Indexed as:

Burrell (Re)

IN THE MATTER OF Part XX.1 (Mental Disorder) of the Criminal Code R.S.C. 1985 c. C-46, as amended 1991, c. 43
AND IN THE MATTER OF the Disposition Hearing of
Ronald Morris Burrell

[1999] B.C.R.B.D. No. 32

British Columbia Review Board
B. Walter, Chairperson, H. Parfitt and M. Anderson, Members

June 30, 1999.
(44 paras.)

Appearances:

Robert Burrell, accused/patient.
H. Currie, advocate for the accused/patient.
Dr. G. Gharakhanian and C. Poquiz, for the hospital/clinic.
No one mentioned for the Attorney General.

¶ 1 CHAIRPERSON:-- Mr. Burrell's case and in light of the new case law, offers a unique challenge in the sense of one of a kind, it is unique in that it is the first time that the issue has presented itself since Winko.

¶ 2 We have to conclude in these hearings that the accused poses a significant threat to the public. In Winko, Justice McLachlin defines "significant threat" as substantial and foreseeable threat of serious physical or psychological harm to a member of the public. The harm must be criminal in nature. She also says, that this entire scheme is part of the criminal justice system. What might be in a client's best interest or what might best meet his treatment objectives are not necessarily part of the criminal system. There is an implicit expectation in the court's mind that once the issue of significant threat falls below the threshold; that is, below how I have described it there is an expectation that a person with an illness is going to be dealt with in the civil mental health system as opposed to under this aspect of the criminal justice system.

¶ 3 We know that sometimes courts make directions without necessarily addressing their implementation, or the reality of whether other collateral systems are, in practice going to respond as they are intended to do.

¶ 4 The other area that Ms. Currie has highlighted in her closing argument is that there is not a burden on this gentleman to disprove that he is dangerous. Nor is there, ultimately, a burden on the hospital team to prove he is dangerous. The inquisitorial burden of reviewing all the evidence on both sides of the issue falls to the Review Board. If we have not satisfied ourselves in terms of meeting that inquisitorial burden then we have a duty to search out and consider evidence in favour of restricting the accused or in favour of discharging him. Uncertainty at the end of the day must be resolved in favour of the accused. We cannot speculate. Significant threat has to be supported by real, current and present evidence. The threat cannot be minuscule and it cannot be trivial.

¶ 5 We are persuaded at this point in time that we do not yet have all the information we need to come to the conclusion we are admonished to reach. We continue to cant' the inquisitorial burden. It is the first time that we have found ourselves in that position. Procedurally, we are new ground here. We think the following has to be within the contemplation of the Supreme Court from a procedural perspective, as the Criminal Code does not give us much guidance in this area. We are going to consider that this is an ongoing hearing; that this hearing is still continuing. We are going, at this point in time, to adjourn this hearing without fixing a day for its resumption. A day for its resumption will be fixed in the ordinary course of the call date process involving the parties and Review Board staff in fixing dates and in scheduling. It may be difficult to find a date for resumption in July. Insofar as we are adjourning, this panel remains seised of this hearing. It remains a live, ongoing hearing. I will instruct registry staff at the Review Board to find as early a date as possible for its resumption.

¶ 6 At its resumption, I must impose on the parties and I have to look at you on this one, Mr. Poquiz, in your role of expert and assist to the Board. What we are needing are the following: We need to obtain a more comprehensive and recent risk assessment. We leave the nature of that risk assessment in the hands of the experts. It could be an HCR 20 or whatever format they choose. Hopefully that it would go beyond the bare, informational components of the HCR 20, i.e. historic factors, clinical factors, future issues, but would use the information gleaned under those various headings and engage an analysis or synthesis of those factors in order to assist us in making a meaningful assessment of Mr. Burrell's significant threat, within the definitional framework that I have laid out before i.e.: substantial and serious.

¶ 7 We also require further information in the event that the risk threshold is not met, what it is that the civil mental health system can offer by way of possibly having a patient like Mr. Burrell transferred, perhaps under certificates, into the care of the Riverview Hospital or some other mental health facility. We are not discounting in any way the evidence that indicate that he requires a high level of care and supervision. But clearly, Winko is saying that constitutionally, the jurisdiction of the criminal justice system terminates if the risk threshold is not met.

¶ 8 I should also address the fact that Mr. Burrell is under a current disposition. The anniversary date of that disposition is July 24th, 1999. Historically, the issue of that anniversary date and whether or not the hearing occurs within the 12-month period has been a matter of some debate of a jurisdictional nature. Clearly, s. 672.81 entitles him, and admonishes the Review Board to hold a hearing not later than

12 months after making a disposition and every 12 months thereafter for as long as the disposition remains in force. I am going to adopt an interpretation of that section that says we have, in fact, manifestly complied with that section of the criminal code by convening a hearing that started today, June 30th, 1999. Insofar as the hearing remains ongoing and this panel is seised thereof, there is absolutely no issue of jurisdiction raised by the fact that the hearing might not complete until after the end of the 12-month period. It is not necessary for us to engage in the gymnastics of making a short order here. This is a live hearing as far as we are concerned. There is, from our perspective and based on Jones and Hutchinson, absolutely no argument here that in not convening again on or before July 24th, 1999, that the issue of jurisdiction is raised.

¶ 9 Is there anything you would like to add?

¶ 10 DR. PARFITT: No.

¶ 11 CHAIRPERSON: Is there anything you would like to add?

¶ 12 MS. ANDERSON: No, thank you.

¶ 13 CHAIRPERSON: Ms. Currie.

¶ 14 MS. CURRIE: I appreciate that procedurally this is new. My concern is that what is being asked of the Director is a risk assessment that has not been provided but was attempted to be flushed out during the course of the hearing. It's my position that any further assessment of risk required to satisfy the Review Board ought to be an independent assessment. In asking the Director to continue on with the risk assessment, in light of the evidence that they provided today, that what they put before you was the risk assessment, it seems as though it would be somewhat unfair to have them go back and re-assess when their evidence was that their risk assessment was complete.

¶ 15 CHAIRPERSON: Unfair or raise a potential conflict for the Director?

¶ 16 MS. CURRIE: Yes.

¶ 17 CHAIRPERSON: So, what are you suggesting?

¶ 18 MS. CURRIE: I'm suggesting an independent risk assessment.

¶ 19 CHAIRPERSON: We may be disabused of this notion, but we believe that the clinical resources that are available to this system are largely reposed in and under the control of the Director. Not to in any way disrespect Dr. Gharakhanian, if a risk assessment could be completed, ideally it would be independent, however one defines that within the system we all work in. If, as his counsel you are offering to obtain the resources to get an independent risk assessment by a professional outside the hospital, then that is certainly an invitation I might respond to. If you are saying that the Review Board

ought to be contracting and retaining its own expert, i.e., identifying an expert in risk assessment and then contracting that individual to come to FPI and assess independently Mr. Burrell from a risk perspective, I do not interpret Winko as imposing that kind of activist duty on the Board. We have a duty to inquire and to satisfy ourselves and to critically analyze and view the evidence that comes before us, and out of it, to arrive at our own risk assessment. However, the Board has neither the resources nor, indeed, the expertise to go about engaging in its own risk assessment processes. At the end of the day we find ourselves back within the, marriage that binds us and this process and resorting to the resources that each of us bring to it.

¶ 20 That is how I view that particular part of the directive. I dare say it is something that we are going to have to learn more about as well. I may be challenged on that. Certainly I do not see the duty to leave no stone unturned and to take every step we can to appropriately inform ourselves as requiring us to engage or hire our own experts.

¶ 21 We also have some hesitation, from embarking in that kind of a process or setting a precedent in terms of process because, frankly, to consider that that would be a routine part of the process would not only have enormous resource and time consequences but, could also have an impact on treatment relationships and the accused NCRs own progress. One would have to undertake this with great caution. We may be disabused of that but I think we have to take our experts where we find them.

¶ 22 Any comments? Anymore comments?

¶ 23 MS. CURRIE: Nothing further.

¶ 24 CHAIRPERSON: Any questions?

¶ 25 MR. POQUIZ: No. No further questions.

¶ 26 CHAIRPERSON: Thank you.

QL Update: 20000823
qp/s/qldrk