Indexed as:

Gielow (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 Christopher Gielow

[1999] B.C.R.B.D. No. 30

British Columbia Review Board
E.A. Tollefson, Alternate Chairperson, H. Parfitt and B. Brett, Members

February 12, 1999.
(18 paras.)

Appearances:

Christopher Gielow, accused/patient.
A. Pollak, counsel for the accused/patient.
K. Lynd, for the Director, Adult Forensic Psychiatric Community Services.
L. Hillaby, for the Attorney General.

REASONS RESPECTING PRELIMINARY ISSUE OF JURISDICTION

¶ 1 CHAIRPERSON:-- On February 12, 1999, a panel of the British Columbia Review Board ("the Review Board"), composed of E.A. Tollefson (Alternate Chairperson), Dr. H. Parfitt (Psychiatrist) and B. Brett (Social Worker), convened to hold a disposition hearing pursuant to section 672.47 of the Criminal Code in respect of Christopher Gielow ("the accused"). Those present were the accused; A. Pollak (counsel for the accused); L. Hillaby, (counsel for the Attorney General of British Columbia); and K. Lynd (a representative of the Director, Adult Forensic Psychiatric Community Services ("the Director")). Mr. Gielow's parents were also in attendance.

¶ 2 Before the disposition hearing commenced, Ms. Pollak raised an issue of whether the Review Board had jurisdiction to hear the case, arguing that the Board had lost jurisdiction because the period between the verdict of the court and the commencement of the hearing far exceeded the time limits set out in section 672.47.

¶ 3 The relevant facts were that on April 30, 1997 the accused was charged with two counts of

assaulting a peace officer engaged in the execution of his duties and one count of assault causing bodily harm, contrary to sections 270(2) and 267(1)(b) respectively of the Criminal Code. All charges arose out of incidents occurring April 29, 1997 at Agassiz, British Columbia. The trial took place before the Honourable Judge B.G. Hoy of the Provincial Court of British Columbia at Chilliwack, January 26, 1998. The Honourable Judge, on the basis of an agreed statement of facts, found that the accused had committed the actus reus of the crimes alleged, and on the basis of expert psychiatric evidence that was endorsed by both Crown and defence, found that at the time of the offence the accused was so mentally disordered that he was not criminally responsible for his acts. He also accepted the submissions of both counsel that the accused should be given a discharge subject to conditions pursuant to section 672.54(b), and a disposition order was made to that effect January 26, 1998. It appears that the judge and both counsel were confused about the operation of this provision, possibly thinking that it was the same as the "conditional discharge" sentencing option under section 730. The Court, in ordering the release of the accused into the community used a document headed "Disposition", which stated that the Court had found the accused was exempt from criminal responsibility for the three offences charged and that the Court had held a disposition hearing and made a disposition. The Disposition document then incorporated a two-page "Probation Order", containing terms and conditions that were to apply to the accused in the community during the life of that order, which it stated to be 18 months. On the other hand, the Disposition document stated that this 18-month period depended upon the Review Board: "This disposition ceases to be in force on 18 months from Jan 26, 1998 or when another disposition is made by the Review Board, whichever is first." The first Review Board hearing took place February 12, 1999, and in the period between issuance of the court verdict and the Board's hearing, the accused apparently had complied with all the terms and conditions set out in the so-called Probation Order.

¶ 4 The governing provisions of the Criminal Code with regard to the court's power to make dispositions, and the period of time thereafter within which the Review Board should hold a disposition hearing, are set out in sections 672.45 and 672.47.

> 672.45(1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the court may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing.
>
> (2) At a disposition hearing, the court shall make a disposition in respect of the accused, if it is satisfied that it can readily do so and that a disposition should be made without delay.
>
> 672.47(1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.
>
> (2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.

> (3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of the accused, the Review Board shall hold a hearing on a day not later than the day on which the disposition ceases to be in force, and not later than ninety days after the disposition was made, and shall make a disposition in respect of the accused.

According to section 672.47(3), the Review Board's first disposition hearing therefore should have been held within 90 days of the verdict, i.e., by April 26, 1998.

¶ 5 Ms. Pollak argued that the Review Board had never received jurisdiction from the Court, for the Court in fact had made a Probation Order. Alternatively, if the Court was found to have made a disposition under section 672.54, the Review Board was "way out of time" in dealing with the case. This was no mere harmless irregularity that could be overlooked, but it went to the jurisdiction of the Review Board. She said that the Review Board, being a statutory body, had no inherent jurisdiction but only such jurisdiction as was given to it by statute. She distinguished the cases of Jones v. Attorney General of British Columbia and the Director, Adult Forensic Psychiatric Services (B.C.C.A., December 12, 1997) and Hutchinson v. Attorney General of British Columbia (B.C.C.A., October 5, 1998), saying that the former dealt with a situation in which the Review Board overshot a self-imposed time limit, and the latter dealt with a dual status offender, where the Court held that so long as the accused was serving his sentence in prison the obligation to hold a review hearing every twelve months was held in abeyance. She referred to decision of the Review Board in Crosson (April 11, 1996) where, having failed to hold a disposition hearing within twelve months of the previous hearing, the Board concluded that it had lost jurisdiction over the accused.

¶ 6 Mr. L. Hillaby argued that what the Court had done was clearly contrary to the law, but it did not result in a loss of jurisdiction by the Review Board. He referred to Doucet (decided December 15, 1997) in which the Review Board concluded that it had not lost jurisdiction where there had been a 73 day lapse between the date of the verdict and the Board's first hearing. As against the Board decision in Crosson, that Ms. Pollak relied upon; he cited another decision of the Board in Chen (decided April 3, 1996) in which a different panel of the Board found that the Board had not lost jurisdiction as a result of a lapse of time in excess of a year between hearings. He referred to the decision of the Ontario Court of Appeal in R. v. LePage (1998) 119 C.C.C. (3d) 193, in which Doherty J.A., delivering the judgment of the majority, said that the legislation was intended to provide a procedure for risk management of those found to have committed a crime while mentally disordered. While Mr. Gielow's crimes were towards the lower end of the scale of seriousness, a decision in this case that the Board had no jurisdiction would apply equally in more serious cases, which could not have been the intention of Parliament. He submitted that the time limits set out in section 672.47 were not intended to be treated as mandatory and exclusive, citing similar provisions in relation to bail, which had been interpreted by the courts as allowing some discretion in terms of their operation. Finally, he referred to the statement by McEachern C.J.B.C. in the Hutchinson decision (supra) that jurisdiction over a person "would rarely be lost by reason of a failure to hold hearings strictly as required." Mr. Hillaby pointed out that the courts have the power to protect the accused against undue delay by means of prerogative writs ordering the Review Board to do what it is supposed to do.

¶ 7 In reply, Ms. Pollak submitted that the cases involving the bail provisions were inapplicable because the Review Board was not a court. She argued that the purpose of the Mental Disorder Amendments was not only to protect the public, but also to protect the liberty of the accused. She asked the Board to decide the case on its merits and not on the basis of factual situations that might arise in the future.

¶ 8 The Director, Adult Forensic Psychiatric Services, was not represented by legal counsel at the hearing, and his representative, Ms. K. Lynd, took no part in the argument relating to the preliminary issue.

Considerations and Conclusions

¶ 9 After considering the arguments presented by Ms. Pollak and Mr. Hillaby, the Review Board concluded unanimously that it had the jurisdiction to proceed, but it indicated that it intended to give written reasons at a later date. These are those reasons.

¶ 10 The Review Board found that while the Court had used some language which was inconsistent with an order under section 672.54, an examination of the record shows that the Court had in fact found the accused to be not criminally responsible on account of mental disorder and had referred him to the Review Board. Indeed, the verdict of not criminally responsible on account of mental disorder was sought by both counsel, who, to facilitate proof, agreed upon a statement of facts in which the actus reus was admitted. Moreover, both counsel sought a conditional discharge under section 672.54(b), and an examination of the documents in exhibit 9 indicates that the Court was trying to make such an order, releasing the accused into the community subject to conditions, pending a disposition hearing by the Review Board. The Court was in error in using the term "Probation Order" as a heading for the terms and conditions applicable to the accused, and in referring to the "Probation Order" remaining in force for 18 months, but these errors do not affect the fundamental nature of the Court's decision, which was to discharge the accused subject to conditions, which conditions would remain in force only until the Review Board made another disposition.

¶ 11 This case is therefore clearly distinguishable from that of Karl Grant Jacobson (B.C.R.B., October 27, 1998), where the accused was charged with "assault" and "theft under". According to the transcript of the proceedings in that case, the Court spoke of the accused being not criminally responsible on account of mental disorder, but when it made its order April 14, 1997, it made no reference to the accused being found NCRMD, or to him being placed under the jurisdiction of the Review Board. Instead, the court simply ordered that he be placed on six months probation. After completing his 6-month term of probation without incident, the file was closed October 14, 1997. It was not until August, 1998, approximately sixteen months after the verdict, that someone forwarded the file to the Review Board. The Board held a hearing in the absence of the accused (who could no longer be found) and concluded that the accused was not subject to its jurisdiction because it had received no clear indication from the court that it was the court's intention to place him under the aegis of the Review

Board. The accused had every reason to believe that he was only subject to a probation order, and when he successfully completed the term of probation, he could go free.

¶ 12 In view of the finding that in Mr. Gielow's case the Review Board was properly invested by the court with jurisdiction over the accused, the Board next had to address the question of whether by failing to hold its first disposition hearing within the time prescribed by section 672.47 the Board lost that jurisdiction.

¶ 13 The only case that the Review Board was aware of that directly involved section 672.47 is Doucet (supra). In that case, acting on the understanding that the court under section 672.47(1) had deferred the making of a disposition to the Review Board for 45 days, Counsel for the accused argued that the Board had lost jurisdiction by not holding a hearing until 73 days after the verdict. The Board found that it retained jurisdiction. Failure to meet the deadline did not go to the issue of the Board's continuing jurisdiction, but, instead, it was only a procedural irregularity, which by virtue of the saving provision of section 672.53 did not affect the validity of the proceedings unless it caused the accused substantial prejudice. In the Board's view a delay of 28 days in holding the hearing did not of itself amount to "substantial prejudice". Chairperson Dickson referred to section 485(1) of the Criminal Code which states that "Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands". She suggested that taking a purposive approach to the legislation the Review Board might be considered to be the equivalent of a summary conviction court in order to ensure internal consistency with other provisions of the Code. She also referred to the decision of the Ontario Court (Provincial Division) in R. v. Talbot (November 21, 1996), where the Honourable Judge Paris concluded that failure to hold an inquiry under section 672.33(1) within two years after a verdict of unfitness, to determine whether sufficient evidence can be adduced to put the accused on trial, did not result in a loss of jurisdiction. She noted that in coming to this conclusion, Paris P.C.J. had referred to a number of cases in which jurisdiction was maintained despite a failure to bring prisoners to court for a bail review pursuant to a statutory time requirement set out in section 525. These cases include Gagliardi and the Queen (1981), 60 C.C.C. 267 (B.C.C.A.); R. v. Reimer (1987), 47 Manitoba Reports (2d) 156 (Man.C.A.); R. v. Pomfret (1990), 53 C.C.C. (2d) 56 (Man.C.A.); and R. v. Neill (1990) 60 C.C.C. (3d) 26 (Alta. C.A.). The Honourable Judge concluded:

> The common conclusion in these cases is that although the detention is unlawful the jurisdiction over the offence is not affected. In other words the failure to bring the prisoner to court as mandated is a collateral matter that affects the legality of the detention but not the jurisdiction over the offence.

Other decisions to the same effect are R. v. Johnson (1993), B.C.D. Crim. Conv. 5150-01 (B.C.C.A.); Re Ferreira (1981) 58 C.C.C. (2d) 147 (B.C.C.A.); and Vukelich v. Vancouver Pre-Trial Centre (1983), 87 C.C.C. (3d) 32 (B.C.C.A.)

¶ 14 Another provision of the Mental Disorder Amendments of the Criminal Code that contains a time limit for holding a hearing is section 672.81(1), which requires that the Board "hold a hearing not later than twelve months after making a disposition and every twelve months thereafter". Ms. Pollak cited the Board decision in Crosson (supra) for the proposition that if the time limit were exceeded, the Board would lose jurisdiction. She failed, however, to mention that Crosson was only a majority decision, and at approximately the same time, in Chen (supra), the majority of a differently constituted panel concluded that jurisdiction was not lost through the passing of the annual hearing date. Nor was it mentioned that in two other subsequent cases, Vos (May 21, 1996) and Hutchinson (January 26, 1998), the Review Board unanimously concluded that jurisdiction was not lost by failure to hold a hearing within twelve months. While accepting that it only had such powers as were given to it be statute, the Review Board in each of these cases pointed out that there was nothing in the legislation that indicated loss of jurisdiction was the necessary result of missing a statutory deadline for holding a hearing; indeed, the history and content of the Mental Disorder Amendments would appear to indicate the contrary. In Hutchinson the Board repeated the following paragraph from its reasons in Vos:

> Prior to the introduction of the Mental Disorder Amendments, the jurisdiction with respect to determining if, when, and under what conditions persons found "not guilty on account of insanity" or "unfit to stand trial on account of insanity" might be released into the community was assigned to the Lieutenant Governor of the Province. That jurisdiction was indeterminate and only came to an end if the status of the mentally disordered accused was changed as a result of death, court order (e.g. a finding of fitness to stand trial), the entry of a stay of proceedings, or the granting of an absolute discharge by the Lieutenant Governor. The Amendments removed this jurisdiction from the Lieutenant Governor and gave it to the Review Board of the province, which was to exercise this role according to procedures that were designed to establish a fair balance between the protection of the public and the protection of the rights, freedoms and liberty interests of the accused. The Amendments did add two specific new situations in which the jurisdiction over the accused would be lost, namely, where the court concludes that the Crown cannot adduce sufficient evidence to put an unfit accused on trial (section 672.33(6)), and the "capping" provisions (sections 672.64-66, as yet unpromulgated). Nowhere does the legislation say that the Review Board loses jurisdiction over the accused as a result of the expiration of an order, and to read such a limitation in would be inconsistent with the ongoing responsibility the Review Board has been given by the legislation to protect the public from potentially dangerous persons.

The Review Board went on to say in Hutchinson:

> Although the Review Board does not lose jurisdiction with respect to the accused if it fails to hold a review hearing within the prescribed time, this does not mean that the accused is left without a remedy in such situations. He/she may apply to the Board for a review hearing under section 672.82(1), or may apply to a superior court either to challenge the continued application of the expired disposition or to seek a prerogative writ to enforce his/her right to have a hearing before the Review Board. This approach protects not only the legitimate liberty interests of the accused but also meets the need to protect the public from dangerous persons.

It can be seen that in both of the above cases the Review Board stressed that applying the rules of statutory interpretation to the Mental Disorder Amendments necessarily involves not only a concern for the liberty interests of the accused but also the security interests of the public. This has also been stated by the courts on a number of occasions.

¶ 15 On appeal by the accused, Hutchinson, the Court of Appeal chose to avoid the jurisdictional issue by holding that the requirement in section 672.81(1) that there be an annual hearing was not applicable in his case because he was a dual status offender, who, at the date of the expiration of twelve months, was serving a sentence in prison. However, the Honourable Chief Justice McEachern, while agreeing with the majority, added that in his opinion "it would only be in the most unusual circumstances that an administrative failure to hold a hearing of the kind required in this case would result in a loss of jurisdiction, particularly in a case such as this one where public safety is involved."

¶ 16 The question that the Review Board had to decide at this time was whether this case fell within the limited, special category described by the Honourable Chief Justice in Hutchinson. After considering the evidence, the Review Board was unanimous in holding that it did not. While Mr. Hillaby described the index offences as being towards the lower end of the scale of seriousness, one could scarcely call the assaults that took place minor. The Review Board found that the first assault was both violent and unprovoked, involving blows and perhaps kicks to the head of the victim. The assaults on the peace officers involved extreme force being utilized by the accused in a manner that created the risk of serious personal injury to the police. The psychiatric evidence submitted to the court by Dr. P.H. Adilman indicated that the accused has a significant psychiatric history and suffers from hallucinations when off his antipsychotic medication. At the time of the index offences he had been off his medication for several months and was hearing voices. In Dr. Adilman's opinion the accused was so mentally disordered at the time that he should be found exempt from criminal responsibility (exhibit 6). Another psychiatrist, Dr. C. Kerr, wrote to the court that at the time of the index offences the accused was sufficiently ill (probably suffering from Schizophrenia) that he had been certified under the Mental Health Act (exhibit 4).

¶ 17 Has the accused suffered any substantial prejudice as a result of the delay of approximately ten months in the holding of the first disposition hearing by the Review Board? It is difficult to answer that question because the Board does not know what other evidence might have been adduced at the hearing had one been held by April 26, 1998 (i.e., within 90 days of the verdict). However, on the basis of the evidence as it existed at the date of the verdict, it is clear that the court found that he continued to pose

"a significant threat to the safety of the public", as that term has been interpreted by the British Columbia Court of Appeal in Orlowski (1992), 75 C.C.C. (3d) 138, and therefore he was not entitled to an absolute discharge. The court found that the least onerous and least restrictive appropriate disposition at that time was a discharge subject to conditions. In the opinion of the Board, this was the appropriate disposition to make at that time, given his history of mental instability and physical violence when off medication. It is likely, therefore, that even if the first Review Board hearing had been held within the time specified by section 672.47(3), the Board would not have given a less onerous and restrictive disposition to the accused than was given to him by the Court. As the disposition orders of the Board normally run for one year, it appears probable that if the first hearing had been held when it should have been held, the accused would have been subject to much the same type of order over the last ten months as he in fact was under at the date of the Board hearing. Therefore, the Board concludes that the accused did not suffer a substantial prejudice by remaining under the Court disposition due to the Board's delay in the holding his first disposition hearing.

¶ 18 To summarize, the Review Board holds: (1) that in this case, despite the use of improper nomenclature, the court made an order that had the effect of transferring jurisdiction over the accused to the Review Board; (2) that a failure by the Review Board to hold a hearing within the time limits specified by section 672.47 goes to procedure rather than jurisdiction and does not of itself result in a loss of jurisdiction by the Board; (3) that in "the most unusual circumstances" (which the Board does not find to exist in this case) the Board or court may find, after weighing the protection of the security of the public against the liberty interests of the accused, that the balance of fairness requires that the accused be released from the jurisdiction of the Review Board; and finally, (4) that the accused's remedies for failure to hold a hearing within the prescribed time limit are in the form of an application to the Board to have the hearing take place as soon as possible, or an application to a superior court either to challenge the continued application of an expired order or to seek a prerogative writ to compel the Board to do its duty.

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