

CA020369

Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

THE DIRECTOR, FORENSIC PSYCHIATRIC INSTITUTE

PLAINTIFF

(APPELLANT)

AND:

DAWN MARGARET JOHNSON and

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

(RESPONDENTS)

Before: The Honourable Mr. Justice Wood

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

M. P. Acheson Counsel for the Appellant

D. J. Nielsen Counsel for the Respondents

Dawn Margaret Johnson

W. K. Kinash Counsel for the Respondent

Attorney General of British Columbia

Place and Date of Hearing: Vancouver, British Columbia

18 August, 1995

Place and Date of Judgment: Vancouver, British Columbia

31 October, 1995

Written Reasons by:

The Honourable Mr. Justice Wood

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

No. CA020369

Vancouver Registry

Columbia

The Director, Forensic Psychiatric Institute

v.

Dawn Margaret Johnson and

Attorney General of British Columbia

REASONS FOR JUDGMENT OF

THE HONOURABLE MR. JUSTICE WOOD

I

1. The Director of the Forensic Psychiatric Institute (the "Director") appeals from an order made pursuant to s. 672.54 (b) of the **Criminal Code** by the British Columbia Review Board (the "Review Board"), dated 3 May 1995, conditionally discharging Dawn Margaret Johnson without delegating authority to the Director to control her rights of unescorted access to the community. Ms. Johnson cross-appeals, seeking either an order of absolute discharge, pursuant to s. 672.54(a), or a conditional discharge order with legally enforceable conditions.

2. The appeal, as initially presented, was based on an allegation of factual error; namely, that the majority decision of the Review Board not to delegate authority to the Director to control Ms. Johnson's community access was unreasonable or not supported by the evidence. The cross-appeal alleged, alternatively, either that the Review Board made errors of both fact and law in arriving at its decision not to order that Ms. Johnson be discharged absolutely, or that the conditional discharge order formally signed and entered was not in accord with the reasons of the majority insofar as the conditions were vague and uncertain to the point that they permitted the Director to apply the conditional discharge order as a custody order. As argument before us progressed, it became apparent that the principal question which all counsel wished this court to resolve, and which involves a question of law alone, is whether a discharge order, made pursuant to s. 672.54(b) of the **Criminal Code**, can be limited by conditions which have the effect of confining the accused within the Forensic Psychiatric Institute.

II

3. Ms. Johnson, who is now 31 years of age, was first diagnosed as a paranoid schizophrenic during a 3½ week hospitalization in 1985. She was further hospitalized for 2

months at Maple Ridge and University Hospitals in 1987, for 3 weeks at University Hospital in 1991, and for 2½ months at Maple Ridge and Riverview Hospitals ending in September of 1992. On each of these occasions she was committed under s. 20 of the **Mental Health Act** and discharged into the care of her family after treatment with various medications led to an improvement in her condition.

4. The second, third and fourth committals were provoked by Ms. Johnson's failure to maintain her prescribed medication program, a failure which resulted in the deterioration of her mental health and led to agitated and threatening behaviour. The clinical records associated with each of these admissions record a poor prognosis due to her apparent inability or unwillingness to comply with her treatment regime, as well as a lack of cooperation on the part of her family with whom she has lived for all but a very short period of her life.

5. While attending at Maple Ridge Mental Health Centre as an outpatient on 23 November 1992, for the purpose of receiving her bi-weekly injection of medication, Ms. Johnson physically assaulted a nurse. This incident eventually resulted in a formal charge of assault under s. 266 of the **Criminal Code**, the first of what are referred to in the vernacular as the "index" offences.

6. On 31 January 1993, Ms. Johnson was committed to Maple Ridge Hospital after attempting to assault her father. On 5 February, while still in hospital, she again assaulted a nurse who sustained injuries to her head, neck and back which required medical attention. This incident also resulted in a criminal charge of assault and is the second of the "index" offences.

7. On 8 February, Ms. Johnson was transferred to Riverview Hospital. The admission records describe the nature of her delusional thought processes and record further acts of violence:

On the basis of her delusional ideas she has assaulted four people recently. She assaulted her mother [sic] prior to

admission, and at Maple Ridge Hospital she assaulted a nurse who was doing one-to-one observation on another patient because she thought that nurse was deliberately bothering the patient, and in some ways interfering with the other patient's mind. She felt that it was the nurse's intention to "get me next" (as told to me in an interview on March 23rd, 1993), and that the nurse definitely "did not have good intentions."

Since arrival at Riverview Hospital she has eloped and assaulted a female police officer on return from that elopement, and approximately 10 days ago assaulted a number of our cleaning staff...At the present time she still feels justified in her behavior and still has delusions about it.

8. Charges with respect to the "index" offences were laid in March of 1993. On 2 August, Ms. Johnson left Riverview Hospital without authority. Her whereabouts were described as "unknown" when she was formally discharged from that institution 2 weeks later.

9. Although her whereabouts were officially "unknown", it would appear that Ms. Johnson was in fact living once again with her family. On 31 August, she appeared in Provincial Court in answer to the two assault charges. At that time, the court ordered a psychiatric assessment pursuant to s. 672.11(a) of the **Criminal Code**, to determine whether she was fit to stand trial. In his report to the court, Dr. James Burns confirmed the diagnosis of paranoid schizophrenia. He noted that Ms. Johnson had no insight into her condition and regarded all attempts at treatment as assaults upon her. In his view, the possibility of treatment on an out-patient basis depended on her willingness to comply with her treatment regime. Failure to comply with that regime would lead to "a mounting level of aggression" and the need for prolonged treatment.

10. On 16 November, Ms. Johnson was found unfit to stand trial. It would appear that the court then held a disposition hearing pursuant to s. 672.45 of the **Criminal Code**:

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.

As a result of the disposition hearing, Ms. Johnson was discharged into the community.

11. At a hearing held 7 February 1994, pursuant to s. 672.48, a Review Board found Ms. Johnson fit to stand trial and ordered that she be sent back to court so that a verdict could be rendered. That was done on 29 March, at which time she was found not criminally responsible by reason of mental disorder in respect of the two "index" offences.

12. The court then held a disposition hearing, again pursuant to s. 672.45, following which Ms. Johnson was given a conditional discharge, pursuant to s. 672.54(b):

672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking 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, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged

subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

13. The conditional discharge order was subject to the following conditions:

1. That she keep the peace and be of good behaviour;
2. That she continue to reside with her parents; and
3. That she continue to see her mental physician or psychiatrist as required or directed.

14. When a court, acting pursuant to s. 672.45(2), makes a disposition under either paragraph (b) or (c) of s. 672.54, s. 672.47(3) requires that the Review Board hold a hearing within 90 days to "make a disposition in respect of the accused". Thus, on 20 June 1994, a hearing was held, following which the Review Board made an order, the relevant terms of which were as follows:

THE REVIEW BOARD ORDERS that the accused Dawn Margaret [sic] JOHNSON be discharged, subject to the following conditions:

THAT she be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services (Director) for the purpose of ensuring that an effective plan for her assessment, counselling and rehabilitation, as well as for assisting her in her treatment, be developed at the earliest practicable time, as deemed appropriate by the Director;

THAT she reside in such place in the Province of British Columbia as deemed appropriate by the Director and not change her place of residence unless otherwise permitted by the Director;

THAT she report to the Adult Forensic Psychiatric

Services Outpatient Clinic at 307 - 300 West Broadway Avenue, Vancouver at least once a week as well as at any other time and place authorized by the Director to assist in monitoring her mental condition and her compliance with this order;

THAT she shall attend at any other time and place authorized by the Director, to include returning to the Forensic Psychiatric Institute, for the purpose of assessment, counselling, rehabilitation, as well as for assisting her in her treatment;

THAT she shall not acquire, possess or use any firearm, explosive or offensive weapon;

THAT she shall keep the peace and be of good behaviour;

THAT she present herself before the British Columbia Review Board when required by the chairperson;

THAT a review of this disposition be made no later than the 20th day of October, 1994.

15. As a result of the foregoing order, Ms. Johnson continued to live at home with her family. On 20 September, she assaulted her mother, who sought refuge by locking herself in the bedroom and telephoned the Maple Ridge Outpatient Clinic for assistance. A nurse kept Ms. Johnson talking on the telephone until the police were able to attend. During this conversation Ms. Johnson expressed numerous paranoid ideas. She also threatened to shoot the nurse when she realized the police had been called. As a result of this breach of the terms of her conditional discharge order, Ms. Johnson was apprehended and brought before a Justice of the Peace. She was released the following day after an out-of-custody Assessment Order was made for the purpose of determining whether she was unfit to stand trial due to mental disorder and/or whether she was suffering at the time from a mental disorder that would render her not criminally responsible for her conduct.

16. On 22 September, Ms. Johnson was brought to the

Outpatient Clinic of Maple Ridge Hospital by her father, where she was assessed by a psychiatrist. At that time, she was requested to return to the Forensic Psychiatric Institute under the authority of the term of the order of 20 June requiring her to:

... attend at any other time and place authorized by the Director, to include returning to the Forensic Psychiatric Institute, for the purpose of assessment, counselling, rehabilitation, as well as for assisting her in her treatment;

Ms. Johnson refused to comply with this request. This precipitated another appearance before a Justice of the Peace for breaching the terms of her disposition order, as well as yet another out-of-custody Assessment Order, which was made on 23 September.

17. On 27 September, the Director requested a special hearing before the Review Board to consider Ms. Johnson's case pursuant to s. 672.81(2)(b) of the **Criminal Code**:

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a).

(2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend

(a) has increased the restrictions on the liberty of the accused significantly for a period exceeding seven days; or

(b) requests a review of the disposition.

(3) Where an accused is detained in custody pursuant to a disposition made under paragraph 672.54(c) and a sentence

of imprisonment is subsequently imposed on the accused in respect of another offence, the Review Board shall hold a hearing to review the disposition as soon as is practicable after receiving notice of that sentence.

18. At this hearing, which was held on 28 September, Ms. Johnson appeared without counsel. During the course of the hearing she was certified under s. 20 of the **Mental Health Act** and committed to the Forensic Psychiatric Institute.

19. As required by the terms of the conditional discharge order of 20 June, a review hearing had already been scheduled for 17 October. This hearing was adjourned for one month at counsel's request. On 18 November, following a two day hearing, the Review Board made the following conditional discharge order:

THE REVIEW BOARD ORDERS that the accused Dawn Margaret JOHNSON be discharged subject to the following conditions:

THAT she shall be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services (Director) for the purpose of ensuring that an effective plan for her assessment, counselling and rehabilitation, as well as for assisting her in her treatment, be developed at the earliest practicable time, as deemed appropriate by the Director;

THAT she shall reside in such place in the Province of British Columbia as deemed appropriate by the Director and that she remain resident at such place unless otherwise permitted by the Director;

THAT where her approved place of residence is within the geographic boundaries of the Forensic Psychiatric Institute or at the Hillside Unit or the cottages on the grounds of the Riverview Hospital under the administration of the Director, the accused has the right to unescorted access to the community, however the imposition of any condition under which that right is to be exercised, including a requirement that access be supervised in a manner considered appropriate by the Director, is delegated to the Director pursuant to s.672.56

(1), with liberty to apply in the event the delegated authority is considered to be exercised in an unduly restrictive manner;

THAT where her approved place of residence is beyond the geographic boundaries of the Adult Forensic Psychiatric Institute she shall attend and report as directed by the Director to assist in monitoring compliance with this order;

THAT she shall attend at any other time and place authorized by the Director, to include returning to the Forensic Psychiatric Institute, for the purpose of assessment, counselling, rehabilitation, as well as for assisting her in her treatment;

THAT she shall keep the peace and be of good behaviour;

THAT she shall present herself before the British Columbia Review Board when required by the chairperson thereof;

THAT a review of this disposition shall be held no later than the 30th day of May, 1995.

(emphasis added)

20. The highlighted paragraph represents the only substantial change from the conditions attaching to the order of 20 June. This provision was added pursuant to s. 672.56:

672.56 (1) A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b) or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.

(2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall

(a) make a record of the increased restrictions on the file of the accused; and

(b) give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board.

21. Notwithstanding the fact that she was subject to a conditional discharge order, rather than a custody order under s. 672.54(c), Ms. Johnson remained confined to the Forensic Psychiatric Institute without any access to the community, supervised or otherwise, up until 3 May 1995 when she appeared before the Review Board for the purposes of the disposition review called for in the final condition of the order of 18 November.

22. The evidence led on behalf of the Director at the review hearing on 3 May included the written reports of Dr. M. T. Dilli, Ms. Johnson's treating psychiatrist, Ms. Krista Field, her Case Management Coordinator and Mr. David Westell, a psychiatric social worker. Ms. Field also gave *in vivo* evidence before the Review Board.

23. Ms. Field's evidence recorded a number of incidents between the November hearing and the time of her testimony in which Ms. Johnson became agitated or angry and threatened other patients and staff members with bodily harm. On one occasion, she assaulted a staff member and continued to make threats against her even after being placed in seclusion. Frequent periods of seclusion were ordered, as well as isolation in something called a "side room", which may be either open or closed, and which is apparently intended to remove the patient from the company of others while she regains her composure.

24. Ms. Field also testified that, on that very morning, Ms. Johnson was involved in an altercation during which another patient was burned with a cigarette and had hot coffee spilled on her.

25. In Dr. Dilli's opinion, Ms. Johnson continues to suffer from paranoid schizophrenia and her behaviour problems are primarily a product of that unstabilized mental illness. He noted that Ms. Johnson has no insight into her mental disorder and remains paranoid and greatly influenced by her psychotic symptoms. Her behaviour becomes unpredictable whenever she becomes slightly frustrated. In his opinion, her poor record of compliance with her treatment regime is one of the main reasons for her ongoing difficulties. His report, which recommended a continuation of the conditional discharge order with the same delegated authority to the Director as that found in the order of 18 November, contained the following conclusion:

Ms. Johnson is suffering from a debilitating mental illness of long-standing - a type of schizophrenia which sadly does not respond to treatment easily. Nevertheless the members of her treatment team are determined to continue reviewing her regularly and adjusting her medicines as well as encourage her to participate in various rehab programs in this hospital in the hope that she will be eventually sufficiently stabilized to be tried in the community in due course.

Ms. Johnson remains a potential significant threat to the public safety specifically towards her family members and professionals more so than others in the community.

26. Mr. Westell noted that Ms. Johnson's illness has been complicated by the fact that she and her parents have not been accepting of help from the mental health professionals who have treated her. He warned:

If Dawn Johnson were discharged into the conditions which existed prior to her admission, her mental state would again become unknown to her treatment team, and there would be no help for her until another crisis arose, possibly in the form of an assault.

27. The Review Board concluded that Ms. Johnson should not be discharged absolutely under s. 672.54(a), because they

were unable to come to the opinion that she was not a significant risk to the safety of the public. While all agreed that a conditional discharge was the most appropriate disposition, they disagreed as to the conditions which should attach to that order.

28. The majority of the Review Board expressed concern over the fact that Ms. Johnson had not enjoyed any community access since her admission to the Forensic Psychiatric Institute in September of 1994. In separate reasons, each expressed the view that the amount of restriction she was experiencing in hospital was likely to be counter-therapeutic. Their decision resulted in the order from which the appeal and cross-appeal are brought:

THE REVIEW BOARD ORDERS that the accused Dawn Margaret JOHNSON be discharged subject to the following conditions:

THAT she shall be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services (Director) for the purpose of ensuring that an effective plan for her assessment, counselling and rehabilitation, as well as for assisting her in her treatment, be developed at the earliest practicable time, as deemed appropriate by the Director:

THAT she shall reside in such place in the Province of British Columbia deemed appropriate by the Director and that she shall not change her place of residence unless permitted by the Director;

THAT where her approved place of residence is beyond the geographic boundaries of the Adult Forensic Psychiatric Institute, the D.H.U./Hillside Unit or the cottages on the grounds of the Riverview Hospital under the administration of the Director, she shall attend and report at such time and place as required by the Director to assist in monitoring her mental condition and her compliance with this order;

THAT she shall attend at any other time and place required by the Director, to include returning to the Forensic

Psychiatric Institute for the purpose of assessment, counselling, rehabilitation, as well as for assisting her in her treatment;

THAT she shall keep the peace and be of good behaviour;

THAT she shall not acquire, possess or use any firearm, explosive or offensive weapon;

THAT she shall not use any drugs except as approved by a medical practitioner;

THAT she shall present herself before the British Columbia Review Board when required.

29. While the Chairperson agreed that Ms. Johnson's continued confinement to the Forensic Psychiatric Institute was not in keeping with the spirit of the order made 18 November, he felt she should remain in the institution, subject to the discretion of the Director to decide when she could be granted community access. He made it clear that he expected Ms. Johnson to enjoy frequent community access. He would have added a condition delegating authority to the Director to decide whether she needed supervision during her community access visits, together with a condition requiring that she be entitled to at least one community access every seven days.

30. During the hearing of the appeal we were advised that, notwithstanding the change in conditions effected by the majority decision of the Review Board on 3 May, Ms. Johnson has yet to enjoy any community access. It would appear that her continued confinement to the Forensic Psychiatric Institute results from the exercise by the Director of the discretion, vested in him by the second condition noted above, to determine the appropriate place in which she shall reside.

III

31. Because of the nature of the arguments raised by the appeal and the cross-appeal, and, in particular, because of the

somewhat unusual course which the argument took during the hearing of the appeal, it will be convenient to deal first with the first ground of cross-appeal in which it was argued that the Review Board erred by refusing to grant Ms. Johnson an absolute discharge. I will then turn to the issue which both counsel asked us to determine; namely, whether a conditional discharge order under s. 672.54(b) may contain conditions which have the effect of confining an accused to the Forensic Psychiatric Institute, since the answer to that question is dispositive of both the appeal and the second issue raised on the cross-appeal.

DID THE REVIEW BOARD ERR IN THEIR APPLICATION OF THE TEST FOR AN ABSOLUTE DISCHARGE FOUND IN S. 672.54(a) OF THE CRIMINAL CODE?

32. The Chairperson purported to speak for the Review Board when he described the reasons for rejecting Ms. Johnson's request for an absolute discharge. After reviewing the procedural history leading up to the review hearing, he said:

We are all of the opinion that you are not a significant threat to the safety of the public at this time, but we might say you could be in certain conditions.

...

But you could be such a risk in certain circumstances. We believe that we have sufficient doubt to prevent an absolute discharge being ordered.

...

The concern is that you lack sufficient insight into the seriousness of your behaviour from time to time and your possible risk to others. You clearly need a supportive living environment. Whether that has to be the hospital at all times remains to be seen. There are times when you are appropriate, others when you are not. You are, in the view of the treatment team and in our opinion, still evidencing some symptoms of your psychosis. You are undergoing a change from one medication to a new medication. All of this indicates that it would be wrong and

indeed irresponsible to come to an opinion that you are not a significant risk. Until those variables are manageable, we believe a conditional discharge is the most appropriate.
(emphasis added)

33. The Chairperson then invited the other members of the Review Board to express their views. Dr. Johnson had this to say:

Yes. Ms. Johnson, I felt that you deserved a conditional discharge, first of all because you have no criminal history...

...

...and although there have been some episodes of assaults, and they're unfortunate, I'm certain you don't approve of them, **they are after all been of a relatively minor nature and therefore I don't think anyone could seriously argue that you present a significant threat to the general public. That's certainly my opinion.** (emphasis added)

34. Dr. Bunton also addressed the issue of an absolute discharge before moving on to explain his reasons for ordering the conditions which the majority attached to the conditional discharge order:

Ms. Johnson, my reasons closely parallel those of Dr. Johnson, and I did pay attention to the request you made for an absolute discharge but I could not convince myself with any sufficient certainty that you do not represent a significant risk to the community as projected into the future.

35. Focusing narrowly on the highlighted portions of the reasons of both the Chairperson and Dr. Johnson, including the passage from the reasons of Dr. Johnson characterizing the "index" offences and Ms. Johnson's other assaultive behaviour as "relatively minor", counsel argued that the Review Board had concluded, both as a matter of law and on the evidence, that Ms. Johnson did not pose a significant threat to the safety of the public.

36. In ***Orlowski v. British Columbia (Attorney General)*** (1992), 75 C.C.C. (3d) 138 (B.C.C.A.), Chief Justice McEachern described the proper approach to take when considering whether to grant an absolute discharge under s.672.54(a):

This exercise does not centre only upon whether the accused is a significant threat to public safety. For example, a patient may be perfectly lucid at the time of his disposition hearing yet still be a significant threat because of his history and prognosis. The question of "significant threat", however, is a most important question because Parliament has left the board with no alternative other than absolute discharge, if it has the opinion that the accused is not a significant threat.

The language of s. 672.54, however, does not require the board to reach a conclusion, "yes" or "no", as to whether the accused is not a significant threat as some of counsel's submissions suggest. This is because s. 672.54(a) is phrased in such a way that the requirement for an absolute discharge only arises when the board does have the opinion that the accused is not a significant threat. If the board does not have that opinion then it need not order an absolute discharge.

In other words, in my view, the board need not order an absolute discharge when it has doubts as to whether the accused is a significant threat or not. The board must affirmatively have an opinion that the accused is not a significant threat before s. 672.54(a) applies. ***It seems to me, with respect, that if the board is concerned that an accused with an appropriate history is not a present significant threat and will not become one if he continues with prescribed medications, but the board also has the opinion that he may be a significant threat if he does not take his medication, then the board cannot be said to have an opinion that the accused is not a significant threat. The word "threat", in my view, has a future connotation.*** (p. 146, emphasis added)

37. I do not agree that the highlighted passage from the reasons of the Chairperson amounts to a finding that Ms. Johnson is not a significant threat to the safety of the public. I am of

the view that, when they are read as a whole, his reasons demonstrate that he applied his mind to the test described by Chief Justice McEachern in *Orlowski*, particularly that portion of the test described in the highlighted passage of that judgment as set out above.

38. Similarly, I am of the view that the reasons of Dr. Bunton demonstrate that he applied the proper test when considering whether an absolute discharge was appropriate.

39. However, it seems apparent from the highlighted portion of Dr. Johnson's reasons that, in her opinion, Ms. Johnson posed no significant threat to the safety of the public because her potential for violent conduct did not extend beyond minor assaults. If that is so, then, contrary to the Chairperson's statement, the Review Board was not unanimous in its opinion that Ms. Johnson represented at least a future, potentially significant threat to public safety.

40. Be that as it may, the majority opinion against the granting of an absolute discharge was based on a correct application of the law. Accordingly, I would not give effect to the argument that the Review Board applied the wrong legal test when considering that issue.

41. Nor am I persuaded that the decision not to grant an absolute discharge was unreasonable or unsupported by the evidence. There was opinion evidence before the Review Board supporting the following conclusions:

(1) that, without strict adherence to her treatment regime, Ms. Johnson's mental condition deteriorates to the point where her behaviour becomes unpredictably threatening and violent;

(2) that she lacks insight into her illness and the need to adhere to her treatment regime and, in fact, has demonstrated a consistent refusal or unwillingness to do so; and

(3) consequently, that until she gains the necessary insight and accepts the importance of maintaining her treatment

regime, she poses a continuing potential significant threat to the safety of the public.

42. The evidence also established at least five incidents of assaultive behaviour by Ms. Johnson since January of 1993, in addition to the two "index" offences. These incidents occurred in circumstances which closely resembled the pattern described in the expert opinion evidence.

43. In the circumstances, the evidence could reasonably prevent the Review Board from reaching an opinion that Ms. Johnson did not pose a significant threat to public safety. That is all that is required to rule out an absolute discharge under s. 672.54(a). In my view, the two members of the Review Board who formed the majority on this issue had the above conclusions supported by the opinion evidence in mind when they decided not to grant an absolute discharge.

44. It follows that I would not give effect to this argument raised on behalf of Ms. Johnson in the cross-appeal.

WAS THE DECISION OF THE REVIEW BOARD TO GRANT A CONDITIONAL DISCHARGE WITHOUT A DELEGATION OF AUTHORITY TO THE DIRECTOR UNREASONABLE OR NOT SUPPORTED BY THE EVIDENCE?

DID THE REVIEW BOARD ERR IN LAW BY IMPOSING CONDITIONS ON THE DISCHARGE OF MS. JOHNSON WHICH WERE INCONSISTENT WITH THEIR REASONS?

45. The first of these questions presents for determination the Director's sole ground of appeal. The argument was that the evidence of Ms. Johnson's lack of insight, her history and her prognosis, all of which was undisputed, leads irresistibly to the conclusion that she is not yet ready for unrestricted community access, and that, accordingly, the Director ought to have been given the discretion to control that access in a manner consistent with her treatment needs.

46. In support of this argument, counsel sought to adduce fresh evidence in the form of psychiatric reviews and incident

notes relating to the period of time following the Review Board's decision of 3 May. In keeping with the practice of the court, we reserved decision on that application.

47. The second question posed presents Ms. Johnson's alternative ground of alleged error on her cross-appeal. In short, counsel's position was that the terms of the order of 3 May are uncertain, if not contradictory. On the one hand, the order purports to grant Ms. Johnson a conditional discharge, while on the other hand, it contains conditions which give the Director the discretionary authority to confine her indefinitely to the Forensic Psychiatric Institute. That discretion is found in the emphasized portions of the following terms:

That she shall be subject to the general direction and supervision of the Director,...for the purpose of ensuring that an effective plan for her assessment, counselling and rehabilitation, as well as for assisting her in her treatment, be developed at the earliest practicable time, as deemed appropriate by the Director;

That she shall reside in such place in the Province of British Columbia deemed appropriate by the Director and that she shall not change her place of residence unless otherwise permitted by the Director;

That where her approved place of residence is beyond the geographic boundaries of the Adult Forensic Psychiatric Institute, the D.H.U./Hillside Unit or the cottages on the grounds of the Riverview Hospital under the administration of the Director, she shall attend and report at such time and place as required by the Director to assist in monitoring her mental condition and her compliance with this order;

That she shall attend at any other time and place authorized by the Director, ***to include returning to the Forensic Psychiatric Institute*** for the purpose of assessment, counselling, rehabilitation, as well as for assisting her in her treatment;

48. During the course of argument, it became clear that what was really at issue was whether a conditional discharge order, as described in s.672.54(b) of the **Criminal Code**, could contain restrictions or conditions which have the effect of detaining the accused in custody in a hospital, as described in s. 672.54(c). Counsel for Ms. Johnson argued that it could not. In her reply, counsel for the Director took the same position, a concession which effectively resulted in the abandonment of the Director's appeal.

49. I am of the view that, when the provisions of s. 672.54 are considered in the light of the entire scheme described in Part XX.1 of the **Criminal Code**, an order that the accused be discharged pursuant to paragraph (b) of that section means that the accused shall be discharged to the community from whatever "hospital", as that term is defined in s. 672.1, in which he is then confined, or to which he could potentially be confined. In that respect, I concur with the position ultimately taken by all counsel in argument. Any other interpretation of the term "discharged" would render paragraph 672.54(c) meaningless.

50. It is apparent from the scheme of Part XX.1 as a whole that the paramount duty of the Review Board is to craft disposition orders which achieve an appropriate balance between the liberty interests of an accused, who has been found either unfit to stand trial or not criminally responsible by reason of mental disorder, and the public safety interests of the community as a whole. It is also clear that, in enacting Part XX.1, Parliament anticipated that striking an appropriate balance would, in some cases, require that conditional discharge orders be made with respect to accused persons who could not be ruled out as posing a significant risk to public safety. In such cases, the 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, and this is one of them, the

two considerations will be inextricably linked.

51. At the same time, Parliament recognized that the formal Review Board procedure may not be adequate to respond to changing circumstances in all cases. Indeed, there will be situations where the volatile nature of an accused's mental disorder leads to a sudden increased risk to public safety, or where the Review Board's conditions prove unworkable due to circumstances in the community which either could not have been foreseen or have changed since the order was made. In other cases, the progress of treatment may be such that liberty restrictions can safely be reduced without engaging the full formality of the hearing process.

52. 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 such a change in status 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.

53. 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 an 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.

54. It is because the primary responsibility for maintaining that balance lies with the Review Board that the delegation to the Director of the discretion to vary the liberty restrictions of an accused is coupled with the proviso that, where the exercise of the discretion results in a significant

increase in restrictions on the liberty of the accused for a period longer than seven days, notice shall be given to the Review Board which is then required, under s. 672.81(2)(a), to hold a review hearing as soon as is practicable. The notion that an accused, who has been conditionally discharged under s. 672.54(b), may nonetheless be detained in hospital indefinitely by virtue of the Director's exercise of the discretion delegated to him under s. 672.56, is inconsistent both with the existence of that proviso, and with the scheme of Part XX.1 as a whole.

55. I turn then to the Director's appeal from the refusal of the Review Board, by a majority decision, to replicate the delegation of discretion which formed part of the conditional discharge order of 18 November, 1994. For convenience, I repeat that clause of that order, together with the clause immediately preceding it, since the two were complementary conditions:

That she shall reside in such place in the Province of British Columbia as deemed appropriate by the Director and that she remain resident at such place unless otherwise permitted by the Director;

That where her approved place of residence is within the geographic boundaries of the Forensic Psychiatric Institute or at the Hillside Unit or the cottages on the grounds of the Riverview Hospital under the administration of the Director, the accused has a right to unescorted access to the community, however the imposition of any condition under which that right is to be exercised, including a requirement that access be supervised in a manner considered appropriate by the Director, is delegated to the Director pursuant to s. 672.56(1), with liberty to apply in the event the delegated authority is considered to be exercised in an unduly restrictive manner.

56. The first of these conditions gives the Director the power to designate the Forensic Psychiatric Institute as Ms. Johnson's place of residence. Such a designation is anticipated by the preamble to the next condition, and the Director has, in fact, made that designation. If the conditional discharge order described in s. 672.54(b) is intended to be an order discharging

the accused from the "hospital" to the community, on conditions intended to protect against an unacceptable risk to public safety, a condition that gives the Director the power to direct that such an accused reside in the "hospital" in effect gives the Director the power to convert the conditional discharge order into a custody order under s. 672.54(c), without any attendant requirement that such a direction be reviewed by the Review Board. Such a power is inconsistent with the concept of a conditional discharge order.

57. Significantly, this first condition is not couched in language which acknowledges s. 672.56 as the source of its discretionary power. Counsel was unable to point to any explicit authority in Part XX.1 of the **Criminal Code**, other than s. 672.56, which would entitle the Director to require that a conditionally discharged accused be confined to the Forensic Psychiatric Institute as though ordered detained in custody under s. 672.54(c). The suggestion was that this condition reflected a residual discretion, which the Director had prior to 1992, and which had not been explicitly extinguished when Part XX.1 was proclaimed.

58. Whatever may have been the extent of the Director's discretion to alter the accused's liberty restrictions prior to the 1991 amendments, I am of the view that such discretion is now confined to that which must be explicitly delegated by the Review Board pursuant to s. 672.56. Furthermore, where a conditional discharge order has been made, together with a delegation of discretion to the Director under s. 672.56, the exercise of that discretion so as to require the accused to return to hospital from a community residence for a stay of more than seven days duration must necessarily be accompanied by notice to the Review Board pursuant to s. 672.81(2)(a), so that the Director's exercise of discretion as well as the disposition order itself may be reviewed as soon as is practicable.

59. To summarize, an unrestricted delegation to the Director of the authority to determine the place in the Province of British Columbia in which a conditionally discharged accused shall reside, where such discretion implicitly includes the

power to direct that the accused "reside" indefinitely in the Forensic Psychiatric Institute, is incompatible with an order that the accused be discharged conditionally into the community. As a matter of law, such an order cannot be made.

60. That is precisely the combined effect of the two clauses replicated from the Review Board's order of 18 November 1994. It is those clauses, or "conditions", which the Director's appeal, as originally presented to this court, sought to have reinstated in the order of 3 May 1995. Thus, for the reasons given, I am of the view that the Director's appeal must fail. In the circumstances, I would also dismiss the Director's application to adduce fresh evidence, since that evidence could have no bearing on the outcome of his appeal.

61. On the other hand, as will be obvious from what has been said so far, I am of the view that the alternative argument advanced on Ms. Johnson's cross-appeal must succeed. As drafted, and as implemented by the Director, the conditions attaching to the order of 3 May 1995 authorize the detention of Ms. Johnson in custody at the Forensic Psychiatric Institute, at the Director's discretion, for more than seven days without the safeguard of a review hearing. Thus, both as drafted and as implemented, those conditions are inconsistent with an order for conditional discharge under s. 672.54(b). A conditional discharge is a discharge from the hospital into the community subject to conditions. Those conditions may restrict the liberty of the accused in the community, and they may also give the Director the power to alter such restrictions. But they cannot go so far as to give the Director the power to remove the accused from the community and detain her for more than seven days in the hospital, without notice being given to the Review Board under s. 672.81(2)(a) so that a review of the original disposition may be held as soon as is practicable. To the extent that the conditions attaching to the order of 3 May 1995 do just that, they are inconsistent with the order discharging Ms. Johnson from the hospital into the community, and thus are bad in law.

IV

62. Pursuant to s. 672.78(3), where this court allows an appeal from a disposition order, it may:

(a) make any disposition under section 672.54 or any placement decision that the court or Review Board could have made;

(b) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or

(c) make any other order that justice requires.

63. In my view, where evidentiary matters remain to be resolved, disposition orders should be made by the Review Board since it is comprised of members with a special expertise in such matters.

64. It is at least possible that the result of this appeal will cause the Review Board to reconsider whether, given her present condition, her present willingness or ability to accept treatment and her prognosis, a conditional discharge is the appropriate disposition in Ms. Johnson's case. That is a decision that I do not feel qualified to make.

65. Accordingly, I would dismiss the appeal by the Director from the disposition order made 3 May 1995, allow the cross-appeal by Ms. Johnson from that order and refer the matter back to the Review Board for a full rehearing.

66. I would not direct that the members of the Review Board, who presided over the disposition hearing of 3 May 1995, be seized of the matter. However, I would point out that Ms. Johnson has now had three disposition hearings before three differently constituted Review Boards. The potential for conflicting findings of fact in such a regime is exemplified by the contrast between the June 1994 Review Board's conclusion that her "index" offences were serious assaults and Dr. Johnson's conclusion on 3 May 1995 that those same assaults were

of a "relatively minor nature". If logistics prevent continuity of hearing panels in the continuing review process of individual accused persons mandated by Part XX.1 of the **Criminal Code**, and I can well understand how that would be the case, it seems to me that, as between successive Review Boards, curial deference should be accorded to findings of fact. In the absence of such deference, continuity in the progress of accused persons who are undergoing treatment, from custody to absolute discharge, will be difficult if not impossible to achieve.

"The Honourable Mr. Justice Wood"

I agree: "The Honourable Madam Justice Rowles"

I agree: "The Honourable Madam Justice Ryan"