Indexed as:

Hutchinson (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
Martin Lawrence Hutchinson

[2001] B.C.R.B.D. No. 13

British Columbia Review Board
F.A.V. Falzon, Chairperson, G. Laws and
J. Budden, Members

Heard: January 18, 2001.
Disposition: January 26, 2001.
Written reasons: February 12, 2001.
(79 paras.)

Appearances:

Martin Lawrence Hutchinson, accused/patient.
G. Barrière, counsel for the accused/patient.
P. Parnell, J. Broom and Dr. E. Zoffmann, for the hospital/clinic.
R. Levenson, for the Attorney General.

THE PANEL:--

I. Introduction

¶ 1 On January 18, 2001, a Panel of the British Columbia Review Board (F.A.V. Falzon, Alternate Chair, Dr. G. Laws and J. Budden) conducted a mandatory hearing at the Forensic Psychiatric Institute (FPI) to review the disposition of the accused, Mr. Hutchinson. The Panel reserved decision. On January 26, 2001, the Panel unanimously issued a custodial disposition, and indicated that written reasons would follow. These are those reasons.

¶ 2 In arriving at our disposition, the Panel reviewed Mr. Hutchinson's voluminous Review Board file (132 Exhibits prior to the hearing) together with the oral and documentary evidence tendered at the hearing. Considered reasons for decision have been prepared over time by previous Board panels: see

for example Exhibits 44, 52, 86, 112, 121. We nonetheless find it necessary, given the order we have made, to provide a fulsome procedural history.

II. The Court's April, 1993 verdicts

¶ 3 On April 2, 1993, the British Columbia Supreme Court found the accused not criminally responsible by reason of mental disorder (NCRMD) of aggravated assault. The act consisted of the violent pistol whipping of a 68 year old victim on September 28, 1992 in Mission, B.C.: Ex. 38, p. 6. The Court considered conflicting expert evidence about the accused's mental state at the time of the incident. In the end, the Court found that while the accused had consumed 11 glasses of beer over an extended period of time, the assault was a function not of inebriation but rather "insane automatism".

¶ 4 Dr. Ley, whose opinion the Court preferred, found the accused to suffer from fetal alcohol syndrome and mild retardation, attention deficit and hyperactivity disorder. Dr. Ley emphasized a history of neglect, physical and sexual abuse, all of which laid the groundwork for the accused's unconscious and involuntary reaction to an unwanted homosexual advance by the victim, which incident then resulted in the accused's "psychogenic amnesia".

¶ 5 Relying on this evidence, the Court found that the accused's background "created in him a subjective condition or weakness" that met the criteria for "disease of the mind" in the sense of being a malfunctioning of the mind having its source in his psychological or emotional makeup. The Court made a finding that, by reason of mental disorder, the accused was not criminally responsible for the offence of aggravated assault. The Court entered a conviction on the separate charge of theft of the motor vehicle the accused had taken after leaving the victim in the ditch at the roadside.

¶ 6 Immediately following the Court's verdict on the aggravated assault charge, the Court dealt with a separate criminal information. That information disclosed that within four days of the NCRMD incident, the accused sexually assaulted and terrorized a 14 year old girl in Kamloops. He had been drinking but did not appear drunk. No NCRMD defence was raised. The accused pled guilty. The Court found the following facts (Ex. 40):

> It was dark. She was unaware of the presence of the accused at this time but suddenly while she was in the playground she was grabbed around the shoulder area on top of her clothes by this accused. She was pushed down to the ground and she immediately cried out for her mother, but he rolled her over, pulled out a handgun, [and] told her to look at the gun. She refused to do so.
> And then he terrorized her by saying that if she said anything or screamed, he would kill her. He compounded the terrorization and traumatization of this young lass by then showing her photographs of females together with some photograph in a newspaper article of another female and advised this girl that they did not agree to do what he requested and that he had killed them. One can only imagine the emotional condition of this child.

¶ 7 Neither the accused's history nor the fact that the handgun was an excellent replica of a real gun diminished the reality that the accused "was fully cognizant of what he was doing" in respect of this offence. The Court imposed a sentence of 4 years, plus 18 months for the motor vehicle theft conviction.

¶ 8 At the time of the Court's 1993 verdicts, the accused had a criminal record dating back to 1983. There are, in addition to various property offences, two robbery convictions. Both involved the brandishing of knives. The 1987 conviction followed the robbery of a Mac's Milk Store at night using a butcher knife. He had been drinking. This conviction resulted in a one year jail sentence (Ex. 45). The 1989 conviction (Ex. 37) - which involved what Judge Nimsick noted was a threat with a knife causing "terror" to a victim - resulted in a two year jail sentence. Both convictions are serious offences demonstrating aggression and a risk of serious violence. Nor are these convictions the only indicia of risks of violence in the accused leading up to the verdicts of 1993: "Psychological Treatment Summary" (Ex. 77), at p. 2.

¶ 9 From the convictions alone (1987, 1989 and 1993) it is impossible not to observe the use of weapons for making threats to vulnerable persons, the use of alcohol and the escalation of both the threats and physical violence over time in the context of subjective emotional turmoil: Ex. 45.

III. Review Board dispositions during currency of criminal sentence

¶ 10 The Review Board's first disposition (June, 1993: Ex. 44) was one of custody. This rendered the accused a "dual status offender" - an offender who is at the same time subject to a sentence of imprisonment in respect of one offence and a custodial disposition under paragraph 672.54(c) in respect of another offence: Code, s. 672.1. The accused was placed to serve his prison sentence at the Regional Psychiatric Centre (Pacific) ("RPC") which is within a maximum security federal institution and is also a designated hospital for the purpose of Part XX.1 of the Criminal Code.

¶ 11 As a dual status offender, the Review Board was empowered to make a placement decision as between a hospital and a prison if it felt that the court's place of custody was inappropriate: s. 672.68. From 1993 to 1997, the Review Board did not disturb the placement at RHC, though it considered the issue on a number of occasions: April, 1994 (Ex. 52), December, 1994 (Ex. 65), July, 1995 (Ex. 65), July 9, 1996 (Ex. 74), November, 1996 (Ex. 86).

¶ 12 On January 29, 1997 (Ex. 91) the Review Board directed that the accused leave RHC and be detained at Mountain Institution or such other prison as may be determined from time to time by Corrections Canada. The Review Board concluded that a medium security institution was appropriate as providing "security at a level which permits a certain amount of freedom with the confines of the prison, but also ... where there is drug and alcohol abuse counseling that will inevitably be of benefit to him when he is released": Ex. 91, p. 5. Following this order, the accused was transferred to William Head prison.

¶ 13 On January 26, 1998 (Ex. 98), the Review Board maintained the accused's placement at William Head prison. While noting that he had made "great progress" since going to William Head, the Board also noted that he had "not been tried in the community under the type of situation where he would not necessarily have the supports and restraints he has had over the last several years...": p. 3. The Board maintained its custody disposition.

IV. October 1, 1998: criminal sentence expires: custody at FPI

¶ 14 The accused's criminal sentence expired on October 1, 1998. He thereupon ceased to be a "dual status offender". This meant that his Review Board custody order became the operative order.

¶ 15 Effective October 1, 1998, the accused was transferred directly to the Forensic Psychiatric Institute (FPI), a place to which he had requested transfer in the past: Ex. 65.

¶ 16 Mr. Hutchinson's detention at FPI was not ideal. He was frustrated by being in maximum security in the wake of greater liberty he had enjoyed at William Head. He requested, but was denied, a change in psychiatrist. He felt out of place among the mentally ill population. He had to defend himself following an unprovoked attack by another patient (evidently, the other patient got the worst of the encounter). In November 1998, he went AWOL into the community. Upon his return, he refused drug testing; he was placed in seclusion. He later told staff that if he had stayed away, he would have to have re-offended to support himself: Ex. 100, p. 4. He was frequently counseled on how to manage his behavior so that he would be cascaded to lower levels of security: Ex. 101. On December 29, 1998, Dr. Zoffman noted as follows (Ex. 101, pp. 3-4):

> Mr. Hutchinson is a man who suffers from probable Fetal Alcohol Syndrome. This has left him with diminished intellect. He is impulsive and aggressive and our recent experience with Mr. Hutchinson reveals that these factors have not moderated significantly. As stated in previous reports, Mr. Hutchinson's risk for future recidivism arises from a combination of factors. These include his Mixed Personality Disorder, his limited intellectual and coping skills and drug and alcohol abuse. Actuarial risk assessment indicates that he is at moderate high risk of reoffending violently if left to his own devices in the community. The only things that appear to be able to moderate this are intensive supervision and support.

¶ 17 On January 21, 1999, the Board continued its custodial disposition, emphasizing that "what we have to work towards is getting you out into the community but you have to work on it yourself. You cannot simply say that this is something that you are entitled to. You have to work with the team here in order to get progress": Ex. 102, pp. 5-6.

V. February 14, 2000: first conditional discharge order

¶ 18 Following a bridging order (Ex. 104), the Board held its next substantive hearing on February

14, 2000 at which time it granted the accused a conditional discharge.

¶ 19 The reasons for the February 14, 2000 order bear upon our present decision. The background to that order, and the reasons given by the Panel, are worthy of a moment's reflection.

¶ 20 Over the year leading up to the February 14, 2000 hearing, the accused did make efforts to work with the treatment team, which responded by increasing his liberties. However, when on March 20, 1999 Mr. Hutchinson's privileges were suspended for taking greater liberty that was granted, he reacted. On March 22, he phoned police claiming that he had shoplifting charges in order to return to the Corrections system. On March 25, a patient reported that the accused had threatened him, to which the accused claimed he was "just kidding". On March 27, the accused expressed the belief that his treatment team was motivated to keep him locked up in hospital. Hours later, the accused went AWOL. He was returned after turning himself into RCMP after being unable to tolerate an ankle sprain he sustained during the escape. He confirmed that, but for the ankle injury, he would not have come back: Ex. 107. He was later charged and convicted for unlawful escape and received 30 days custody, to be served at FPI.

¶ 21 In April, 1999, the accused expressed anger at his treatment team, seeing them as the cause of his lack of liberty, and taking their comments at earlier hearings about there being little to offer him at FPI "to mean that we were recommending that he should be locked up indefinitely."

¶ 22 By June, 1999, the treatment team was considering the accused's sister as a potential resource for community reentry. By the end of August, 1999, the accused had been the victim of two unprovoked physical attacks, which he handled with admirable restraint.

¶ 23 Having earlier resisted suggestions that he move to less restrictive parts of the hospital, the accused was eventually receptive to this in November, 1999 and consequently received increased liberties. By December 15, 1999, he had been transferred to Elm unit. While he had more privileges there, he also encountered difficulties with a peer group having significant mental illness features. In January 2000, Dr. Zoffman wrote as follows (Ex. 106, pp. 2-3, and p. 6):

> The plan is to continue to escalate his freedoms and privileges until he has community access.
> We may explore the use of our Cottages for community supervision. He will be encouraged to engage with a community drug and alcohol counselor in support his abstinence. He will be encouraged to find work or engage in work training. We will also support and encourage contact with the more prosocial members of his family. Martin is showing us in small ways that he can moderate and change his behavior when he chooses. This is a positive sign and we are hopeful that he will continue to behave in a manner that is in his own best interest...

> It remains to be seen whether the improved cooperation we have seen of late translates into any significant change in non-incarcerated behavior. His insight into his risk factors are limited at best as he does not seem to be aware that his plans for work, living situation and recreation are inherently unstable and stress-laden. He says he will remain abstinent but simplistically believes he will remain so because he said so. He is not aware how his social isolation and awkwardness contribute to his alcohol abuse and to date he refuses alcohol and drug counseling necessary to support continued abstinence.
> His sister, Sandy Hart, remains interested and involved, but it is too early to tell if Martin will avail himself with the supports offered (family visits, sports, church).

¶ 24 The February, 2000 Review Board Panel also had the benefit of an expert report by Dr. Joseph Noone (Ex. 108). In interviewing the accused, Dr. Noone noted that "he agreed with me that he is somewhat institutionalized and that a halfway house situation might be optimal in facilitating his rehabilitation to the community": p. 9. After describing Mr. Hutchinson's pride in his physical abilities (best free weight bench press of 270 lbs, dead lift of 400 lbs, free weight squat of 265 lbs), he concluded as follows:

> It would be in his best interests and not against the best interests of society for him to receive a conditional discharge subject to such conditions as the court or a review board considers appropriate to allow a period of perhaps four to six months of targeted discharge planning and gradual cascade to the community via a clearly defined program of escorted passes, halfway housing, vocational programming, including lifeskills training, with checks and balances to ensure continued sobriety.
> I would recommend that such conditions be clearly laid out by the Review Board as components of a conditional discharge and not be delegated in any way to the director of adult forensic psychiatric services. A continued custodial order would clearly be counter-therapeutic for Mr. Hutchinson and would continue the impasse that has occurred where he has essentially been warehoused for well over a year at FPI. On the other hand, separation of the policing role from the therapeutic role in the management of Mr. Hutchinson would allow Forensic Services to concentrate purely on a graduated cascade and community reintegration phase at which they can be quite skilled.

¶ 25 On February 14, 2000, the Board granted a conditional discharge, effective February 29, 2000. The order included weekly reporting and testing conditions for the first 3 months and thereafter as directed. With the accused's consent, it also included drug and alcohol counseling.

¶ 26 The Board's February 14, 2000 reasons reflected that Panel's serious dilemma, expressed as follows by the Panel Chair (Ex. 112, pp. 5-6):

> All the parties agreed that the preferable discharge plan would involve the use of either a forensic mental health boarding home or a "halfway house", such as is normally used by inmates being discharged from a correctional facility. Unfortunately, Mr. Hutchinson is, for all practical purposes, ineligible for either staged reintegration. Because his corrections warrant has expired, he not eligible for a corrections-based halfway house. Because of his past history of violent crime, especially sexual assault, he would likely not be accepted as a referral candidate to a forensic mental health boarding home. As a result, the Review Board is faced with the option of either continuing to detain Mr. Hutchinson in a hospital where there were no appropriate programmes available to him and where he was not a candidate for psychiatric treatment, or a discharge into the community without the staged, structured assistance of a boarding home or halfway house.

¶ 27 Noting the continuing existence of a significant threat, the Panel nonetheless felt that, given the dilemma before them, the purpose of Part XX.1 and interests of the accused which were not being served in custody, he ought to be given the chance to live in the community. The Panel delayed the conditional discharge date in order to give him an opportunity to find an apartment, apply for financial assistance and get settled. The Panel concluded (pp. 7-8):

> I repeat, this is not the optimal manner of discharge into the community. In making this order we realize its terms may strain existent hospital protocols. However, we believe the liberty interests of the accused demand that he be given the opportunity to prove to this Board and to his forensic psychiatric supervisors that he is able to live successfully and lawfully in the community.
> Finally, we wish to thank Gail Curtis and Sandy Hart, sisters of the accused, for their show of support for their brother. Based on their evidence at the hearing, we expect that they will provide such support as he needs, especially in the early weeks and months of his community reintegration to assist him with the activities of daily living, with setting up his apartment and with entering into recreational and social activities which will lower his chances of returning to a criminal lifestyle and substance abuse.

VI. Life under the conditional discharge

¶ 28 Immediately following his discharge, the accused went to live with his sister. On April 1, 2000, he moved into a basement suite in Abbotsford. He had found casual work as a labourer.

¶ 29 Unfortunately, the accused frequently did not comply with the Board's conditions to report to the Outpatient Clinic. Most of the time, he called the clinic and advised that the cancellation was due to work. On some occasions he simply did not report. He continued to express resentment at forensic's involvement in his life.

¶ 30 By early June, 2000, there were reports about his substance use from his outreach worker, his

sister and an FPI employee who saw him in a local bar. On June 9, 2000, breach proceedings were commenced. A warrant was issued for his arrest. On June 14, 2000, the Provincial Court issued an enforcement order, and ordered his release on conditions pending a Review Board hearing: Ex. 113. That hearing would take place July 19, 2000.

¶ 31 In the month between the Court's order and the Review Board hearing, the accused became increasingly confrontational, and upset by having to report to the Outpatient team. His family support, emphasized by the February 14, 2000 panel, was no longer present. On July 13, 2000, Mr. Parnell wrote as follows (Ex. 119, p. 3):

> Should the Review Board consider a continuation of Mr. Hutchinson's Conditional Discharge Order, I would like to highlight that this man's risk of reoffending has not diminished at all during our supervision, nor do I expect it to do so in the future. In fact, the risk of re-offending has actually increased with his lapse into abuse of alcohol and illicit drugs. He has shown himself to be an unwilling and unreliable participant in the supervision process, and states that this will not change in the future. With this in mind, it is my opinion that even the most intensive supervision would not alleviate his risk of re-offending; it would merely allow us to track his whereabouts on a regular basis. I also believe that imposing further restrictions may result in an exacerbation of an already volatile presentation.

¶ 32 At the July 19, 2000 hearing, Crown Counsel emphasized that the accused's track record does not support a finding that he can safely function in the community. The Review Board, however, found that he should be given a further chance to function in the community (Ex. 121, pp. 14-15):

> ...the Board does feel that Mr. Hutchinson's history of extremely violent offending behavior, his limited cognitive functioning which impairs his capacity to comply with conditions and to understand and experience remorse or responsibility for actions, his untreated attraction to alcohol and/or drugs which has always been considered a potential exacerbator in terms of his behavior, his recent overt and flamboyant non-compliance with his disposition as well as his limited response to community programming, all support the conclusion that Mr. Hutchinson continues to meet the threshold of significant threat and warrants the ongoing jurisdiction and oversight of the Board....
>
> This issue having been dealt with, the Board was obligated to consider which of the remaining alternative dispositions was the least restrictive and least onerous to the accused. We felt that under the conditions imposed on the record, the accused could be afforded a further opportunity to demonstrate that he can comply and function safely in the community. We adopt the comments made on the record that Mr.Hutchinson must be made to understand that his choices of whether to comply with our very flexible and straightforward disposition will have significant implications for his future.

> At the same time, without imposing these as conditions of the disposition, we strongly recommend to the Director that a certain amount of flexibility and discretion be imported into Mr. Hutchinson's management, supervision and reporting obligations, and that efforts be made to enable the accused to have access to the literacy aids to daily living, vocational, social and substance abuse counseling programs which would structure and occupy non-working hours and enhance his capacity to function in an ongoing and safe manner in the community.

¶ 33 It is obvious that the July 19, 2000 Panel, despite its finding of significant threat, strove mightily to give maximum possible scope to the liberty and reintegration interests of Mr. Hutchinson.

¶ 34 Regrettably, this second conditional discharge order did not assist to diminish the risks to the public. Earlier in the summer, the accused had taken up residence at the Garfield Hotel in New Westminster. The drug culture there did not assist the accused's efforts to remain alcohol and drug free. He was still not reporting as directed, often citing work commitments as the reason, through Mr. Parnell is skeptical that he was working on all such occasions.

¶ 35 By September, 2000, the accused requested readmission to FPI due to increasing stress and anxiety. He tested positive for cocaine, alcohol and marijuana. The Treatment Team agreed to request his return, but prior to that the accused changed his mind, phoning Mr. Parnell and advising that he was on the ferry to Vancouver Island. The following Monday afternoon, he turned up at FPI. Dr. Zoffman's September 27, 2000 report (Ex. 123) states:

> Since the time of his readmission Mr. Hutchinson seems to be a little bit more open to working with the management team at the Forensic Institute and the Outpatient Clinic. He admits to experiencing high levels of stress as a result of his struggles to maintain employment, a difficult living situation and his reporting obligations.
> His thinking around these issues is quite concrete. He feels that he must keep his legal status a secret from potential employers as he assumes that he will lose his work if he tells them what his regular absences are about.
> It should be noted that just 3 or 4 days ago Mr. Hutchinson obtained a job where his employer telephoned him at his home ward. The employer asked staff for an explanation of what "Elm" was and was told. In spite of this, Mr.Hutchinson was able to keep his employment. One sincerely hopes that this is a valuable object lesson for Mr. Hutchinson and may assist in reducing his stress in the future.

¶ 36 The "restriction of liberties" resulting from his return to FPI triggered a further Review Board hearing set for October 12, 2000. Pending that hearing, the accused once returned late, consumed alcohol twice but otherwise was compliant and received community leaves to obtain work. Dr. Zoffman noted as follows (Ex. 123):

> The treatment team (inpatient and outpatient) is actively searching for a supported housing situation which will accommodate Mr. Hutchinson. In the meantime we have plans to move him to the unsupervised side of Willingdon House. Mr. Hutchinson has been made aware of the ongoing demands for continuing with supervision, zero tolerance for drug and alcohol use and need to maintain a curfew. We are actively encouraging ongoing job search. We are not aware of the stability of his current work placement (Mr. Hutchinson is reluctant to have us approach his employer).
> Mr. Hutchinson has been started on a medication called Fluvoxamine. The purpose of this medication is a trial to see if his significant social anxiety can be moderated pharmacologically. ...
> The treatment plan outlined does involve increased risks for Mr. Hutchinson. The risk of increased stress, drug abuse, increased impulsivity and poor judgment are inherent in any management plan that involves community access. For the time being we feel we have some cooperation from Mr. Hutchinson and only time will tell if this is the beginning of a significant positive change.

¶ 37 On October 12, 2000, the Board (by majority) continued the conditional discharge order. Noting its past efforts to ensure flexibility for Mr. Hutchinson, it was not prepared either to find bad faith on the part of the Treatment Team or to micromanage his case. As noted by the majority (Ex. 125, pp. 6-7):

> It was Mr. Hutchinson's and his then counsel's choice to seek a verdict of NCRMD in 1993. Having availed himself of the benefits of this system, Mr. Hutchinson is required, as is any other similarly situated accused, to submit to its authority and to comport himself consistent with his legal obligations. Mr. Hutchinson must understand that in conducting a hearing of this nature this Board is not engaged in a process of "negotiating" conditions which satisfy his desires or requirements....Mr. Hutchinson needs to show that he can accept some personal responsibility rather than persisting in his current pattern of testing and projecting blame onto others when things do not go his way. Perhaps, as has been repeatedly said in the past, his limitations and personality features preclude the likelihood of such a change in demeanor.

¶ 38 On the three days following the Board's order, the accused tested positive for alcohol, after being suspected of drinking following day leaves to go to work. Needless to say, this use of alcohol heightened risk, thus reasonably triggering the Director's judgment that he should remain at FPI.

¶ 39 At a TPC meeting on October 23, 2000, he was angry at being so restricted. He was offered drug and alcohol treatment in hospital which he declined. He demonstrated no insight into his circumstances. He refused offered programs at FPI, other than fitness opportunities.

¶ 40 The restriction of liberties triggered yet another mandatory Review Board hearing. The Board's November 14, 2000 hearing was the accused's 4th substantive Review Board hearing in the year 2000. The Board concluded as follows (Ex. 127, p. 3):

> ...we take the view that there is no new evidence which has arisen since the October 12th hearing which would allow a majority of this panel to come to a different conclusion on the threshold issue of significant threat. The circumstances of the index offence and Mr. Hutchinson's career in the corrections and forensic systems have been canvassed. In deference this panel continues to be of the view that Mr. Hutchinson poses a significant risk justifying our ongoing jurisdiction. However, we are once again persuaded that hospitalization is not indicated. We, therefore, with some hesitation, restore the conditional discharge disposition effective December 1, 2000. That date is chosen in order to provide time for Mr. Hutchinson, with the support of his Treatment Team, to explore and obtain appropriate accommodation.

¶ 41 In the face of the many difficulties the accused experienced in the community, one cannot help but be impressed by the lengths to which Board panels have been prepared to go in deference to Mr. Hutchinson's liberty interests. Rather than imposing a custody order, the Review Board again continued the conditional discharge order. Rather than including the standard "return" clause, it took the exceptional step of removing the Director's usual discretion to order a patient returned to Hospital. The only way to return Mr. Hutchinson to FPI would be by Court order or further Review Board order.

¶ 42 The Review Board's order effectively gave Mr. Hutchinson a two week period to establish a new residence. During that period, an "exit interview" was held between the accused and the treatment team on November 23, 2000. At the interview, the accused expressed hostility toward Mr. Parnell, who inquired whether the accused's girlfriend was aware of his background. Dr. Zoffman describes the interview as follows (Ex. 132, p. 3):

> When Mr. Parnell questioned him about the relationship and if he had informed her of his background, Mr. Hutchinson went on to state that he hadn't told her where he has been or why. He became quite animated and hostile and spoke threateningly while staring at Mr. Parnell. "I'd be extremely pissed...you wouldn't want to get in touch with her...you don't want to do that". At this point he looked very tense and hostile. He was asked directly if this was intended as a threat and he replied "Just what I said ... you don't want to do that".
> During that interview he also stated that he deliberately flouted the Review Board conditions because he felt "they screwed with me".

¶ 43 With the assistance of forensic staff, he obtained residence in a private apartment in Mission effective December 1, 2000. Mr. Parnell agreed at the hearing that the apartment was extremely poor living accommodation. At the same time, Mr. Hutchinson had viewed the location and accepted it. Mr. Parnell agreed that had Mr. Hutchinson called him to discuss a change in residence given the nature of the living quarters, the Director would not have objected to a change somewhere better. Regrettably, the accused was not prepared to communicate with the Treatment Team over this matter. Instead, he saw the apartment as his ticket out of FPI. He dropped out of sight next day.

¶ 44 Following that first day, all attempts to contact Mr. Hutchinson failed. Contact by forensic staff with police, and ensuing media coverage, resulted in a call from the accused to Mr. Parnell on December 18 at the Surrey Outpatient Clinic, evidently following the advice of the accused's legal counsel. During the call, the accused advised Mr. Parnell that he had decided not to live at the Mission apartment, that he had confused the dates for the appointment and that he would not come in for testing because "it would be wrong to take alcohol".

¶ 45 Mr. Parnell gave evidence that, as the conversation moved on, Mr. Hutchinson advised Mr. Parnell that Mr. Hutchinson had phoned him at home, at night, on a number of occasions, and stated that "I didn't realize that you lived in [location]". He then asked why Mr. Parnell did not have a Christmas tree up. He said to ensure that Mr. Parnell had a gift for Mr. Hutchinson "when I call". Mr. Parnell gave evidence that he had in fact been receiving calls at night. On some occasions he was not home. On others, he would answer but no one was on the other end. Mr. Parnell gave evidence that the accused "said he considered visiting me and would do so in future". Mr. Parnell perceived the statements made to him by the accused as threatening and believes they were intended as threats.

¶ 46 The accused categorically denied this part of the conversation. We prefer the evidence of Mr. Parnell as being more credible. Both the detail in Mr. Parnell's account and his response to cross-examination questions implying that he was fabricating the story, together with our assessment of the accused's responses in the overall context of this matter, satisfies us that Mr. Parnell is telling the truth. While we are not aware of any criminal proceeding arising from Mr. Hutchinson's statements, we believe that the accused made the statements to Mr. Parnell, and that they were intended and reasonably perceived by Mr. Parnell as threatening.

¶ 47 Following the December 18, 2000 conversation, Mr. Parnell wrote to the police (Ex. 128) asking that they utilize their power under s. 672.91 of the Code to "arrest an accused without a warrant ... if the peace officer has reasonable and probable grounds to believe that the accused has contravened or willfully failed to comply with the disposition or any condition of it, or is about to do so". We are satisfied that the Director did not in any way request media coverage following this contact with police. For reasons not clear to us, media coverage (which we have not seen but which the Director advises was inaccurate and misleading) ensued.

¶ 48 The media coverage prompted employees of the Jolly Coachman Pub to call the Director in mid-December. The Director was informed that Mr. Hutchinson had been a regular customer at the bar and

was paying unwanted attention to female staff. He gave one of them a stuffed animal. However, there is no report of threatening behavior toward staff or complaints to police about him.

¶ 49 On December 21, 2000, the Review Board Chair issued a warrant to compel the accused's attendance at a hearing, under s. 672.85 and at the request of the Crown. On December 23, 2000, the Provincial Court issued its second enforcement order in 6 months. This time, the Court ordered the accused's detention at FPI pending our Review Board hearing, conducted January 18, 2001.

VII. Jurisdiction to hold the January 18, 2001 hearing

¶ 50 Counsel for the accused conceded that the Board had jurisdiction to conduct the January 18, 2001 hearing. Specifically, counsel conceded that a mandatory hearing was justified based on the Court's enforcement order: s. 672.94. He further conceded that the Review Board was required to hold a hearing following the Director's December 22, 2000 written request for a hearing (Ex. 133): s. 672.81(b).

¶ 51 As a matter of principle, counsel took issue with the Director issuing a "Notice of Change of Liberties" (Ex. 131) when there was no return clause in the Order. In our view, Mr. Broom adequately explained that the notice form was issued not to purport to act under a return clause, but rather to administratively notify the Board that the Court had ordered the accused returned to FPI and thus the Review Board needed to know about it. While s. 672.93(2) on its face requires the justice to cause notice of their order to be given to the Review Board, it appears that this task was left to FPI in practice. At worst, the Notice was redundant. It did not purport to be a "restriction of liberties" imposed by the Director and is not a legal basis for our hearing.

¶ 52 Counsel for the accused also took issue with jurisdiction arising from the Attorney General's oral request for a hearing, which request Mr. Hillaby put to Chairman Walter in a transcribed proceeding on December 21, 2000: Ex. 129, p. 3. While conceding that (a) the Code does not specifically require a written request, (b) the Attorney General may make "ex parte" requests under that section, and (c) there is no question of fact that a proper party has made the request in this case, counsel nonetheless argues that it would be contrary to "natural justice" for a hearing request to be made other than in writing.

¶ 53 Natural justice is by its very nature an individual right: the right of a person potentially affected by a state decision to notice and an opportunity to be heard. In respect of mandatory hearings triggered under s. 672.81(2), it is common ground that the Director may make his application ex parte. If such a request is made, the Review Board must hold a hearing. It has no discretion to refuse. As such, natural justice in advance of the Director making such application simply does not apply. The real question arising under s. 672.81(2) is whether the Director's application has truly and reliably been communicated to the Board. That is a question of fact, and there is more than one way for that fact to be established. Usually, writing is the easiest way. But there are other ways, such as an oral hearing by the Director, by his counsel, or even by the Attorney General who, as an officer of the Court, may presumptively be trusted to honestly convey a request by the Director for a mandatory hearing in extenuating circumstances. Should questions arise as to whether such a request has truly been made

following notice being given to the accused, it is of course open to any accused to question, upon receiving the notice of hearing, whether the condition precedent in s. 672.81(2) has been satisfied.

¶ 54 Unlike mandatory hearings held under s. 672.81, hearings held at the request of the accused or a party such as the Attorney General are discretionary: s. 672.82. In those circumstances, one can envision that, from a natural justice standpoint, an accused might at least in some cases have an interest in making submissions concerning whether a hearing should be granted at all. Again, however, that argument has nothing to do with the form in which the request is made as long as it is reliably received and communicated to the accused. There is a fundamental difference between the imperatives of reliability, and those of procedural fairness.

¶ 55 In sum, the relevant issue is not whether a request for a discretionary hearing is made orally or writing, but whether it is reliable, recorded in some fashion, and, where appropriate, disclosed to the other parties in advance of the decision to hold a hearing. In this case, we have a transcript of the request by Crown Counsel in person, which is at least as reliable as a letter. The statute was complied with.

VIII. Our decision to issue a custodial disposition

A. Relevant legal principles

¶ 56 The Court in Winko confirmed in the discharge of our statutory function, Review Boards are governed by the criteria set out in s. 672.54 of the Criminal Code. These provisions require the Board, in making a disposition, to take into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused and then to make the disposition least restrictive on the accused's liberty. Where the Board forms the opinion that the accused is not a significant threat to the safety of the public, the Board is required to grant the accused an absolute discharge.

¶ 57 A major insight provided by the Court in Winko, which represents a departure from the law as stated by the Court of Appeal, is that when the Board sits in its capacity from time to time, it must answer, in a decisive manner, the issue of significant threat. It cannot defer the question to a later date, as had previously been accepted as the more reasonable interpretation of the section by our Court of Appeal and by Justices Gonthier and L'Heureux Dube in the Supreme Court of Canada.

¶ 58 The need to be "decisive" having been articulated in Winko, it would be a fundamental error to confuse the need for decisiveness about risk with the question whether harm will certainly happen. We are doing our utmost to responsibly predict the future, and by definition, questions about future risk cannot be answered with certainty or empirical precision. If they could, these inquiries would not be about "risk". Consequently, while doubt about the question of "significant threat" entitles a person to an absolute discharge, doubt about the question whether a criminal act will certainly occur does not entitle a person to an absolute discharge. Even in the face of a finding of significant threat, there is always doubt

about whether something will occur. A finding of significant threat does not demand omniscience, psychic foresight and the absence of doubt. Such a requirement would be entirely unrealistic and a serious misreading of the judgment and the legislation.

¶ 59 As recognized by the Supreme Court of Canada, the test we have to concern ourselves with is concerned with potential dangerousness and in particular, whether the accused poses a significant threat to the safety of the public. In arriving at that conclusion, stereotypical notions that mentally ill persons are inherently dangerous must be avoided. There is no presumption that an NCRMD accused is a threat and no onus on any such person to prove otherwise. The Review Board's job is to make that assessment on all the facts within our inquisitorial process, with the benefit of our experience and skills, and on an individualized basis. In making our decisions, we must take into account and resist reported tendencies toward the over-prediction of dangerousness.

¶ 60 At the same time, the Court in Winko made clear that it was not suggesting that Courts and Review Boards apply the test in a fashion that would expose the community to undue threats to its safety and well-being. To the contrary. Where the Board opines that there is a real risk to public safety, no absolute discharge can follow. One must assiduously avoid the over-prediction of dangerousness. At the same time, we cannot be so timid in forming our opinions as to wait until someone has been harmed before forming a positive opinion about significant threat, as that would defeat the very purpose of the risk prediction exercise. The prediction of risk, by its very nature, has uncertainty attached to it. The best the Board can do is to undertake the exercise with professional integrity, based on the evidence before us rather than speculation, and with high regard for the liberty interest of the accused. It is in the nature of things that, on such difficult questions, Review Boards members will from time to time have different opinions. Such is the strength of the three person quorum requirements in the Criminal Code, and the provision for periodic reviews.

¶ 61 On the latter point, we reiterate the Court's caution that an opinion of significant threat must be based on the evidence rather than speculation. It must be significant in the sense that there must be a real risk of physical or psychological harm to individuals in the community that is serious in the sense of going beyond the merely trivial or annoying. The potential anti-social conduct of concern must be criminal in nature. There must be a foreseeable and substantial risk that the accused would commit a serious criminal offence if discharged absolutely. In making these determinations, we must have regard both to the interests of individual liberty and public protection. If the Review Board determines that the accused is a significant threat, it must, in choosing between custody and a conditional discharge, make the disposition least intrusive to the accused in light of the preamble factors.

B. Application of the facts to the law

¶ 62 We have no hesitation in concluding that, if discharged absolutely, the accused would represent a significant threat to the safety of the public. This has been the conclusion of Review Boards since 1993. It is, we find, a sound conclusion today.

¶ 63 Both the 1993 index offence and the sexual assault are extremely serious acts. They demonstrate the actions the accused is capable of when, in light of the vulnerabilities that stem from his organic functioning and his background, he finds himself in circumstances of emotional turmoil and/or significant stress. When one considers these actions, particularly the sexual assault conviction, in light of his criminal record, one sees from the convictions alone that there was no period of more than two years without some conflict with the law; in three of the more recent offences, we see the use of weapons for making threats to vulnerable persons, the use of alcohol which we find would have had the effect (at a minimum) of decreasing his inhibitions, and the escalation of both threats and physical violence in the context of subjective emotional turmoil: Ex. 45.

¶ 64 Among the many experts that have reviewed his case, there is universal agreement that, left to his own devices, the accused would function poorly in the community. One looks to family supports and finds that the supports that had materialized prior to the February, 2000 hearing are now absent. He does not appear to have close and loving friends. He readily projects blame for problems onto others. His ability and/or willingness to analyze himself appears limited. His reaction to Mr. Parnell very recently resulted in the making of threats which, in and of themselves, constitute "harm" as defined in Winko. The accused remains extremely sensitive to what he perceives as criticism. He lacks significant insight into his personality style.

¶ 65 Significantly, he has recently returned to substance use - predominantly alcohol, but also drugs as well. Whether or not he has been legally "intoxicated" during various crimes, substance use has undeniably figured prominently in his criminal history. He has turned to alcohol and drugs in the face of not one or two but repeated Review Board dispositions throughout the year 2000 discharging him into the community. As the Review Board wisely anticipated in 1996 (Ex. 74) "the real test of Mr. Hutchinson's resolve will not occur until he is back on the street".

¶ 66 He was back on the street for many months in 2000. The facts above speak for themselves. He did not fare well. For this man, the use of alcohol is a very significant risk factor. In our view, it is not a satisfactory answer for him to say that he does not believe he needs such counseling at FPI because he took two courses in prison and that drugs and alcohol are not a problem for him in FPI.

¶ 67 We do not wish to leave the impression that there have been no positives or that the accused is a "bad" man. He has had a difficult background. He does not appear to have strong emotional connections with any positive role model. The accused did well within the carefully controlled freedom of William Head prison. The accused has shown admirable restraint on two occasions when he could have acted more violently at FPI. He has looked for and found occasional work in the community. He likes to work hard and can be a hard worker. He has returned himself after one of his AWOLS (but for the bad ankle, he would not have come back from the other). With the passage of time, he seems to be learning that he cannot just "will" old patterns to go away.

¶ 68 We take to heart the Court's important reminder in D.H. v. Attorney General of British Columbia, [1994] B.C.J. No. 2011 (C.A.) that review board should adopt a "caring and compassionate

approach" to accused persons. While Mr. Hutchinson may find it difficult to accept, we find this attitude demonstrated throughout the many creative orders the Review Board has made in his case, both before and after the expiry of his prison sentence.

¶ 69 The fundamental reality before us, however, is that he would be an unacceptably high risk to the community if discharged at this time. Our conclusion on this point is not based on his "challenging" attitude toward supervision. If discharged absolutely, we find that he would not have either the internal or external supports in place to return to anything other than his previous recipe of factors - isolation, drinking, doing drugs and interacting with undesirable elements - that typified so much of his past serious criminal activity. In our professional judgment, the prediction of serious harm to others in this context is not speculation; it is real, serious, foreseeable and substantial. The circumstances we have seen over the past months are not dissimilar from those that prevailed in the early 1990s, prior to the index offence and the sexual assault. In our view, it would be an improper exercise of our legal mandate to order the accused discharged absolutely.

¶ 70 Beyond a very superficial analysis, the situation before us is very different from that which prevailed in D.H. v. Attorney General of British Columbia, supra. In that case, the Court specifically noted that "he has no history of assaultive behavior": para. 7. In this case, there is a history of serious violence and threats of violence, which we find to be a significant risk factor. In D.H., the Review Board ordered a conditional discharge over the treatment team's "strong recommendation" of an absolute discharge which was an "about face" for the team from previous hearings: para. 15. In this case, there has also been an "about face", but it is in the opposite direction, based on the Treatment Team's strong view that the events of the past year and lack of structure in the community has increased the risk of offending. In D.H., there had been no behavior in or out of hospital that would constitute a significant threat to the safety of the public: para. 17. In this case, the threatening statements to Mr. Parnell, and the substance use, represent conduct evidencing a significant threat to the public. If, as in D.H., it were simply a matter of the accused having "difficulty reintegrating into the community" (para. 20), we would have no hesitation in granting an absolute discharge. But that is not this case.

¶ 71 This leaves the question of disposition. The test we have to apply here is what disposition most minimally infringes the accused's interest in a fashion consistent with public protection. In considering this issue, we have instructed ourselves in accordance with the Court of Appeal's findings in British Columbia (Forensic Psychiatric Institute) v. Johnson, [1995] B.C.J. No. 2247 (C.A.) at paras. 50-54:

> [T]he Review Board is charged with the responsibility of crafting conditions which are relevant to the special and differing needs of each accused person. The principal object of those conditions is to achieve the maximum protection for the public safety with a minimum degree of interference with the accused's liberty, and not simply to enhance the accused's treatment, although in many cases ... the two considerations will be inextricably linked.

> At the same time, Parliament recognized that the formal Review Board procedure may not be adequate to respond to changing circumstances in all cases.... [T]he progress of treatment may be such that liberty restrictions can safely be reduced without engaging the full formality of the hearing process.
> Thus, in many cases, it will be appropriate to give the Director a discretion to increase restrictions on the liberty of an accused person in the event it becomes apparent that a change is required to protect the safety of the public. At the same time, and again in keeping with the scheme of Part XX.1 generally, the Director may be given a discretion to lower any restrictions placed upon the accused's liberty by the Review Board.
> The discretion which may be delegated to the Director under s. 672.56 is an important vehicle through which the Review Board can achieve its mandated purpose. It was not intended to, and must not, be used as a means by which the Director can circumvent a conditional discharge order and keep the accused detained in hospital, as though a custody order had been made under s. 672.54(c). Nor must it be used as a means by which the Review Board can delegate to the Director its paramount responsibility for ensuring that a proper balance is maintained between the liberty interests of an accused and the safety interests of the public.

¶ 72 Hard experience leads us to the candid recognition that the Board's conditional discharge dispositions have not meaningfully addressed the serious risk to the public posed by the accused. Nor, for that matter, have they been meeting the accused's needs. The model of independent community living and Outpatient reporting has, quite bluntly, caused unacceptable risks to the public. Much of the time, the accused failed even to report to the Outpatient team. Family supports, present when the panel made its February, 2000 decision, have ruptured. The most serious risk factor - drug and alcohol use - has only become more acute, in contrast to the almost total compliance able to be achieved on this front when the accused was in hospital.

¶ 73 Does this leave us in the predicament faced by the February, 2000 Review Board, of detaining an accused in hospital with no hope for community access? No it does not.

¶ 74 Based on the evidence before us, we are satisfied not only that the accused will have access to useful and productive resources at FPI if he genuinely chooses to make use of them (e.g., schooling, greenhouse, drug and alcohol counseling) but that supervised forensic community resources (cottages, Willingdon House) would be available for him in the event that he demonstrates the willingness and responsibility to exercise them. A staged re-entry into the community has for some time been the Treatment Team's management plan. Dr. Zoffman has specifically identified Willingdon House as a springboard for community placement. On the evidence before us, it is simply not the case - as the February, 2000 Panel found matters to be for them - that he would never qualify for a community placement.

¶ 75 After a year of conditional discharge failures which have undermined both the accused's

interests and the community's safety, we believe that it is time to take the path recommended by the Director. We believe that it is the only path left that will at once protect the community and allow for the successful reintegration of the accused into society.

¶ 76 Given the experience over the past year, we are not prepared to direct arbitrary days of the week for unescorted day leaves to the community. Unescorted access - together with overnight leaves up to 28 days away from FPI - is permissible under our order, but it will be subject to the Director's assessment of the risk he then poses to the public should such leaves be granted.

¶ 77 In making this order, we recognize that we may only be able to achieve the public protection objective should the accused continue the attitude that he is owed either an "absolute discharge or an apology" for his circumstances. It is in the accused's hands to take advantage of the ordinarily liberal system at FPI to obtain cascading privileges. If he does not, and instead chooses continued hostility, resentment and suspicion, he will find himself in a difficult predicament and may indeed find himself "no further ahead" than he is today. We sincerely and earnestly hope this will not be the case. However, neither the Criminal Code nor Winko authorizes us to sacrifice public protection because an accused is unwilling to interact with a treatment team.

¶ 78 We are compelled to observe that a principal theme of the accused's evidence was that his treatment team dislikes him, has no interest in assisting him and only responds to legal action (in the form of appeals) on his part. In the evidence before us, we have found no evidence of bad faith on the part of the Treatment Team. While they have at times been strict with Mr. Hutchinson, they have done so out of good faith professional judgment in a very difficult case. Whether or to what extent, for therapeutic or administrative reasons, the Director intends to maintain or change the existing treatment team is not a matter for us. Based on the evidence before us, we are not prepared to manufacture conditions based on a mistrust of the Treatment Team.

¶ 79 We fully expect that, true to its word, the Treatment Team will be flexible and continue to make cascading privileges available to Mr. Hutchinson as he exercises them responsibly. Manifestly, it would be ideal if Mr. Hutchinson could move quickly into the less supervised areas of FPI with opportunities for greenhouse work, schooling and counselling, and thus be given a chance to function in a fashion akin to how he was doing at William Head. However, given the experience of the past year, we are not prepared to dictate the pace of those privileges or to impose enforced periods of liberty without regard to circumstances. This is a matter for the Director to administer, taking into account the risk he poses to the public at any particular time.

F.A.V. FALZON, CHAIRPERSON

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