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T C.T.O. (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
C.T.O., a young person

[2000] B.C.R.B.D. No. 264

British Columbia Review Board
B. Long, Chairperson, G. Laws and
M. Anderson, Members

Heard: October 24, 2000.
Reasons: November 6, 2000.
(54 paras.)

Appearances:

C.T.O., accused/patient.
R. Strandberg, advocate for the accused/patient.
P. Clugston, for the hospital/clinic.
R. Zeunert, for the Attorney General.
E. Pendleton and S. Novac, Ministry for Children and Families.
C. Lawrence, social worker.
Cst. Beardsome, Fort St. John RCMP.
G.O., accused's cousin.

CHAIRPERSON:--

Background

¶ 1 On October 24, 2000, the British Columbia Criminal Review Board held a hearing in Fort St. John to review the disposition of C.T.O. At the conclusion of the hearing we were unable to agree on a disposition and reserved our decision. On October 31, 2000 we decided that there should be a broad custodial disposition. These are the reasons for our decision.

¶ 2 C.T.O. was found not criminally responsible by reason of mental disorder (NCRMD) on August

2, 2000 in Provincial Court on a charge of possession of stolen property. The Court made a disposition and ordered a conditional discharge (Tab 22). This hearing was conducted pursuant to s. 672.47(3) of the Criminal Code. This section of the Code requires the Review Board to hold a disposition review within 90 days of a Court ordered disposition.

¶ 3 The hearing did not start on time as counsel were occupied in Court on other matters. When the hearing did start about a half-hour later, the accused, C.T.O., was not present. We adjourned for a short time after his cousin Mr. G.O., who had attended, volunteered to try to find C.T.O. and bring him to the hearing. Mr. G.O. returned with C.T.O. in about a half-hour and the hearing commenced with the following persons participating.

1. Mr. Peter Clugston, a Regional Manager with Youth Forensic Psychiatric Services representing the Director of Forensic Psychiatric Services.
2. Ms. Elizabeth Pendleton, C.T.O.'s Community Living social worker, and representing C.T.O.'s legal guardian, the Ministry of Children and Families (MCF).
3. Ms. Sandra Novac, C.T.O.'s continuing care worker with the MCF.
4. Ms. Cindy Lawrence, a social worker employed by the Blueberry Band.
5. Cst. Beardsmore, a member of the Fort St. John RCMP.
6. Mr. G.O., C.T.O.'s cousin.
7. Mr. Robert Zeunert, counsel for the Attorney General.
8. Mr. Rod Strandberg, counsel for C.T.O.
9. The accused, C.T.O.

Evidence

¶ 4 In addition to the written material found in the disposition information, a number of the participants provided oral evidence.

¶ 5 Ms. Pendleton advised us that C.T.O. has been absent without leave from the supervision of the Director and MCF since he was last placed in a foster home on September 25, 2000. This placement lasted for approximately one-hour, before C.T.O. left, never to return. Neither the MCF nor the Director has since taken any significant steps to regain control or supervision of C.T.O.

¶ 6 Ms. Novac spoke of the experiences of the MCF with C.T.O. since he was first apprehended at about two years of age. She has personally been involved in his case since then. The gist of her evidence is that the MCF has been unable to provide any foster placement that C.T.O. will agree to or work with. He has always been difficult to supervise or control. The MCF appears to have given up at this stage. C. T.O. has been living either on the streets of Fort St. John, or somewhere on the Blueberry or Doig Reserves.

¶ 7 Ms. Lawrence spoke about how C.T.O. was more or less hiding out while living on the Blueberry

Reserve. Apparently C.T.O. finds that necessary because of the anger of the many victims of his property offences. She also complained of the MCF's inflexibility in approving a foster family on the Blueberry Reserve.

¶ 8 Cst. Beardsmore has had substantial involvement in investigating C.T.O. for numerous criminal offences. He spoke to the many contacts between the Fort St. John RCMP and C.T.O. He also provided his view about C.T.O.'s continuing criminal behaviour and the negative impact in the community. He described the frustration and anger that victims of property crime express to the police. He said that C.T.O. is almost invariably with others when he steals vehicles and that he believes that C.T.O. is still active in committing break and enters.

¶ 9 Mr. G.O. told us about having C.T.O. live with him several years ago. He said that C.T.O. did well in that environment and described his experiences in requiring C.T.O. to accept responsibility for the consequences of his behaviours. He also described C.T.O.'s well-recognized talents as an artist and his survival skills.

¶ 10 We also had the benefit of hearing directly from C.T.O. He answered questions in a number of areas including his drinking and drug habits, his driving, his foster placement and his late attendance for this hearing.

Positions Of the Parties

¶ 11 Mr. Clugston on behalf of the Director reluctantly asked us to impose a short custodial disposition. He accepted that although C.T.O. needed to continue to be part of and connected with the Blueberry Reserve and his First Nations heritage, there was no other alternative to try and control C.T.O.'s behaviour. He said that if a custodial order were made, C.T.O. would be placed in a program called Crossroads at the Maples Adolescent Treatment Centre in Burnaby. This program would be aimed at giving C.T.O. a fresh start. He believed that it would likely only be necessary for C.T.O. to be in custody for between 30 and 90 days.

¶ 12 Ms. Pendleton on behalf of C.T.O.'s legal guardian the MCF supported that disposition. In her view there was no resource in the community that could accommodate C.T.O.'s needs.

¶ 13 Mr. Zeunert on behalf of the Attorney General strongly urged us to impose a custodial disposition. In his view C.T.O. has demonstrated that he is impervious to any conditions and was a habitual thief. He strongly argued that C.T.O.'s use and operation of motor vehicles, particularly when impaired, constituted a significant threat to public safety. He argued that C.T.O.'s propensity to steal and drive would inevitably become a lethal combination.

¶ 14 Lastly Mr. Strandberg on behalf of C.T.O. urged us to impose an absolute discharge. In his view the threat to public safety was small. Given the high frequency of contact between C.T.O. and the police, he argued that there should have been far more substantial evidence of impaired and/or dangerous

driving. He argued that the evidence contradicted all the submissions of the other parties and that while C.T.O.'s behaviours were an annoyance to the community they did not constitute a significant threat to public safety.

Analysis

¶ 15 C.T.O. is a First Nations member of the Blueberry Band in Fort St. John. He was born on April 11, 1984 and is now 16 years old. He was exposed to alcohol in utero and almost certainly born with some form of fetal alcohol syndrome. His parents were subject to frequent drinking binges and C.T.O. was first taken into care when he was two years old. Although he was subsequently returned home, he was taken into care on numerous occasions until 1991. The reasons for his apprehension were always the same; alcoholic binges of his parents and neglect. He was able to live at home from August of 1991 until March of 1998. Since then he has been in care of the MCF and has been made a permanent ward.

¶ 16 C.T.O.'s mother lives on the Blueberry Reserve. His father lives on the nearby Doig Reserve. Although he was raised in an environment of severe drinking and neglect, he is nonetheless well bonded with his mother, the Blueberry Reserve and his First Nations heritage. In fact C.T.O. prefers to live with his mother, and continues to do so when he returns to the Blueberry Reserve despite his legal status.

¶ 17 Notwithstanding C.T.O.'s abuse and neglect, he is a pleasant young man. He is a skilled artist and possesses substantial survival skills. He is also mentally retarded with significant cognitive impairments. Psychological assessments have consistently shown an enormous discrepancy between his verbal scores (first percentile) and his performance scores (37th-80th percentile). That may have something to do with why C.T.O. does not immediately present as mentally handicapped. He has attended high school locally and was last in grade 10. At the moment for all intents and purposes he has dropped out.

¶ 18 One of the things that C.T.O. likes to do is steal vehicles. His objects of choice are all-terrain vehicles. He has probably stolen about 20 of them to date according to the estimates given in evidence. He likes to ride them in the bush as well as use them as a means of transportation to return to the Blueberry Reserve. Evidence was given that these vehicles are easily capable of reaching speeds in excess of 80 kilometres per hour. There are numerous reports that C.T.O. has driven while intoxicated although there is very little firsthand evidence. C.T.O. has had accidents with the vehicles that he has stolen and apparently has been involved in at least one chase with the police. C.T.O. does not have a driver's license.

¶ 19 The disposition information contains only one psychiatric assessment, written by Dr. Postnikoff and dated January 18, 2000 (Tab 4). He describes C.T.O. as a friendly and cooperative youth. He noted that although C.T.O. at times appeared to provide a significant amount of self-incriminating information, there were other occasions when he resorted to minimization or denial. He admitted to purposefully withholding information for fear of getting into further trouble, although at times he seemed to reveal information that was more self incriminating than the material he was holding back. Dr. Postnikoff

observed at p. 7 of his report that:

"C.T.O. appeared to be somewhat apathetic with regards to the entire assessment procedure. He frequently would look up at the clock and ask whether or not the appointment was nearly finished. C.T.O. appeared to show no remorse or regret for his negative behaviors. He would have the examiner and the Court believe that he had full awareness of the illegal nature of his activities with regards to the offenses in question as well as full awareness of the terms and conditions of his probation order. C.T.O. suggested that he willfully chose to disobey his probation order rather than being unable to comprehend its meaning."

¶ 20 C.T.O. told Dr. Postnikoff about a number of other offences that he had committed. In each case he described what he had done and his awareness that those behaviours were both wrong and illegal. He admitted to lying to avoid getting into trouble. He denied that a particular theft of an ATV was impulsive and said that it was a planned and deliberate act that was planned over an entire evening. He said that he knew that stealing was wrong and illegal and simply did not care.

¶ 21 He volunteered that he had shoplifted on at least 50 occasions and has never been caught. He denied having any feelings of guilt, remorse or regret about having stolen \$50 from his foster sister on one occasion. He said that he was involved in 2 break and enters a few months before the assessment. He said that in one of the break and enters, he and a friend stole a number of guns, a stereo and a large TV. He said that his friend got caught but did not tell the police about his involvement. He said that he received about \$1500 from the sale of the stolen items and his friend got approximately \$1000.

¶ 22 C.T.O. discussed his attitude surrounding his failure to attend court or keep appointments with his probation officer. He admitted to being fully aware of the dates and times of his appointments with the probation officer and Court. He said that even though the probation officer phoned him on the day before Court to remind him to attend, he purposefully slept in that morning so that it would be too late for him to get a ride into town. He said that he hoped that this would be an excuse sufficient for him to avoid having to go to Court. He said that he in fact awoke early in the morning and had time to get up and arrange a ride into town for Court, but chose not to do so. He said that he did not want to attend appointments with his probation officer although he was aware of each day and time of the appointment. He also said that he did not think he would get into much trouble for breaching his order, which required him to report to his probation officer.

¶ 23 Although this is C.T.O.'s first hearing in this matter, he received an absolute discharge from the Review Board on June 30, 2000 (reasons for disposition at Tab 17). The index offence then was breach of probation. Most of the reports in the disposition information, including Dr. Postnikoff's report at Tab 4, were prepared for that hearing. The panel remarked at p. 4:

"When we consider those alternatives, perhaps more than with any young person that we have seen C.T.O. appears incredibly vulnerable to the negative aspects of institutional life. That is something that has weighed heavily on us. He is connected to his family, his culture, whatever the problems are, in a way that, frankly, I have rarely seen having myself worked in the child welfare field. He poses a very difficult placement challenge."

¶ 24 The panel was unable to conclude that C.T.O. was a significant threat to public safety. They thought that it was foreseeable that if C.T.O. continued his escalating pattern of behaviour, someone could get hurt. However they concluded that he was not a significant threat despite a host of needs that needed attending to.

¶ 25 After C.T.O. was once again found NCRMD on August 2, 2000, the Court did not wish to defer its disposition to the Review Board. The Court noted (Tab 21, p. 26):

"In view of the recent disposition by the Review Board, and the material that was before the Board when it made its disposition, I do not believe a referral of this matter to the Board would result in a disposition that would differ greatly from its previous disposition.

Accordingly the court will make the disposition, pursuant to the provisions of section 672.54 and I'll hear submissions from counsel as to an appropriate disposition, here."

¶ 26 The Court then ordered that C.T.O. be subject to a conditional discharge for a period of 12 months (Tab 22).

¶ 27 C.T.O. is seen as a significant problem within this community. The perception is that C.T.O. may break the law with impunity because he has been judged NCRMD for his offences and not a danger to the safety of the public. If that is true, then the community perception is indeed accurate.

¶ 28 The issue of public safety arises from the provisions of the Criminal Code that govern disposition hearings. S. 672.54 sets out the test to be applied in deciding a disposition. It requires us to impose the least restrictive and onerous disposition compatible with the accused's circumstances, bearing in mind the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society, as well as any other needs of the accused. S. 672.54 (a) requires us to impose an absolute discharge unless we find the accused is a significant threat to public safety.

¶ 29 This phrase was recently interpreted by the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paragraph 57:

"Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". To engage these provisions of the Criminal Code, the threat posed must be more than speculative in nature; it must be supported by evidence: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (C.A.), at para 21. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature: *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406 (B.C.C.A.), at p. 413."

¶ 30 C.T.O.'s documented criminal behaviour generally centres on property offences. The disposition information records numerous thefts, possessions of stolen property and breaches of court orders. We have been unable to conclude that C.T.O.'s repeated thefts of ATVs, continuing possession of stolen property, and refusal to attend and report as required results in the kind of harm described in *Winko*, supra. We are aware that victims of property crime are frustrated and often angry. However in *D.H. v. British Columbia (Attorney General)*, supra, our Court of Appeal said the following when considering property offences in the context of this section:

"An examination of the record will not reveal anything in the appellant's behaviour, in or out of hospital, which would constitute a significant threat to the safety of the public. Mr. Hillaby fairly conceded in argument that that phrase must refer to a threat of harm to the person and not property damage and that such a qualification is implicit in what this court said in *Orlowski v. British Columbia (A.G.)* (1992), 10 C.R.R. (2d) 301."

¶ 31 A similar conclusion was reached in *R. v. Furlong*, [1998] N.J. No. 332 (Nfld. Prov. Ct.). We are therefore unable to find any authority that would suggest that the harm which flows from the offences that C.T.O. is inclined to commit, such as the frustration and anger experienced by the victims of his property crimes, is the kind of harm referred to in this section.

¶ 32 We then considered whether C.T.O.'s driving was dangerous. In Dr. Postnikoff's report of January 18, 2000 (Tab 4), he notes at p. 3 that C.T.O.:

"...has stolen two trucks, one from his mother and in the other from his aunt. ... He also indicates that he has outrun the police when driving his mother's truck although has not been caught."

Dr. Postnikoff continued:

"With regards to his use of alcohol and drugs, C.T.O. indicates he began drinking alcohol at the age of 14. He reports that he drinks approximately once a week, usually upwards of the case and a half of beer along with several cups of whiskey. He indicates he has had a few blackouts. He does not believe that he loses control when he drinks, but rather purposefully drinks to get drunk. He denies any history of compulsive drinking. He does not believe alcohol has caused him any negative consequences in his life and indicates it is not involved in any of his offenses. With regards to his use of drugs, he states he began smoking marijuana at the age of 13. He reports that he averages 3 to 4 joints a day although has smoked upwards of one-half ounce of marijuana in a day (approximately 20 to 30 joints). ... he indicates he has tried LSD on one occasion and magic mushrooms approximately 10 times. He states he finds hallucinogens to be "trippy" and indicates he likes the experience."

¶ 33 Tab 15 of the disposition information contains a number of documents relating to C.T.O.'s criminal offences from May 1999 to June 20, 2000. It includes 8 separate charges and supporting police information in the form of Reports to Crown Counsel (RTCC's). There are several property and theft offences. At p. 15 the RTCC in support of a theft charge found at the preceding page notes that:

"On October 8, 1999 on the Blueberry Reserve, Buick Creek, B.C. past 2 AM while intoxicated the accused attended Paul's yard and quietly pushed a Yamaha blaster 125 racing Quad...to the roadway hotwiring the Quad and went joy riding before driving off the reserve"

At p. 24, the RTCC supporting another charge noted on May 5, 2000 that:

"He (C.T.O.) also kept talking about a truck that he rolled the night before with some friends out in Cecil Lake while 4x4 ing. He was also noticed to have injuries to his hand shoulder and possibly neck. ...

The accused advised Police that he had taken his uncle's truck (L.A.) with permission and had had a rollover accident with it near Clover Farms on the Siphon Creek Road. The accused admitted that he was under influence of alcohol at the time."

Another RTCC at Tab 19 notes that C.T.O. has been charged for impaired driving.

¶ 34 Mr. Zeunert advised us that C.T.O. had been charged yet again on the morning of this hearing with another offence relating to possession of a stolen ATV. The supporting RTCC was marked as Tab 24. In the circumstances leading to C.T.O.'s arrest the following is written:

"A. arrested by Cst. WELSH for breach of the peace and C.T.O. arrested along with M. D. for causing a disturbance. While back at the detachment a search of A. located an ATV starter key on his person. A. advised Cst. WELSH that he took the key from C.T. O. as he was driving dangerously on a Quad because he was intoxicated. A. took the police to where the Quad was located outside of Greenglen apartments where A. was observed yelling at C.T.O. Quad was recently stolen from high-performance Honda, some damage to the console. The Quad was a 2000 model. While C.T.O. was being searched a small vial of hash oil was located in his left sock and seized. Investigation to date reveals that C.T.O. was operating the quad most of the night, with some people taking it to for a spin."

The report concluded with the following:

"Matters to Consider:

- C.T.O. has been deemed criminal irresponsible by the courts.
- C.T.O. has no remorse for his actions and will continue to commit criminal activity as there is no consequences to his actions.
- C.T.O. has a criminal record for theft under and fail to comply in 1999.
- police records indicate that C.T.O. has been investigated for 5 Break and enters, 12 Motor vehicle thefts, 7 thefts, 3 psp from 1997-present.
- member feels that as long as the courts do not charge C.T.O. for his criminal activity he will continue to commit crimes against the people of Fort St. John.

(M. H WELSH) Cst.

Fort St. John Detachment "

¶ 35 Although the accused is repeatedly referred to as non-violent, that view is not uniform. Tab 15 contains a report dated June 23, 2000 at pp. 31-32 from Mr. John Bird, a probation officer. It records that on June 7, 1999, C.T.O. was suspended from his high school after he assaulted another student. On the following page Mr. Bird reports that during the evening of April 16, 2000, C.T.O. threatened to slash Interchange Group Home staff with a broken bottle, threatened to blow staff up, and threatened to ram the police car with the stolen vehicle.

¶ 36 It is apparent to us that C.T.O. is a strong-willed young man who is at present completely beyond the control of his legal guardians and his community. He has consistently demonstrated that he will do as he pleases. That includes living where he wants, not attending school, stealing ATVs, abusing alcohol and drugs, refusing to comply with the requirements of the Court system and for that matter the Review Board. He is simply not amenable to any direction by anyone. His legal guardians, the MCF, appear to have given up trying to do anything.

¶ 37 C.T.O. did not attend this Review Board hearing and only showed up when his cousin, Mr. G.O. found him and brought him to the hearing room. When the panel asked him why he had not attended, he

replied that he had slept in. We think it far more likely that he simply cared not to attend. It does not appear that C.T.O. is deliberately disrespectful. Rather it seems to us that C.T.O. has not had much in the way of parenting or guidance for some time and is not prepared to accept any guidance at this stage of his life.

¶ 38 We believe that C.T.O.'s mental condition, flowing from his fetal alcohol syndrome, and his diminished cognitive capacity, has significantly impaired his judgment and his ability to control his impulsive behaviour. For example in his evidence before the Board, he said that he would drive a vehicle if he had drunk a small amount of alcohol; such as 1 or 2 beers, which in his view did not leave his faculties impaired.

¶ 39 We have concluded, not without considerable discussion and difficulty, that C.T.O. would be a significant threat to public safety if he were discharged absolutely. As noted above, C.T.O. is completely beyond the control of anyone. His day-to-day life is circumscribed by his own judgment. If we were to discharge him absolutely, we are convinced that he will continue to act as he has in the past. All of the evidence before us points towards an escalating and alarming pattern of behaviour that is likely to put the public safety at significant risk.

¶ 40 The greatest risk is likely to come through a form of dangerous driving, either due to impairment by drugs and/or alcohol or poor judgment. It appears to us that it is only a matter of time before C.T.O. injures either a passenger that might be inclined to ride with him or some other member of the public that might happen to be on or near the places that C.T.O. drives. We are not prepared to accept that the judgment of this 16-year-old mentally handicapped youth, suffering the effects of fetal alcohol syndrome and without the benefit of any parental control or guardianship, is to be trusted in the manner and circumstances in which he chooses to drive.

¶ 41 We are also concerned about the potential for an increase in criminal behaviour, especially when we consider the report by Ms. Gosson at Tab 20 that C.T.O.'s peers now get him to commit their offences. We note as well that C.T.O. was involved in 2 break and enters last year. One of them involved the theft and sale of guns.

¶ 42 Looked at in another way, we asked ourselves whether we would be surprised if after giving C.T.O. an absolute discharge, we subsequently learned that he been involved in a motor vehicle accident that had injured someone else or that he had committed a serious criminal offence. Are unanimous answer was that we would not. In our view such a conclusion is not speculative and is well grounded in the evidence. The last panel noted that (Tab 17, page 6):

"It is possible to foresee that if C.T.O. continues in his escalating pattern of behavior somebody could get hurt. We are not diminishing that, but currently we are simply not at the level where we believe he meets the legal test for our ongoing jurisdiction."

We find that he has now reached that level.

¶ 43 We then turn our attention to the least restrictive and onerous disposition compatible with C.T.O. circumstances. Placement was an issue that weighed heavily upon the last panel as it does upon us. They commented how C.T.O. appeared incredibly vulnerable to the negative aspects of institutional life and that he was deeply connected to his family and his culture.

¶ 44 There is no doubt that C.T.O.'s proper place, bearing in mind his heritage and roots is on the Blueberry Reserve. His legal guardian, the Ministry of Children and Families, limited as they are by policies which restrict the choice of appropriate foster families, are unlikely to find an acceptable family on the Reserve. Mr. G.O. and Ms. Lawrence seemed to suggest that it was the responsibility of the MCF to create and fund a placement tailored to C.T.O.'s special needs. We believe the reality in today's world of limited resources makes that unlikely. We were disappointed to learn that the Blueberry Band had not brought forward any alternate plan given that we were told that the Band is relatively well off as a result of a recent land settlement.

¶ 45 As C.T.O. has demonstrated that he is completely beyond the control or direction of the MCF or his community, we have reluctantly concluded that the only place that he can live at this point is at the Maples Adolescent Treatment Centre in Burnaby. In so concluding we share the last panel's concern about C.T.O.'s vulnerability to such a placement. Mr. Clugston believes that a placement at the Maples would likely only be necessary for 30 to 90 days. In view of his position we have made this order for only for 90 days. We hope that C.T.O. will be able to return to Fort St. John in the near future pursuant to the visit leave clause that we have ordered. We sincerely hope that some structure and control can be brought to this young man's life in that time. In the interim we urge the Blueberry Band to consider bringing forward a proposal for C.T.O.'s care on the Reserve.

Concurring Reasons by Dr. G. Laws

¶ 46 Although it is not for us to question the Court's findings, there are unusual aspects to this case that beg for comment. A finding of Not Criminally Responsible by Reason of Mental Disorder (NCRMD) is a most serious undertaking, regardless of the nature of the offense in question. It is therefore surprising to find that successive findings of NCRMD have occurred for different offences, in significantly different time periods, without psychiatric reexamination of the accused with regard to the specific mental state that existed at the time of the individual offences. Despite the fact that the underlying "mental disorder" in this case is a combination of intellectual deficits and probable effects of alcohol on the unborn fetus, both of which conditions are not directly "curable", the degree of comprehension of right and wrong and the ability to appreciate the nature and quality of one's actions may well vary considerably from time to time.

¶ 47 From the evidence before us it appears that Mr. C.T.O. has been psychiatrically evaluated for Court purposes on only one occasion, specifically, January 17, 2000. An account of that examination is found in a letter from Dr. Postnikoff dated January 18, 2000, addressed to The Presiding Judge, Youth Court of British Columbia in Fort St. John, BC. The subsequent offences for which Mr. C.T.O. was first found NCRMD on May 18, 2000, were committed on April 28 and May 6, 2000, dates clearly

subsequent to Dr. Postnikoff's examination. There is in evidence an Affidavit dated May 9, 2000, signed by Dr. Postnikoff, which pertains to his qualifications and his report of his examination of C.T.O., but which gives no indication of any further meeting with Mr. C.T.O., or that his previously expressed opinions should be applied to the new charges.

¶ 48 The second occasion on which Mr. C.T.O. was found NCRMD, which resulted in the current appearance before the Review Board, was August 2, 2000, pertaining to a charge arising from events occurring on July 20, 2000. In the transcript of the Proceedings at Trial on August 2, 2000, there is again no indication that Mr. C.T.O. had been evaluated from a psychiatric perspective as to his mental state at the time of the new offence. We find this remarkable.

¶ 49 A second issue that is most unusual in this case is the apparent reasoning used by Dr. Postnikoff in his original recommendation of a finding of NCRMD. His report details at great length Mr. C.T.O.'s statements to him of his awareness of the specifics of his multiple charges, as well as their wrongfulness. On page 2 of 13, first paragraph, he writes " C.T.O. indicates he was fully aware that his behaviours in all the offenses were both wrong as well as illegal". There then follows an extensive review of the statements apparently made by Mr. C.T.O. to Dr. Postnikoff detailing specifics of multiple offenses, his awareness of their unlawfulness, his willfulness in participating in the behaviours and his apparent lack of concern about the possible consequences.

¶ 50 Dr. Postnikoff then goes on to opine (page 9 of 13) " While C.T.O. does appear to be aware of the illegal nature of his criminal behaviours, he also suffers from a severe inability to put this knowledge into effect."

¶ 51 On page 11 of 13 under the heading "RECOMMENDATIONS" he "seriously questions C.T.O.'s ability to functionally (emphasis ours) appreciate the difference between right and wrong" and later in the same paragraph " the undersigned would suggest that for all practical purposes, (emphasis ours) C.T. O. should be considered Not Criminally Responsible By Reason of a Mental Disorder".

¶ 52 It thus appears that Dr. Postnikoff is basing his recommendation to the Court for a finding of NCRMD on his perception that Mr. C.T.O. is unable to conform his behaviour to societal expectations, rather than being unaware of those expectations or of the nature and consequences of his actions. This is similar to the doctrine of the so-called "irresistible impulse", an exculpatory finding which has not, to our knowledge, been accepted in the Canadian Court process.

¶ 53 Dr. Postnikoff presumably did not have the benefit of hearing the oral evidence given at this hearing by Mr. C.T.O.'s cousin, Mr. G.O. Mr. G.O. informed us that C.T.O. had lived with him for approximately two years and that during that time he took measures to ensure that C.T.O. was made aware of the wrongfulness of some of his actions and was made accountable for them. In response to this management, C.T.O.'s behaviour was said to have improved significantly. We take this to suggest that C. T.O. has previously demonstrated at least some ability to modify his behaviours.

¶ 54 By these comments, we do not mean to challenge the findings of the Court which have brought this young man before us. Indeed, we have taken his situation very seriously, as witnessed by our custodial disposition, which appears to be the only appropriate outcome given the apparent impasse that has been reached by the Ministry of Children and Families and the local Band members in providing safe harbor for C.T.O. However, we do feel it is appropriate to comment on any aspect of the evidence that seems relevant to the situation, and we have hereby done so.

B. LONG, CHAIRPERSON
G. LAWS, MEMBER

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