Application for Clarification” to the Board, the Yukon Government, Ontario Shores, and Selkirk, which asked:

* Whether the [Board] views [the Yukon Director] and/or the Yukon Government … as a party to the upcoming [review] hearing.
* If so, the authority on which it considers [the Yukon Director/the Yukon Government] a party to that proceeding.

1. In his notice of application, Mr. McGinty asserted that the question raised was important because it involved his right to a fair hearing. He stated, “[n]otwithstanding the inquisitorial nature of review boards, the current composition of ‘parties’ in this matter includes three lawyers who represent interests that are typically averse to those of the Applicant.” He considered the application to be a matter of high priority. He sought ‘clarification’ to decide the issue, as he considered other applications—such as an application for an appeal or judicial review—would be “costly and time‑consuming”. He suggested an interim measure whereby the Yukon Director would be excluded as a party for the upcoming annual review, but could be invited to provide correspondence answering specific inquiries, so long as the answers did not relate to risk or risk management.
2. The Yukon Director delivered a response dated November 2, 2023, noting that the form of Mr. McGinty’s application, which was directed to the Board, did not require the Yukon Director’s response. Nevertheless, its response provided legal argument setting out its position. First, it noted that the Yukon Director was named as a party in the 2022 Order which, pursuant to s. 672.63 of the *Code*, remains in force until the Board makes another disposition. It also submitted that it falls within the definition of a party in s. 672.1(1) of the *Code*, or, if it did not, it ought to be granted party status on the basis that it “has a substantial interest in protecting the interests of the accused”: s. 672.5(4).
3. When the Application for Clarification and the Yukon Director’s response were delivered, the review hearing had already been set to proceed on November 17, 2023. When counsel for Mr. McGinty received the response from the Yukon Director, he indicated on November 6, 2023 that the issue should be litigated after the review hearing:

… I am still of the view that the complexity of the interpretive questions at play (and the urgency of holding the Applicant’s hearing) means that we should litigate this issue after the current review hearing.

[Emphasis added.]

1. On November 8, 2023, the Board wrote to counsel seeking confirmation from all parties that the hearing on November 17, 2023 would be devoted exclusively to a review of Mr. McGinty’s circumstances and his disposition. Counsel for Mr. McGinty questioned whether the request for confirmation was a question or a direction. However, on November 10, 2023, he stated:

As a reminder to the Board, I have not filed a substantive application of any kind. The only ‘application’ I have filed, at the request of the Board, was an inquiry into whether (and if so, why) a particular entity is a formal party to the proceedings before it.

[Emphasis added.]

1. In reply, the Board advised that the hearing would proceed on November 17, 2023, and that a brief case management conference would be held thereafter, presumably to deal with the issue of the Yukon Director’s status as a party. Counsel for Mr. McGinty indicated that he would not raise the issue of party status at the hearing. At the hearing, that issue was not raised and the Yukon Director participated as a party.

### The 2023 Disposition Hearing

1. In advance of the hearing, and in accordance with the 2022 Order, Ontario Shores delivered a “Hospital Report to the Yukon Review Board”, dated November 10, 2023 (the “OS Report”).
2. At the hearing, counsel on behalf of Mr. McGinty argued that the evidence was insufficient to support a finding that he continues to constitute a significant risk to public safety. However, as a fallback position he argued for a non-custodial community disposition. Mr. McGinty also gave direct evidence at the hearing. He attributed his past psychosis to substance use, and expressed that he no longer wished to use substances. He also stated that he wanted to go to residential treatment, if possible.
3. The Crown, the Yukon Director and Ontario Shores all took the position that the evidence—including the OS Report—supported a finding that Mr. McGinty continues to pose a significant public safety risk, and that he should be detained at a psychiatric hospital to manage that risk.
4. Counsel for Selkirk, along with members of the First Nation, also made a presentation to the Board. Chief Nelson and an elder, Lois Joe, spoke about the importance of Selkirk culture and heritage to Mr. McGinty’s spiritual and mental health. Ms. Joe gave evidence about Selkirk cultural practices, including the annual fish camp and moose harvest, as well as Mr. McGinty’s past participation in those practices. She also spoke of Mr. McGinty’s efforts to maintain contact with her, as a Selkirk elder, by phone and text.
5. When asked about housing and supportive living for Mr. McGinty, Chief Nelson stated:

[W]e don’t have any facilities or housing that would be available in Whitehorse. And again, I think we’ve said from the beginning that we do not have the programs and services that will be required for Mr. McGinty if he were to come back to Pelly Crossing.

So the reason why we’re here is to ensure that we do whatever we can to ensure that he does get the appropriate housing and programs and services that he requires. That’s our ultimate goal.

1. After the hearing, the Board ordered that Mr. McGinty be detained in custody at a designated forensic psychiatric hospital. Evidence at the hearing had raised a possibility that a bed might become available at a hospital in Alberta. That did not materialize and the 2023 Order provides for Mr. McGinty’s continued detention at Ontario Shores.
2. The Board issued written reasons for disposition on February 16, 2024 (the “Reasons”). The Reasons set out the background including the charges leading to the NCRMD verdict, Mr. McGinty’s criminal record, and his history before the Board. The Reasons summarize the nature of Mr. McGinty’s mental disorder as follows:

4. The nature of Mr. McGinty’s mental disorder is complex and multi‑faceted, comprising [of] a major mental disorder on the Schizophrenia Spectrum, coupled with antisocial traits, Polysubstance Use Disorder, and Fetal Alcohol Spectrum Disorder (FASO). These specific diagnoses complicate his underlying historical factors and conditions, including developmental trauma and neglect, conduct disorder, and multiple head injuries. Unfortunately, this complex of multiple factors contributes significantly to Mr. McGinty’s lack of insight into the nature of his mental disorder and leaves him vulnerable to impulsive behaviour.

1. The Board observed that, although the evidence was cumulative since Mr. McGinty first came before the Board, it placed greater weight on the most current evidence: the OS Report. That report contains what the Board described as a “comprehensive analysis of Mr. McGinty’s risk profile” based on the HCR-20 risk assessment: Reasons at para. 10. The HCR-20 risk assessment is an empirically and clinically derived checklist developed to structure the clinical assessment of violence risk and to guide treatment. It is based on three information fields: historical; clinical; and risk management.
2. The Board’s reasons are not detailed and can fairly be described as somewhat conclusory. Most of the Reasons summarize the OS Report’s findings, as well as Ontario Shores’ submissions on risk. Specifically, the Board observed that Ontario Shores recommends “that Mr. McGinty remain under a custodial disposition, as he has not yet undergone the important therapeutic steps he needs to accomplish in order manage the various facets of his mental disorder and thereby reduce his public safety risk”: Reasons at para. 16. The Board noted that while Ontario Shores acknowledged that “Mr. McGinty’s removal from his family, his home community, his [I]ndigenous culture, and the Yukon may be a source of ongoing stress for him”, Ontario Shores also warned against premature return until Mr. McGinty achieves greater therapeutic progress, and until there are sufficient risk management supports in place in the Yukon: Reasons at para. 17. The Board also highlighted Ontario Shores’ concern that if Mr. McGinty were returned prematurely “he would likely experience mental destabilization resulting from a possible combination of intoxicating substance use, noncompliance with prescribed medication, psychosocial stressors, and adverse social influences”: Reasons at para. 18.
3. On the question of risk assessment, the Board concluded:

19. The Board finds the Ontario Shores risk assessment analysis to be reasonable and well-founded. While Mr. McGinty has made some progress in the hospital’s therapeutic environment since he has been there, he still has some additional ground to cover before he will be ready to start transitioning into increased liberties and opportunities to spend time in the community. Apart from the credit that the Ontario Shores treatment team has accorded Mr. McGinty, there is no substantial evidence before the Board to rebut that provided by the hospital. Thus, the Board finds that there is ample evidence to support a conclusion that Mr. McGinty’s mental disorder causes him to present a significant risk to public safety. The evidence of risk is not speculative; it is real, present, and rooted in Mr. McGinty’s past history of violence. Accordingly, the Board finds that Mr. McGinty’s current level of significant risk to public safety warrants him remaining under the Board’s jurisdiction.

1. Turning to disposition, the Board ordered that Mr. McGinty remain in custody at Ontario Shores under conditions substantially the same as those in the 2022 Order. It stated:

22. … Ontario Shores will remain a party to this proceeding, as will the Yukon Director by virtue of the need to collaborate with Ontario Shores in respect of eventually transitioning Mr. McGinty back into community living in the Yukon when his mental condition subsides to the point where his public safety risk can be reasonably managed.

1. The terms of the 2023 Order also included:

3. The Plan shall also address Mr. McGinty’s individual needs and liberty interests in a manner proportional to the degree of the actual public risk associated with his mental disorder from time to time. The Plan shall also contain provisions aimed at fostering and maintaining Mr. McGinty’s [I]ndigenous cultural identity, including his relationships and communications with his family and with the Intervener Selkirk First Nation.

…

9. The term of this disposition shall be for a period of one year. Mid-way through the disposition term, the Board will convene a case management conference before the Board Chair or a delegated member, the purpose of which will be to allow Mr. McGinty to provide an update on his progress while in the hospital and to consider further disposition planning.

# Issues on Appeal

1. Mr. McGinty raises three grounds of appeal. He argues that the Board erred:
   1. by misapprehending material evidence regarding Mr. McGinty’s insight into his illness and the inadequacy of the Ontario Shores risk assessment;
   2. by failing to meaningfully incorporate *Gladue* principles in the proceedings; and
   3. by naming the Yukon Director as a party to the proceedings.
2. As I have indicated, I would conclude that this Court should not consider the third ground for the first time on appeal. Accordingly, in my analysis below, I do not consider the substance of that ground of appeal.

# Standard of Review

1. The standard of review for appeals of review board dispositions is established by s. 672.78(1) of the *Code*:

(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(a) it is unreasonable or cannot be supported by the evidence;

(b) it is based on a wrong decision on a question of law; or

(c) there was a miscarriage of justice.

1. In *Nelson v. British Columbia (Adult Forensic Psychiatric Services)*, 2017 BCCA 40, Justice Dickson explained how the standard is to be applied:

[23] The standard of review on appeal from a decision of the Review Board is reasonableness. Mr. Justice Harris described the applicable standard in *Calles v. British Columbia (Adult Forensic Psychiatric Services)*, 2016 BCCA 318:

[14] The standard of review for this appeal is reasonableness: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 at para. 33. Courts recognize that the assessment of whether the mental condition of an NCR accused renders him a significant threat to public safety “calls for significant expertise”: *Owen*, at para. 30. As stated in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 61, “[a]ppellate 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”.

[24] This Court does not make its own judgment on the significant threat issue when evaluating whether a Review Board decision under review was reasonable. Rather, it considers the Board’s reasoning and substantive decision to determine whether an acceptable and defensible outcome was reached: *Carrick (Re)*, 2015 ONCA 866 at paras. 24–26.

1. In *Sim (Re)*, 2020 ONCA 563 [*Sim 2020*], which was decided after *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Ontario Court of Appeal explained the reasonableness standard in similar terms:

[68] The application of the reasonableness test in s. 672.78(1)(a) requires careful attention to the evidence before the Board and its reasoning process as expressed in its reasons. It demands “respectful attention” to the decision-maker’s decision, the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within the range of possible outcomes: *Vavilov*, at paras. 84, 86. The Board’s reasons must be able to withstand a “somewhat probing examination” to determine whether the decision is justifiable, transparent, and intelligible: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 33. Deference is owed if the decision is internally coherent, demonstrates a rational chain of analysis and is justified in relation to the facts and the law: *Vavilov*, at para. 85.

1. The first ground of appeal—alleged misapprehension of evidence in the assessment of whether Mr. McGinty is a significant threat to public safety—goes to whether the decision was unreasonable or not supported by the evidence. It is to be reviewed on a standard of reasonableness under s. 672.78(1)(a) of the *Code*.
2. With respect to the second ground of appeal, Mr. McGinty submits that the board erred in failing to incorporate *Gladue* principles in its disposition and suggests that its failure to do so amounts to an error of law reviewable on a standard of correctness. I would reject that submission. It is clear that the Board recognized the applicability of *Gladue* principles to its task. Mr. McGinty’s argument is not that the Board entirely failed to consider *Gladue* principles, but rather that it failed to “meaningfully incorporate” those principles in its assessment of his risk to public safety and in its placement decision. This raises a question of the application of a legal principle to the evidence before the Board. Under s. 672.78(1)(a), this is to be reviewed on a standard of reasonableness.

# Analysis

## Issue 1: Misapprehension of Evidence

1. The first issue is whether the Board misapprehended material evidence regarding Mr. McGinty’s insight into his illness or the inadequacy of the Ontario Shores risk assessment.

### Parties’ Positions

1. Mr. McGinty highlights two misapprehensions of evidence. Regarding the question of his insight, Mr. McGinty submits that the Board wrongfully focused on his rejection of the diagnosis of schizophrenia, despite the fact there was evidence indicating a diagnosis of schizophrenia might be premature. He argues that the Board did not take account of evidence Mr. McGinty acknowledged the risk associated with his substance use disorder, including evidence regarding his compliance in taking anti-psychotic medication.
2. The second alleged misapprehension is that the Board failed to appreciate that the HCR-20 risk assessment was incomplete. Mr. McGinty notes that the Board found the HCR-20 to be comprehensive, but argues that statement is contradicted by the author of the OS Report, who states: “it is difficult to specifically evaluate the applicable risk management factors per the HCR-20 … given the assessor’s limited knowledge of resources and their availability in the Yukon.” Mr. McGinty argues that the Board’s conclusion on risk management—that he had not yet undergone important therapeutic steps needed to manage the various facets of his mental disorder—cannot be accepted because of that misapprehension.
3. In his written submissions, Mr. McGinty argued that the disposition should be set aside because the alleged misapprehensions concerned material parts of the evidence that played an essential part in the Board’s reasoning process. He referred to *R. v. Lohrer*, 2004 SCC 80, at para. 1, which cited with approval the following statements from *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.):

Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a “true” verdict.

…

If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

1. On the other hand, the respondents—the Yukon Director, Ontario Shores, and the Attorney General of Canada—say Mr. McGinty is unable to show that the Board’s conclusion on risk management or the terms of the disposition are unreasonable. They stress the deferential standard of review applicable on appeals of review board decisions. In particular, the Attorney General and Ontario Shores argue that the Board’s concerns about insight went beyond Mr. McGinty’s schizophrenia diagnosis, and note that the Board’s reliance on the HCR-20 risk assessment was supported by other evidence.

### Analysis

1. For the reasons that follow, I am of the view that the Board did not misapprehend evidence relating to Mr. McGinty’s insight or the HCR-20 risk assessment.
2. First, the *Lohrer* approach to misapprehension of evidence Mr. McGinty relies on does not assist on this appeal. As the Court emphasized, the *Lohrer* standard, which is concerned with conviction appeals, is stringent. While s. 672.78(1)(c) provides that a disposition may be set aside where a miscarriage of justice is found to have occurred, the standard of review of the Board’s decision in this case is reasonableness under s. 672.78(1)(a). As explained in *Sim 2020*, application of that standard requires “careful attention to the evidence”, as well as “respectful attention” to the decision and to “the justification, transparency and intelligibility of the decision-making process”: at para. 68.
3. In *Winko*, at para. 61, the Supreme Court described the broad range of the inquiries that must be undertaken by a review board that include “perhaps most importantly, the recommendations provided by experts who have examined the NCR accused”, and provided a caution to appellate courts:

[61] … 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.

1. Applying the appropriate standard of review here means that the Board’s reasons for disposition must be read in context, in light of the scheme of Part XX.1 of the *Code*, recognizing the informal nature of the proceedings and the extensive body of evidence before the Board, as well as the fact that Mr. McGinty had been under its jurisdiction for two and a half years when the 2023 Order was made.
2. Mr. McGinty’s arguments about misapprehension are, on their face, simplistic and ignore the volume and complexity of the evidence before the Board. Perhaps recognizing this, at the hearing of the appeal, Mr. McGinty argued that the Board committed errors in its apprehension of evidence similar to those identified by the Ontario Court of Appeal in *Sim 2020* and *Sim (Re)*, 2019 ONCA 719 [*Sim 2019*]. As I will explain, I would not accept that argument.
3. The circumstances leading to the decision in *Sim* are not comparable to Mr. McGinty’s situation. Mr. Sim had been subject to the disposition of the Ontario review board for 20 years. The offences which resulted in Mr. Sim coming before the review board occurred in 2000 and 2007. In *Sim 2020*, the Court described Mr. Sim’s situation as follows:

[12] Over the past ten years, except for one three or four-day AWOL incident in 2012, his condition has been stable, and he has not presented any significant behavioural or management problems. There have been no reports that he has been physically aggressive or physically threatening to any person. He is described as well-liked by the staff and other members of the community. He has been consistently compliant with his prescribed medications, notably Clozapine and Risperidone, and has been cooperative with his treatment team. He has been largely abstinent from the consumption of illicit drugs, other than cannabis …

1. Mr. Sim had progressed up the “hospital privileges ladder” ultimately living in a one-bedroom apartment under a conditional discharge. No concerns had been expressed about his behaviour, other than his occasional use of cannabis against the advice of his psychiatrist. He also had regular employment for nearly a decade. Following a hearing in 2018, the review board concluded Mr. Sim continued to pose a significant threat to the public safety. Instead of an absolute discharge, it ordered a continued conditional discharge that included a condition that he abstain absolutely from the non-medical use of drugs and alcohol.
2. Mr. Sim appealed and the Ontario Court of Appeal concluded that the disposition was unreasonable and sent the matter back for a new hearing before a differently constituted panel: *Sim 2019* at para. 33. In making that order, the Court found that the board had lost sight of the key issue: whether the evidence as a whole demonstrated that Mr. Sim posed a substantial risk of harm to members of the public, focusing instead on an absence of insight about his drug use. The Court also found that the board’s evidentiary analysis was inadequate and uneven.
3. After the ordered rehearing, the board again determined that Mr. Sim remained a significant threat to public safety. On appeal, the Court found that the board had made the same errors as before: it lost sight of the main issue and failed to properly consider evidence that did not support the board’s conclusion. Its decision was unreasonable and its analysis did not meet the *Vavilov* standard of justification, transparency and intelligibility. From paras. 70 to 99, the Court highlighted the shortcomings of the board’s analysis: *Sim 2020*.
4. In my view, there is no merit to the suggestion that the Board misapprehended or failed to consider relevant evidence, or that it made errors similar to those identified in *Sim 2019* and *Sim 2020*. Mr. McGinty’s argument asks this Court to scrutinize the Board’s treatment of two pieces of evidence without considering the whole of the evidence in context. I would agree with the Board’s observation that the risk assessment in the OS Report is reasonable and well‑founded. I would also conclude that the Board’s analysis on Mr. McGinty’s risk as a whole was reasonable.
5. With regard to Mr. McGinty’s level of insight, there was cogent evidence that the Board could accept in finding that impaired insight was a significant factor in assessing risk: Reasons at para. 14. Unlike in *Sim 2019* and *Sim 2020*, there is nothing in the Reasons that suggests the Board focused on Mr. McGinty’s lack of insight while losing sight of the principal issue: assessment of his level of risk to public safety.
6. Further, there is no merit to Mr. McGinty’s suggestion that a schizophrenia diagnosis was premature, and therefore the Board’s focus on his failure to accept that diagnosis rendered its conclusion on his risk unreasonable. In the OS Report, written in November 2023, Dr. Harrigan set out Mr. McGinty’s current diagnoses, including schizophrenia. When she testified in front of the Board, Dr. Harrigan stated she was confident with that diagnosis having reviewed his assessments over the previous year. She noted that Mr. McGinty’s current psychiatrist also made the same diagnosis.
7. The OS Report also lists nine areas of clinical concern, including that “[Mr. McGinty’s] insight into past symptoms of his illness, the effects of substance use on his mental status and risk for violence, as well as the need for ongoing treatment with medication remains underdeveloped.” Dr. Healy, the manager of the Forensic Complex Care Team for the Yukon Director, also gave evidence that:

whether we understand Mr. McGinty’s risk through the lens of his complicated mental health diagnosis or substance use, the risk is still substance use. … I appreciate the differential diagnosis and the difference in clinical formulation, but the inherent risk is in the use of substances and not having the insight to not use. So regardless of what lens we adopt, the risk is there.

In short, whether the primary diagnosis is schizophrenia or substance use disorder, there was ample evidence the Board could rely on about Mr. McGinty’s continued risk to the public.

1. Mr. McGinty also submits that the Board failed to consider his testimony on this issue. Having reviewed that evidence, I would agree with the Board’s assessment that there was no “substantial evidence before the Board to rebut that provided by the hospital”: Reasons at para. 19. When the evidence is considered as a whole, there is no merit to the suggestion that the Board somehow failed to properly take Mr. McGinty’s insight, or lack thereof, into account in arriving at its disposition. The risk assessment reflected consideration of the identified areas of concern as well as the evidence that supported a less restrictive disposition.
2. In my view, there is also little merit to Mr. McGinty’s argument that the Board misapprehended evidence about risk assessment because it failed to appreciate that the HCR-20 assessment was incomplete. His argument is based on a single statement in the OS Report taken in isolation.
3. The impugned statement was an appropriate acknowledgment by Dr. Harrigan that Mr. McGinty’s assessors in Ontario had limited knowledge of resources in the Yukon. The statement was made in the section of the report that considered a possible conditional discharge under two scenarios for Mr. McGinty: remaining under the purview of Ontario Shores; or returning to the Yukon. The author was of the view that such a disposition was premature *under either scenario*. Mr. McGinty had “yet to utilize privileges without accompaniment or shadowing”, and if he was conditionally discharged in Ontario, “there was clear evidence of future problems”. Similarly, if he was conditionally discharged in the Yukon:

there was clear evidence of future problems with: *Professional Services and Plans, Living Situation, Personal Support, Treatment and* *Supervision Response* and *Stress and Coping.* These all appear risk-relevant. The caveat to this section is that it is difficult to specifically evaluate the applicable risk management factors per the HCR-2ov (i.e., with respect to monitoring, supervision, interventions, victim safety planning) given the assessors limited knowledge of resources and their availability in the Yukon. As such, the following risk factors were reviewed more broadly. As an aside, the reader is directed to a comprehensive risk assessment completed by Dr. L. Grasswick (March 2021) - whom presumptively had a higher degree of familiarity with the Yukon - which remains relevant to Mr. McGinty's level of risk there.

1. Mr. McGinty’s focus on the “caveat” contained in the quote above is unwarranted. It is evident that the assessors were of the view that the risk level was such that “a detention order would be most prudent as he transitions into the community” under either scenario. As noted, the author of the OS Report had before her an earlier risk assessment that considered resources available in the Yukon. More significantly, the Board heard evidence from the Selkirk First Nation about the lack of appropriate housing, resources and services in Pelly Crossing. In addition, the Board heard submissions of the Yukon Director concerning the available resources in Whitehorse. The Board itself also has particular expertise in this area.
2. In these circumstances, I see no basis on which to conclude that the Board misapprehended the evidence on risk management or that the disposition was unreasonable.

## Issue 2: Incorporation of *Gladue* Principles

1. The second issue is whether the Board failed to meaningfully incorporate *Gladue* principles in the proceedings.

### Parties’ Positions

1. Mr. McGinty argues that the Board erred by failing to meaningfully incorporate *Gladue* principles in its assessment of his risk to public safety and in its placement disposition. In making this argument, Mr. McGinty stresses that his circumstances called out for a careful analysis of the systemic and historical factors relevant to Mr. McGinty as an Indigenous NCRMD accused.
2. In support of his argument, Mr. McGinty points to the failure of the Board in its Reasons to mention his Indigenous status or to discuss how the *Gladue* factors informed the disposition. He submits that the Board’s failure to grant party status to the Selkirk First Nation lends additional support to his position.
3. All of the respondents take the position that the Board appropriately considered *Gladue* principles application to the disposition order. They point to conversations between the Board and Selkirk during the hearing, as well as the wording in the 2023 Order which requires the parties to develop a plan to connect Mr. McGinty with this “[I]ndigenous cultural identity”, as evidence that the Board was alive to the importance of Mr. McGinty’s Indigeneity.

### The Law

1. There is no doubt that the Board was required to consider *Gladue* principles in determining an appropriate disposition for Mr. McGinty. Following the release of *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679, the Ontario Court of Appeal released the decision *R. v. Sim* (2005), 78 O.R. (3d) 183, 2005 CanLII 37586 at para. 16 (C.A.) [*Sim 2005*]. In *Sim 2005*, the Court observed that there was no reason to disregard *Gladue* principles when assessing the treatment of NCR accused under Part XX.1 of the *Code*. The Court noted that the Indigeneity of an NCR accused would ordinarily have little direct bearing on the dangerousness and the mental condition of the accused, the first two criteria to be considered when making a disposition under s. 672.54: at para. 18. However, the third and fourth criteria, “proper consideration of appropriate placement of the accused, reintegration into society and the other needs of the accused” will call for consideration of the unique circumstances and background of an Indigenous accused: at para. 19. After *Sim 2005*, review boards and courts generally followed the approach of only considering *Gladue* principles in relation to the last two criteria under s. 672.54. In my view, the Board followed that approach in this case.
2. There has, however, been criticism of that approach in academic publications. For instance, Kyle McCleery criticizes this approach as meaningless because it “precludes the possibility of a different outcome” and “fails to engage with the principles at the heart of *Gladue*, namely recognizing and understanding the impact of colonialism and its contribution to over-incarceration”: “Resort to the Easy Answer: *Gladue* and the Treatment of Indigenous NCRMD Accused by the British Columbia Review Board” (2021) 54:1 U.B.C. L. Rev. 151 at 189. Michael Michel also criticizes a limited application of *Gladue* factors, and argues that *Gladue* factors should be taken into account when analyzing an Indigenous NCRMD accused’s dangerousness, because “community characteristics, the relationship of the accused to their community, and the relationship of the accused to members of that community are all relevant factors when assessing the dangerousness of the accused”: “The Application of *Gladue* Principles During NCRMD and Fitness Disposition Hearings” (2022) 44:5 Man. L.J. 138 at 160. Michel also notes that expert recommendations and actuarial tests—which review boards often rely heavily on in crafting disposition orders—may not recognize and account for the impact of *Gladue* factors, which may result in overestimating the risk of Indigenous NCRMD accused: at 167.
3. Recently, in *Mitchell (Re)*, 2023 ONCA 229, the Court described an expanded application of *Gladue* principles that would require adjudicators to pay particular attention to how the unique circumstances of Indigenous people detained in psychiatric facilities impact all four of the statutory criteria. I would endorse and adopt the same approach:

[21] As in sentencing, taking into consideration *Gladue* principles does not mandate a different result or favoured treatment for Indigenous people. What is required is a “different method of analysis”, which guards against the discrimination that “as experience demonstrates, will occur where decision-makers fail to advert to the specific and particular problems faced by [Indigenous] Canadians in our system of justice”: *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 59; *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, at para. 63; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 58-59.

[22] In the context of the Board's process, this different method of analysis requires adjudicators to pay particular attention to the unique circumstances of Indigenous people detained in psychiatric facilities, and how those circumstances affect the four statutory criteria to be considered by the Board under the *Criminal Code*, R.S.C., 1985, c. C-46.

[23] Pursuant to s. 672.54 the Board is to consider the following four criteria when making a disposition: i) the need to protect the public from dangerous persons, ii) the mental condition of the accused, iii) the reintegration of the accused into society, and iv) the other needs of the accused. In *Sim (Re)* (2005), 78 O.R. (3d) 183, at para. 16, this court confirmed that *Gladue* principles apply to proceedings before the ORB, though the court raised some question with respect to the application of *Gladue* principles to the first and second criteria (i.e., public protection and mental condition of accused). In *Faichney (Re)*, 2022 ONCA 300, at para. 24, Paciocco J.A. clarified that *Sim*, when read in context, did not suggest that *Gladue* principles are irrelevant to the first and second statutory criteria. Rather, while *Gladue* principles may “more commonly inform statutory factors three and four” (reintegration into society and other needs of the accused), they may be relevant to all four factors and the Board should rely on as full a record as possible.

### Analysis

1. As a factual matter, Mr. McGinty’s *Gladue* factors were clearly relevant here. He is a member of the Selkirk First Nation. His mother engaged in excessive use of alcohol during the latter part of her pregnancy due to stress in her marital relationship. Mr. McGinty has been diagnosed with FASD. As a child he suffered neglect and was exposed to family violence. He was apprehended at the age of eight and placed in foster care for three years. He is reported to have had both learning and behavioural problems at school and is reported to have left school around Grade 9. While the record before this Court is unfortunately scant on how the difficulties Mr. McGinty has faced were caused or exacerbated by colonialism and systemic discrimination against Indigenous Peoples, judges may “take judicial notice of the broad systemic and background factors affecting [Indigenous] people”: *Gladue*at para. 93. In addition, it is clear that as a result of the 2023 Order, Mr. McGinty remains in custody in Ontario, thousands of kilometers from his home, in a facility that does not offer programming tailored for Indigenous people from the Yukon. As Mr. McGinty stated in his written submissions, in these circumstances, his “*Gladue* factors are legion”.
2. In my view, the Reasons, considered in the context of the full record, show that the Board did take into account Mr. McGinty’s *Gladue* factors when considering the third and fourth statutory criteria under s. 672.54 of the *Code*: the re-integration of the accused into society and the other needs of the accused.
3. Contrary to Mr. McGinty’s submission, I would conclude that the pre-hearing order granting intervenor status to Selkirk supported, rather than undermined, the Board’s application of *Gladue* principles. The Board denied party status to Selkirk because it was sensitive to the possibility of a conflict in their and Mr. McGinty’s positions. Indeed, this possibility materialized as Selkirk took the position that it could not support either the conditional or unconditional release of Mr. McGinty into its community, the dispositions that he sought.
4. In contrast, the order granting Selkirk intervenor status avoided the possibility of such a conflict between parties, while also providing Selkirk the opportunity to:

… present evidence and submissions relevant to Mr. McGinty’s status as an [I]ndigenous person and a citizen of Selkirk First Nation, including information pertaining to his [I]ndigenous heritage, traditions, cultural values and perspectives, community reintegration, and such other information as may reasonably inform the Board’s consideration of the disposition criteria set out under section 672.54 of the *Criminal Code*.

1. In addition, the discussions between Board members and the Selkirk and other witnesses in the course of the hearing indicates that the concern over how to reintegrate Mr. McGinty into his community was a critical consideration for the Board. The 2023 Order also provided that the Director of Ontario Shores and the Yukon Director would develop a specific plan, in consultation with Mr. McGinty, which would “contain provisions aimed at fostering and maintaining Mr. McGinty’s [I]ndigenous cultural identity, including his relationships and communications with his family and with the Intervener Selkirk First Nation.”
2. Despite this, in my opinion, there is still some merit to Mr. McGinty’s submission that the Board did not meaningfully incorporate *Gladue* principles in its analysis. While I would not conclude that the Board entirely failed to apply *Gladue* principles, it is not possible to discern from the Reasons how the Board applied those principles to the first two criteria: Mr. McGinty’s dangerousness; and his mental condition. Further, even though I conclude that the Board did consider Mr. McGinty’s Indigeneity and *Gladue* principles in relation to the third and fourth criteria, I can only do so by examining the proceedings in context. The Board did not explain how it applied those principles in making the 2023 Order. In my view, both shortcomings are unfortunate, as I accept Mr. McGinty’s submission that his personal circumstances called out for some analysis of the systemic and historical factors in relation to all four criteria. As he has argued, the disposition has left him dislocated far from his home and isolated from his family and First Nations culture.
3. In my view, the Board ought to have considered the *Gladue* factors in relation to all four criteria, and indicated in the Reasons how this consideration informed their disposition. However, the ultimate question on this ground of appeal is whether this inadequacy means the 2023 Order should be set aside because it is unreasonable. With some hesitation, I would not arrive at that conclusion. Mr. McGinty made no submissions as to how the application of *Gladue* factors would have resulted in a different disposition. In particular, he made no submissions as to how the application of *Gladue* factors could have led to a different conclusion on risk assessment. I have concluded that the risk assessment was not unreasonable and the Board fully explained how its conclusion on risk drove the disposition.
4. In addition, the lack of resources in the Yukon—including the lack of any forensic psychiatric hospitals—meant the alternative dispositions available to the Board were severely constrained.
5. Applying the test as articulated in *Sim 2020* and paying close attention to the evidence before the Board and its reasoning process, I am satisfied that the 2023 Order was reasonable.
6. Nevertheless, when Mr. McGinty is before the Board on his next review subsequent to receipt of these Reasons, I would expect the Board to provide a clear articulation of its decision-making process with reference to *Gladue* factors in relation to all four criteria.

## Issue 3: The Yukon Director’s Party Status

1. The third issue is whether this Court should consider whether the Board erred in naming the Yukon Director as a party to the proceedings.

### Parties’ Positions

1. Mr. McGinty submits that the Yukon Director does not fall within the definition of party in relation to review board proceedings as set out in s. 672.1(1) of the *Code*. He argues that the presence of the Yukon Director as a party created unfairness because Mr. McGinty had to face three parties at the review board hearing with interests contrary to his own.
2. The respondents take the position that the Board did not err in making the Yukon Director a party to the proceedings or in maintaining its party status once Mr. McGinty was transferred to Ontario. The Yukon Director also objects to Mr. McGinty raising this issue on appeal. It notes that the question was not argued before the Board, and says it is an important issue for review board proceedings in the Yukon that should not be considered on appeal without the benefit of the Board’s consideration and determination. The Yukon Director also argues that it would have presented evidence on its alternate position—that it should be a party pursuant to s. 672.5(4), and subsection (e) of the party definition in s. 672.1—had the issue been argued before the Board.
3. In response to the Yukon Director’s position that this issue should not be considered for the first time on appeal, Mr. McGinty submits that this Court should, in these circumstances, consider the issue even though it was not argued before the Board. First, he notes that he did raise the question in his Application for Clarification and says that he never abandoned that position. Second, he submits that the issue concerns statutory interpretation and raises a question of law that this Court is well placed to consider, especially having had the benefit of fulsome argument. The Yukon Director is present and has made submissions on the statutory interpretation question, and the Board was granted intervenor status and has offered its views on its policies and practices in naming parties.

### The Law

1. Generally, this Court does not hear “submissions that were not advanced in the proceeding giving rise to the order appealed”: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 44. This restrained approach “also applies to legal questions that have not been the subject of a reasoned decision”: *Gorenshtein* at para. 46.
2. The rationale for taking a restrained approach to the consideration of new issues on appeal is clear. Not being a court of first instance, this Court’s appellate function may be compromised where the evidentiary record is insufficient to permit proper legal analysis. Permitting an issue to be raised for the first time on appeal may also cause prejudice to other parties, and could undermine the goal of finality in litigation. Finally, the appellate reviewing function is enhanced when the Court has the benefit of considered reasons from the lower court or tribunal: *R. v. Gill*, 2018 BCCA 144 at para. 9.
3. Exceptions may be made if the issue “is a pure legal argument on uncontroverted factual findings or it is clear that, had the question been raised at the proper time, no further light could have been shed upon it”: *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 at para. 36, leave to appeal to SCC ref’d 38325 (28 March 2019).
4. Leave is required for a party to raise a new issue on appeal: *Bartch v. Bartch*,2018 BCCA 271 at para. 30. In determining whether to grant leave, the Court of Appeal for British Columbia has articulated three guiding considerations: (1) whether the issue is truly “new”; (2) whether the evidentiary record is sufficient; and (3) considering the potential prejudice to the opposing parties, whether the interests of justice support granting an exception to the general rule: *Gorenshtein* at para. 45, citing *Quan v. Cusson*, 2009 SCC 62.
5. The onus is on the party seeking to raise the new issue on appeal to “demonstrate that the record in the court below is as complete as if it had been raised at trial and the other party will not be prejudiced”: *Zeligs v. Janes*,2016 BCCA 280 at para. 66.

### Analysis

1. Applying these principles to the circumstances before this Court, it is clear that the question that Mr. McGinty wants to raise was not considered by the Board at the November 2023 review hearing. As I have indicated above, the question of whether the Yukon Director should be a party to the review hearing in November 2023 was raised by Mr. McGinty well in advance of the hearing. However, when his counsel was asked to make a formal application to the Board, he chose not to do so. Instead, he sought “clarification” of the status of the Yukon Director. Unfortunately, this created some confusion about the possible application. Ultimately, counsel for Mr. McGinty confirmed that he had “not filed a substantive application of any kind”, but only inquired as to whether the Yukon Director held formal party status. He also indicated that the status issue should be litigated *after* the review hearing. Accordingly, the parties did not present evidence or argument on the issue, and the Board did not consider whether, or on what basis, the Yukon Director should continue to hold party status to the proceeding.
2. The arguments around the Yukon Director’s party standing are also “legally and factually distinct” from the other arguments advanced before the Board at the November 2023 disposition hearing, which revolved around assessing Mr. McGinty’s public safety risk: *Quan* at para. 39.
3. I do not accept Mr. McGinty’s contention that the evidentiary record is as complete as it would have been if the issue was raised before the Board, nor that there would be no prejudice to other parties, in particular the Yukon Director.
4. It is true that the Yukon Director’s party status raises a question of law involving interpretation of *Code* provisions. In addition, this Court does have the benefit of submissions from Mr. McGinty, the Yukon Director, the Attorney General, and the Board on the issue of party status. These considerations favour the issue being heard for the first time on appeal.
5. However, it is also clear that the question of the Yukon Director’s party status is important for review board proceedings in the Yukon. As the territory does not have a psychiatric hospital, when a disposition order is made detaining an NCR accused in a forensic psychiatric hospital, that individual has to be placed in the custody of a hospital outside of the Yukon. Accordingly, the issue that has arisen in this case—whether the Yukon Director can remain a party when a hospital in another jurisdiction has been added as a party—is likely to arise with some frequency. As the Yukon Director notes in argument:

It is long-standing that the Yukon Director is a party at all Board hearings in Yukon. If that practice is to be challenged, the Board should determine the issue in the first instance.

1. I accept the Yukon Director’s submission that it would have presented further submissions and additional evidence if the question had been raised at the November 2023 disposition hearing. The prejudice to the Yukon Director involves not only the lost opportunity to make full submissions to the Board, but also goes to the sufficiency of the record.
2. This is not one of the exceptional cases where this Court should decide a legal question that has “not been the subject of a reasoned decision”: *Gorenshtein* at para. 46. As the Court held in *R. v. Trieu,* 2010 BCCA 540, at para. 56,“appellate courts should not be forced to sit as courts of first instance by entertaining arguments that could have been made at trial, but for reasons of professional judgment, efficiency or tactics were not pursued”.
3. Mr. McGinty chose not to pursue the issue of the Yukon Director’s party standing before the Board at the November disposition hearing—an issue which has the potential to deeply impact the Board. As the Board states in its written submissions as intervenor on this appeal:

…the Board relies on the Yukon Director to determine if they have the capacity and resources to manage the accused’s needs appropriately and safely within the community. Without the Yukon Director as a party, the Board risks lacking crucial information needed to make informed, balanced decisions on the options available for the least onerous and least restrictive disposition for the accused.

1. In summary, I consider that it would not be in the interests of justice for this Court to now entertain this issue on appeal for the first time without having the benefit of a reasoned decision from the Board on this issue.

# Disposition

1. I would dismiss Mr. McGinty’s first two grounds of appeal, and decline to set aside the 2023 Order on any basis.
2. I would decline to consider the third ground of appeal concerning whether the Board erred in naming the Yukon Director as a party to the proceedings.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Justice Charlesworth”

1. The original disposition order was actually issued on November 23, 2023, but it did not specify which forensic psychiatric hospital Mr. McGinty would be detained at. The specific hospital was included in the 2023 Order, issued the next day. [↑](#footnote-ref-1)