

# BC Review Board Proceedings

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AN OVERVIEW

NOVEMBER 8, 2022

# Outline

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Today we will look at:

1. The Forensic System – why it is separate from the Criminal Justice System
2. The BC Review Board and its Role/Mandate
3. What the Review Board reviews:
  - a) Fitness to Stand Trial (Fit or Unfit)
  - b) Not Criminally Responsible by Reason of Mental Disorder (NCRMD)

# The Mental Disordered Accused and the Criminal Law

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A Brief History:

Historically – Defence of Insanity

Roots in English Law and *mens rea* - based on the concept that to be guilty, the accused has to have voluntarily committed the crime....ie/ acted with a “guilty mind”

Mental illness can negate the “guilty mind”

# Part XX.1 of the *Criminal Code*

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Part XX.1 recognizes that people living with mental disorders may enter the criminal justice system.

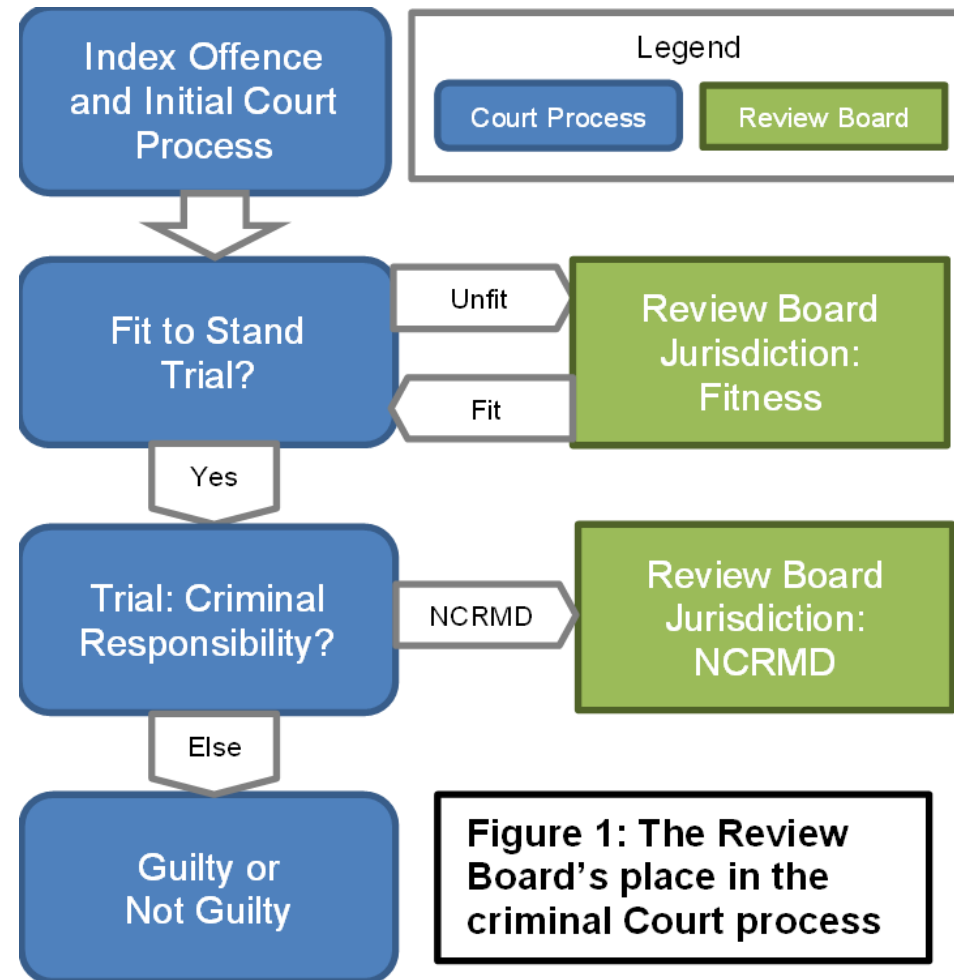
It provides an alternate route that recognizes the role that mental disorders play in the commission of offences or in the fairness of the court process.

Each province has a Review Board to oversee cases under these provisions, and a forensic service to provide treatment and supervision.

# How cases come to the BC Review Board

The BC Review Board has jurisdiction over cases in this parallel stream.

The Accused is not convicted.



# Two Verdicts

**Unfit to Stand Trial**  
("Unfit")

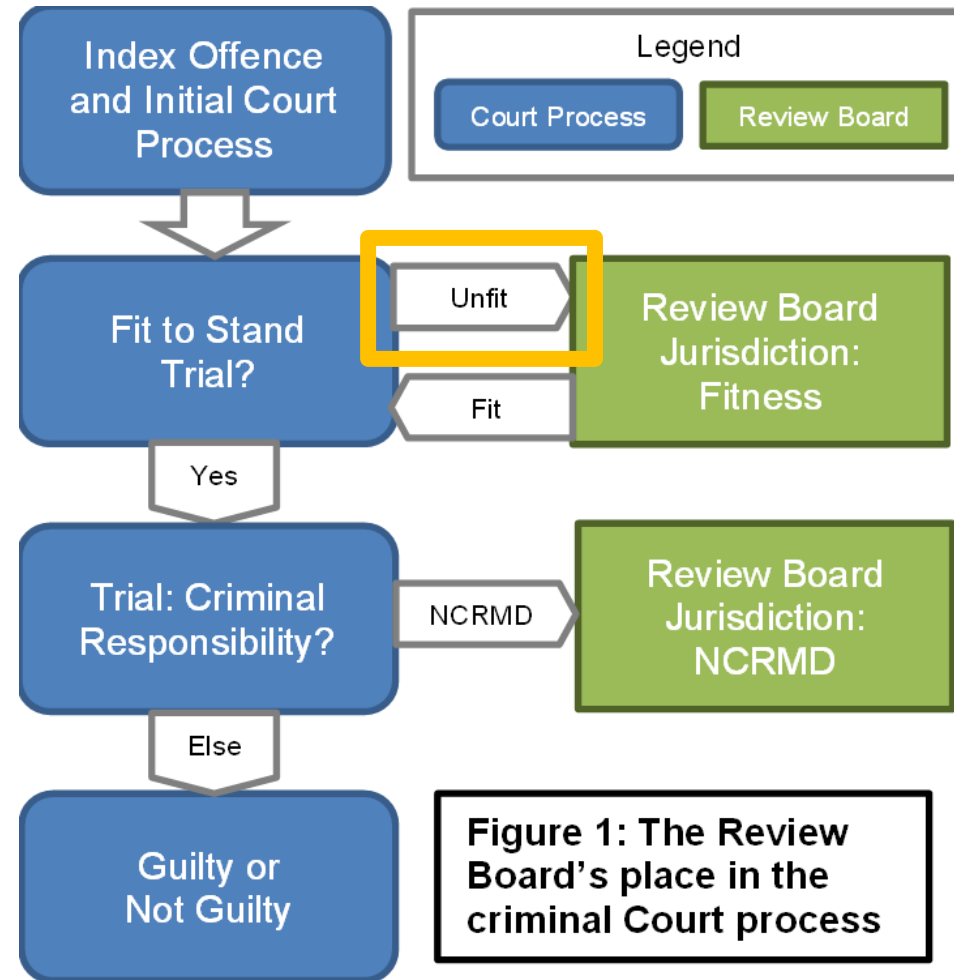
**Not Criminally Responsible by  
Reason of Mental Disorder**  
("NCRMD")

# Unfit to Stand Trial

The accused's mental disorder is interfering with the Court process itself.

Unfair to try the charges, but the charges still need to be resolved.

The Court on PAUSE.



# Unfit to Stand Trial

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## s. 2 – Definitions

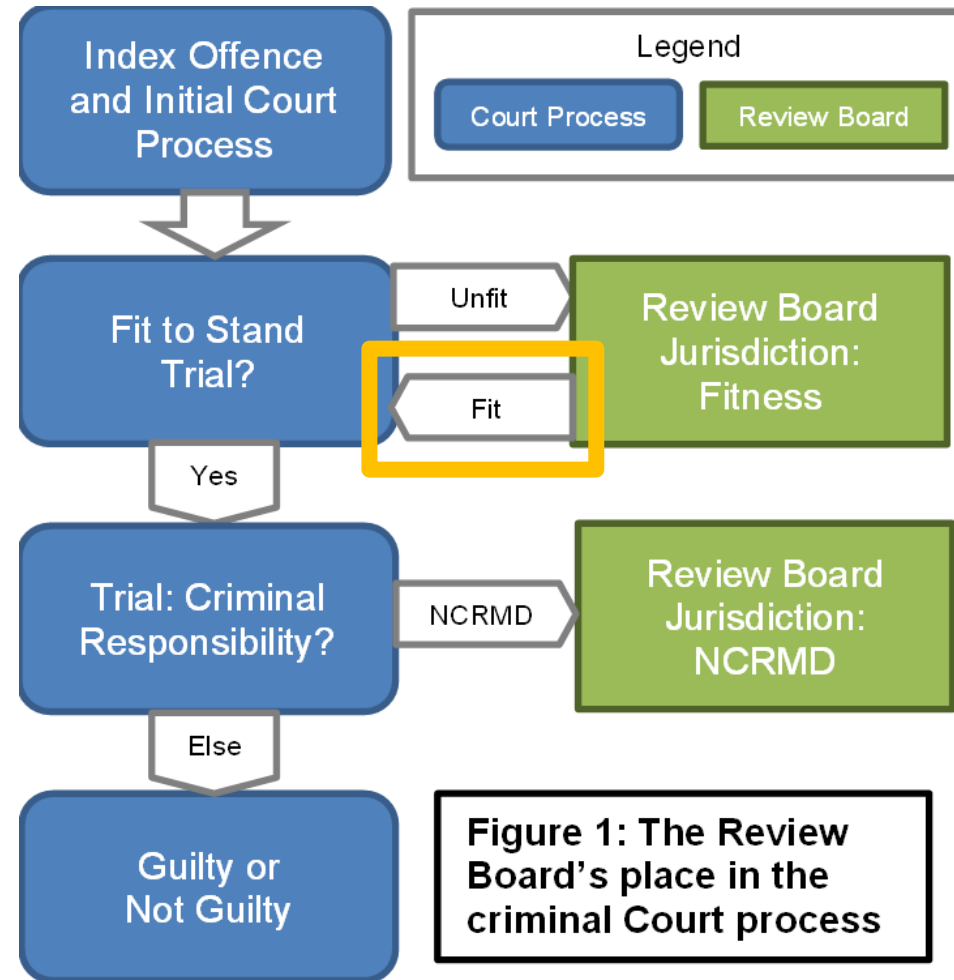
***“unfit to stand trial”*** means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel;



# Fit to Stand Trial

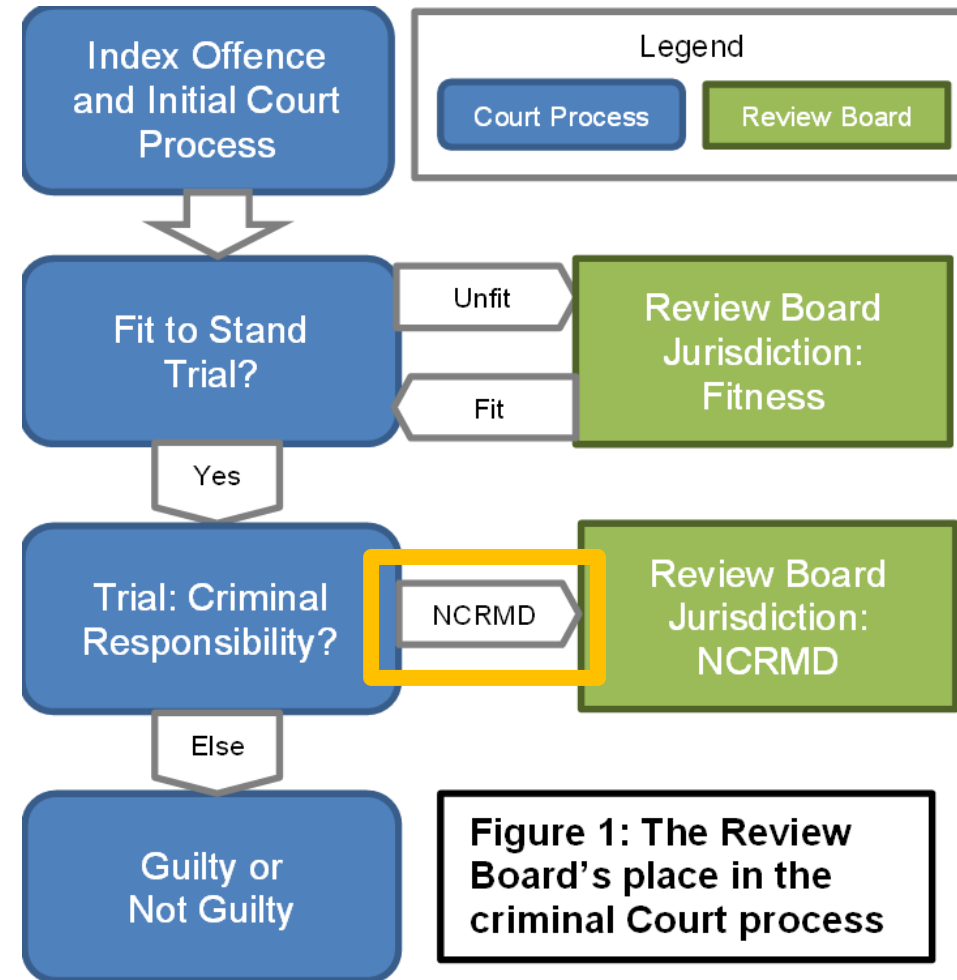
If the Accused becomes fit to stand trial again, prosecution resumes.



# Not Criminally Responsible by Reason of Mental Disorder

The Accused is not convicted. NCRMD verdict does not result in a sentence.

However, risk to public and the Accused's liberties must be assessed.



# NCRMD

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## s. 16 – Defence of Mental Disorder

- (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.

# Courts can make Dispositions

...but they usually do not.

Courts typically conclude that they have do not have the necessary expertise or evidence to make dispositions.

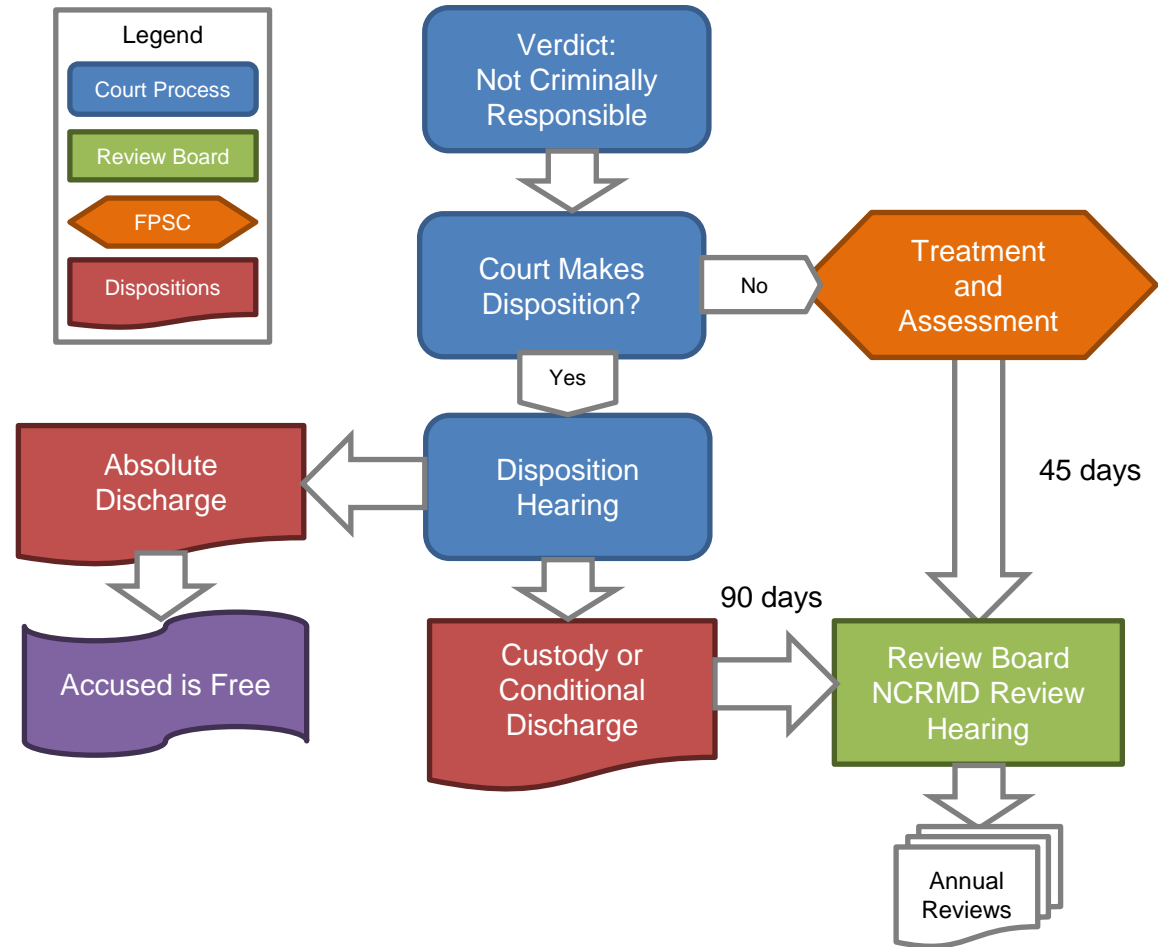


Figure 2: NCR Disposition Hearings in the criminal Court process

# Annual Reviews

The BC Review Board conducts reviews of a disposition at least annually.

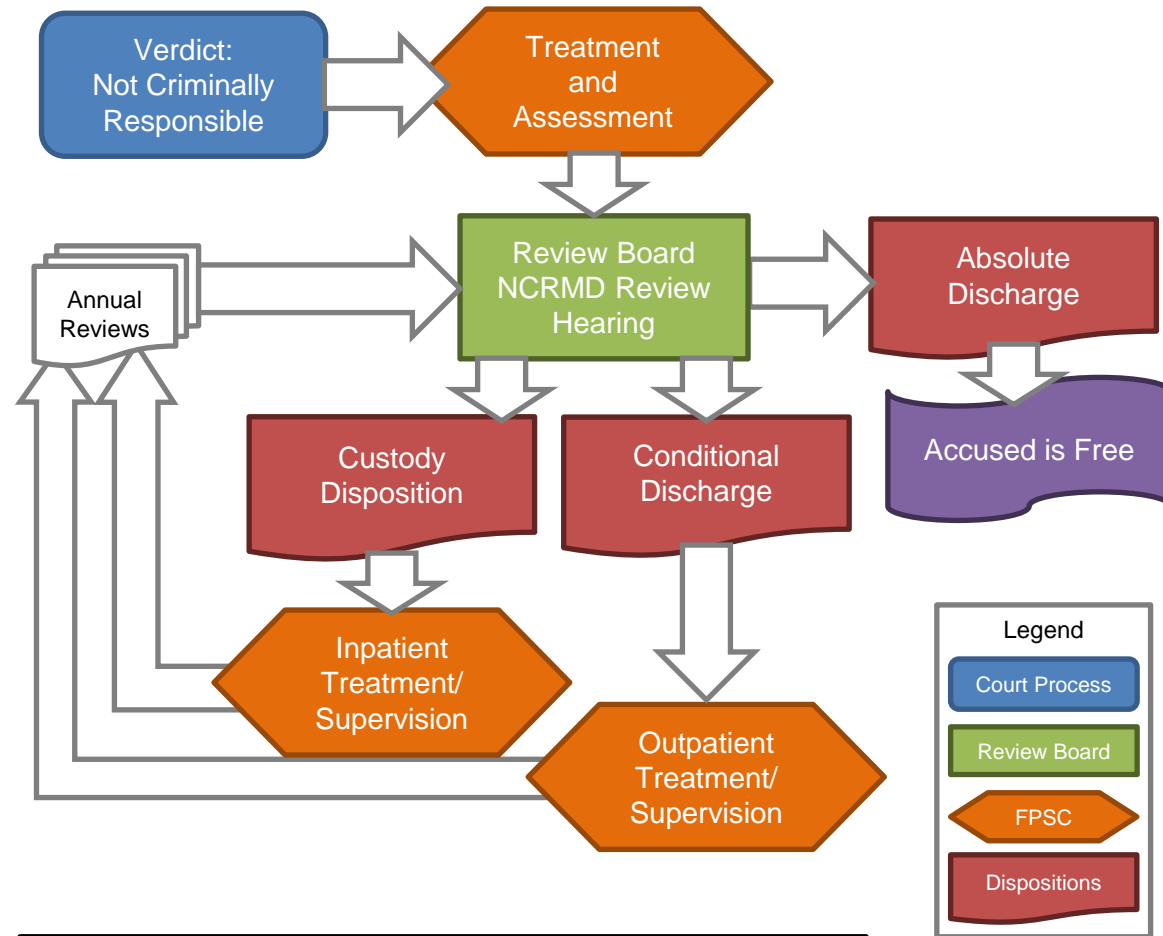


Figure 3: BC Review Board NCRMD Disposition Hearings

# Perspective from the Review Board

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REVIEW BOARD WEBINAR #1 – AN OVERVIEW

NOVEMBER 8, 2022

INGRID FRIESEN



# Today we will look at:

1

The Review Board  
and its  
Role/Mandate

2

What the Review Board Does:

- Fitness to Stand Trial (Fit or Unfit)
- Not Criminally Responsible by Reason of Mental Disorder (NCRMD)

3

Who are the  
parties at a Review  
Board Hearing

# The Criminal Justice System and the Review Board



## Verdicts

After a verdict of **unfit** or **NCRMD** in the Criminal Justice System – the accused is transferred into the Forensic System and comes under the jurisdiction of the Review Board



# The Forensic System

- The Forensic scheme is set out in Part XX.1 of the Criminal Codes. 672.1 – 672.9
- The Review Board is a Tribunal – not a Court
- The Review Board's emphasis is on public safety, assessment and treatment
  - The Board engages in a balance between the need for public safety (the priority) and the rights of the accused (considered to be ill and suffering from a disorder rather than criminally responsible) s. 672. 54

# The Timeline

The transfer of accused from the Court system to the Review Board system requires quick work by Registries, Crown and Defence.

An accused who is found Unfit or NCRMD by the Court must have an ***initial hearing before the Review Board within 45 days of the verdict.***

(UNLESS THE **COURT** GRANTS AN EXTENSION OF TIME TO 90 DAYS IN EXCEPTIONAL CIRCUMSTANCES)

Note: Make sure an assessment is ordered!!



# Review Board Hearings – Who attends?

- Held in a Board Room at hospital or in community - or online with agreement (MS Teams)
- Three members of a Panel
  - Lawyer (Judge, former judge or person entitled to be appointed as a Judge) – Chair
  - Psychiatrist
  - Member of Public – usually has a forensic background
- Director – Director’s Review Board Representative or Counsel
- Counsel for the Crown
- Counsel for the Defence
- Witnesses
  - Director’s witnesses – treating forensic psychiatrist, social worker, case manager
  - Defence witnesses – Accused – sometimes other witnesses
  - Crown – rarely calls witnesses

# Review Board Hearings

## **Informal**

Inquisitorial not adversarial – mostly collegial and sometimes cooperative between counsel

## **Rules of Evidence**

Not as strict or technical as court – no oaths, and hearsay is accepted

## **Dispositions and Reasons**

Board makes a decision and provides a disposition soon after the hearing and written Reasons a month or two later

# Verdict of 'UNFIT to Stand Trial'

**Court** - Made by Judge after hearing opinion of psychiatrist(s)

- the verdict is reviewed by the Review Board.

**Review Board** - *We don't review the court's decision – rather, we reach our own opinion based on the evidence at the hearing*

- Essentially an Unfit Accused is not *mentally* well enough to meaningfully understand the proceedings or participate in their defence or instruct counsel.
- Relevant time to determine whether a person is fit or unfit = at the time of the fitness hearing (*not* the time of the offence)
- Unfit accused are reviewed every year (at least) to determine if they are fit to stand trial and can be returned to court

# Fitness Hearings – Threshold for Fitness

Low Threshold for fit to stand trial – “limited cognitive capacity”

- [R. v. Taylor \(D.R.M.\), 1992 CanLII 7412 \(ON CA\)](#)
- It is in the accused and society’s interest in having a trial as soon as possible

How to determine that a person has become fit to stand trial?

- Type of questions that are asked – Defence usually asks specific questions about the charges, what happens in court
- Counsel often gives a hypothetical question and then asks detailed questions about the accused in the hypothetical, witnesses, evidence etc.
- Fitness does not mean perfection – determine – is the accused capable of participating in a trial? Especially with the assistance of counsel. Consider court accommodations

# Fitness Hearings – What Happens Next?

- If Accused is found FIT to Stand Trial at the Review Board, the next step is to make a disposition (initial hearings only) AND return A to Court for a NEW hearing to **retry fitness** (Remember: “day of” is what matters and now the Judge has to be satisfied A is fit)
  - Accused may be “fit but fragile” (Only at initial hearings) and require care in hospital to ensure they are fit by the time they return to court

# Fitness Hearings – What Happens Next?

- If Accused continues to be UNFIT at the Review Board:
  - Then the Board makes a disposition - usually the Accused is detained in hospital for treatment, but in some circumstances, the Board determines they can be safely released into the community
  - The Board will set a time period for a new hearing within the next 12 months (often shorter if there is some prospect that the accused may become fit to stand trial soon)
  - Some accused never become fit to stand trial – Permanently unfit s. 672.851



# Fitness Hearings – What Dispositions Are Possible?

- Consider the least onerous and least restrictive disposition
- **Custody** – often need for treatment to assist accused to become fit to stand trial as well as public safety
- **Conditional discharge** – when there is no need for hospitalization and the accused can be safely placed in the community
- NO absolute discharges
- Conditions – (see conditions at the end)

# Verdict of 'NCRMD'

Verdict by Court (s. 16) Accused is unable to appreciate the nature and quality of the act or omission or of knowing that it was wrong.

Relevant time period = at the time of the offence

Once verdict of NCRMD is made by the court – the Review Board has jurisdiction and the matter will not return to court (Unless the Board's disposition is appealed – as of right to Court of Appeal)

Review Board's job: s. 672.54 – balance society's needs (paramount) vs. accused's needs for treatment and reintegration

# Criminal Code – s. 672.54

s. 672.54 When 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.

# What is 'significant threat?'

Criminal Code s. 672.5401

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

# Significant threat

How do we determine?

- Psychiatric opinion – Forensic Specialty
- HCR – 20, Various assessment instruments
- Witnesses and accused's evidence
- History – Criminal Record, previous releases into the community
- Behaviour patterns, alcohol drugs plus past mental deterioration
- Seriousness of previous offences
- Treatment adherence in the past



# NCRMD – The Decisions/Dispositions the RB Can Make

Is there a significant threat?

**NO** = Absolute Discharge

**YES** = Decide what is the necessary and appropriate (least onerous) disposition

- **Custodial Disposition:** does the accused's risk require that they remain in hospital?
- **Conditional Discharge:** can the accused's ongoing risk be mitigated sufficiently to allow them to live in the community?

Time period – usually 12 months (can be shorter) and can be extended with the consent of the parties

# Conditions

- Review Board conditions are different from Court ordered conditions
  - When an accused comes under the Board's jurisdiction, the RB's conditions prevail (on that charge)
- RB conditions focus on reintegration into the community and management of risk – they are part of both custodial orders and conditional discharges
- Some (brief) examples of terms:

## Custodial – Strict vs Broad

- 28 day visit leaves, escorted, unescorted
- Drug/alcohol prohibitions
- testing 'on demand'

## Conditional Discharges

- type of residence
- Prohibitions and testing on 'reasonable grounds'
- Breaches/ROL – if an accused breaches an order, can be redirected back to hospital, then there is another hearing

# Resources:

Review Board link [www.bcrb.ca](http://www.bcrb.ca)

Forensic Hospital link <http://www.bcmhsus.ca/our-services/court-referred-mental-health-assessment-treatment/forensic-psychiatric-hospital>

Don't miss the second Review Board presentation – including important *Practice Tips* – November 22, 2022



# Forensic Psychiatric Services

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REVIEW BOARD WEBINAR #1 – AN OVERVIEW

NOVEMBER 8, 2022

PETER PARNELL, FPS

# Colony Farm



# Forensic Psychiatric Hospital (FPH)



## Mandate

To provide court-related forensic psychiatric assessment, treatment and community care management

To enable the safe reintegration of patients/clients from the hospital into the community

To ensure delivery of safe, patient and family centered care that is trauma informed and culturally safe

The authority for the mandate of FPS comes from the following legislation:

- Forensic Psychiatric Act
- Mental Health Act
- Criminal Code of Canada

## Review Board

The BC Review Board is an independent adjudicative tribunal established by the Criminal Code of Canada under section 672.38 (1).

The Review Board has ongoing jurisdiction to hold hearings to make and review dispositions (orders) for any accused where a court has rendered a verdict of not criminally responsible on account of mental disorder (NCRMD) or unfit to stand trial (UST).

The Review Board must take 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.

# Forensic Health System Patient Journey

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# What do we do?

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FPS provides specialized hospital and community-based assessment, treatment and clinical case management services for adults with mental illness who are in conflict with the law.

# FPS Director Responsibilities

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Person in Charge / Director

Legal representation

Oversee Review Board dispositions – Access to community / Community restrictions / Drug Testing

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# Director Witnesses

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Review Board Liaison – update on patient progress since last hearing

Case manager in clinics

Treating Psychiatrist – expert risk assessment / formulation – Dual roles?

Treating team members

Other witnesses





# Evolution of risk assessment

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# Hearing Considerations

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Dedicated space at F.P.H.

Maintain security – patient, staff, Board members, witnesses, attendees

Public access

Media interest



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Follow us:



# Defence Counsel

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REPRESENTING THE INTERESTS OF THE ACCUSED

DANTE ABBEY

A solid green horizontal bar at the bottom of the page.

Dante Abbey

Supervising Lawyer

Mental Health Law  
Program

[dabbey@clasbc.net](mailto:dabbey@clasbc.net)

604-685-3425



**Community Legal  
Assistance Society**

## Obtaining defence counsel

Accused are entitled to be represented by counsel

Private Counsel

Legal Aid BC – apply at 1-866-577-2525

Community Legal Assistance Society - Mental  
Health Law Program – 604-685-3425

We offer representation to any accused going  
before the BC Review Board in the Lower Mainland  
– funded by Legal Aid BC

BC Review Board Assignment

For accused who are self-represented or unable to  
obtain representation – may be *amicus curiae*\*

# Role of Defence Counsel

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Represents the accused's interests.

No different than any other legal proceeding.

Defence counsel will:

- Take instructions from the client
- Give the client legal advice
- Discuss the case and evidence presented by other parties with the client



# Role of Defence Counsel

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Defence counsel will:

- Help the client prepare their own evidence
- Make submissions on behalf of the client
- Seek accommodations for the client



In fitness matters, counsel should also try to liaise with the Defence lawyer in Court to pass on any information that might be helpful to guiding the client through the Court process or working with the client.



# Defence Counsel at Hearing

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Similar to appearing before other tribunals:

- Provide opening submissions
- Deal with preliminary matters
- Cross-examine witnesses – including experts
- Direct evidence – including the accused's evidence
- Closing submissions
  
- Reviewing the reasons



# Role of amicus curiae

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*Amicus curiae* – “friend of the court”

Attempts to assist the tribunal by representing an accused’s best interests when the accused is unable to do so for themselves.

Range of involvement:

- Accused is incapable of giving instruction or self-representing – *amicus* may be proactive in defending the accused’s interests when they cannot speak for themselves
- Accused is able and wanting to self-represent – *amicus* might be ‘translating’ accused’s submissions into legal terms or suggesting areas of inquiry to support their case.

# What about family?

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Counsel represents the accused.

- Legal ethical obligations to the accused
- Cannot give legal advice to family members
- Must keep confidentiality and privilege
- Must be able to share received information with the accused

Family support to the accused can be very helpful with respect to discharge plans, assisting the accused with treatment, corroborating information, or presenting different perspectives on the accused.

Often witnesses at BC Review Board hearings.

# What about family?

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Even more complex when family members are also victims.

Defence counsel can only assist and advise the client.

- Crown can assist with adding or removing no-contact orders
- Forensics can assist with facilitating contact with the accused or meeting their needs
- Victims Services for support

# CLAS Funders

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# Crown Role

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REVIEW BOARD WEBINAR #1 – AN OVERVIEW

NOVEMBER 8, 2022

GERRI-LYN NELSON, BC PROSECUTION SERVICE

# The Review Board Crown Office

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“Review Board Crown”, specialized unit within the BCPS (Provincial Crown)

Staffed by:           2 dedicated Crown (and other trained Crown around the province)  
                          2 dedicated Administrative Staff ([bcps.reviewboard@gov.bc.ca](mailto:bcps.reviewboard@gov.bc.ca))

We represent the Provincial AG (Provincial Crown) at the Review Board hearings once a file is before the Board after a Court verdict of either Unfit to stand trial or NCRMD

# The AG (Crown) Role at RB Hearings

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*“Whose side are you on?”*

**Our role is different than at Court because the issue before the RB is not guilt, but “risk to the public” and reintegration into society.**

**Role is to assist the Board by asking questions and making legal submissions in relation to the issues the board has to decide (“risk” and reintegration).**

**Role is important because the Director is generally not represented by a lawyer at these hearings, and the accused’s counsel has their own obligations.**



# AG Attendance is Optional

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You heard earlier that the Parties to a Hearing at the Accused, Director and Crown.



Unlike Court, the attendance of the AG is *optional* at Review Board hearings. The CCC says “may”.

Practically it means that if for some reason the Crown is not available, the hearing can still proceed without us without any delay and reviews can occur within the statutorily mandated time frames.



# How long does our office follow a file?

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## Unfit files

Until the person is found fit by the Board and returned to court.

- Might be weeks, months or for the chronically unfit, years.

Once returned to Court as fit, file returned to trial prosecutor to carry on

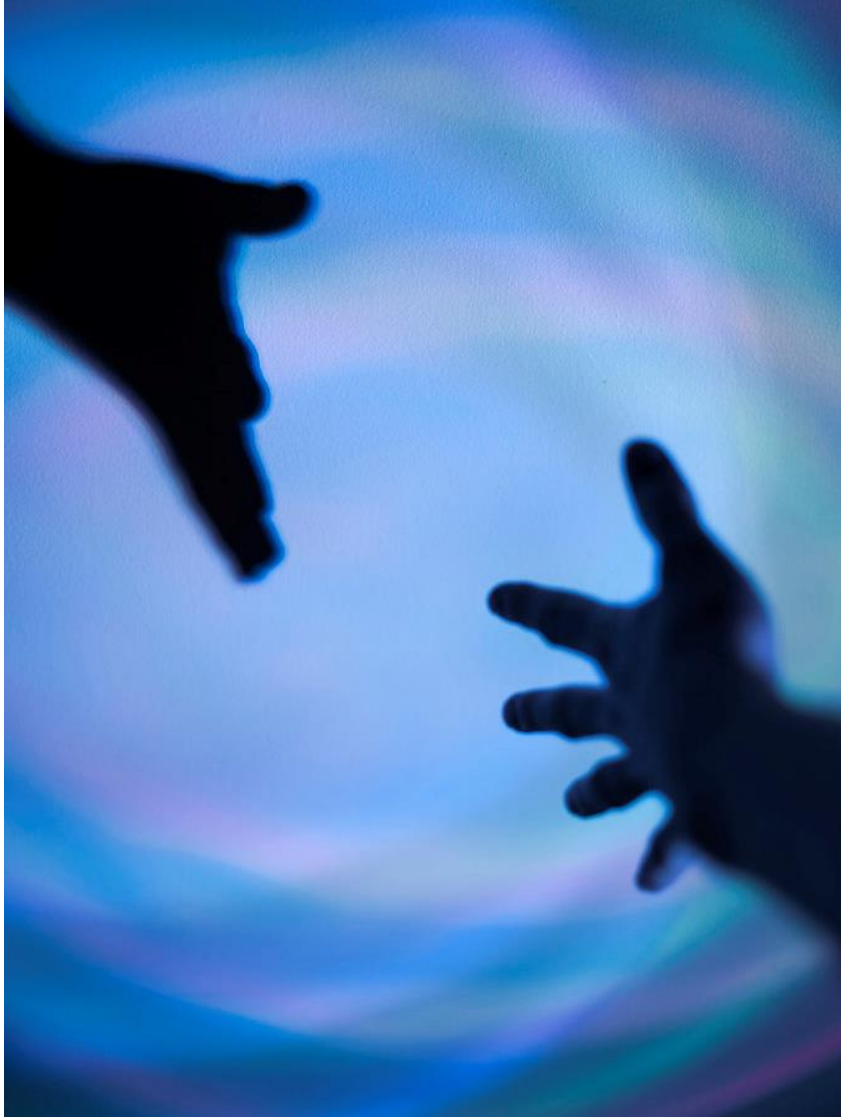
*\* Unfit files are still active prosecutions*

## NCRMD files

Until the person is found by the Board not to be a significant threat, or dies.

- Might be months (rare) or years (more common).





# Victim Liaison

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*What else do we do?*

Whether Unfit or NCRMD, trial prosecutor sends us the file and from that point on, **our office will be the point of contact** with the victim or victim's family members about hearings and updates. [Bcps.reviewboard@gov.bc.ca](mailto:Bcps.reviewboard@gov.bc.ca)

We can **liaise** with them directly or through a Victim Services worker.

**Conduit for** Victim Impact Statements and Victim concerns

**Assist** with explanation/education re RB processes

*\*We are not the lawyers for the victim or families.*

# Information Pipeline

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*What else do we do?*

We also provide the Board with materials that will assist the Treatment Team with their risk assessment and risk management, and assist the Board with having as full a picture of each accused as possible.

ex: Police reports, criminal records, other background materials if any



# Information Bridge or Assistance

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*What else do we do?*

- \* Public education
- \* Available to provide police, other Crown, other lawyers with information about the RB process.
- \* Where the accused is involved in other police files, Crown is often the information link between the hospital and the police

The Crown will assist getting everyone where they need to be, with the right information and materials



# Questions?

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