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Indexed as:

Jones v. British Columbia (Attorney General)

Between
Warren Stewart Jones, appellant, and
Attorney General of British Columbia and The Director, Adult Forensic Psychiatric Services, respondents

[1997] B.C.J. No. 2773
Vancouver Registry No. CA022969

British Columbia Court of Appeal
Vancouver, British Columbia
Southin, Cumming and Braidwood JJ.A.

Heard: November 18, 1997.
Judgment: filed December 12, 1997.
(25 pp.)

Criminal law — Mental disorder — Dispositions by court or review board — Jurisdiction of board — Discharge on conditions.

This was an appeal from a custodial disposition of the British Columbia Board of Review. The 22-year-old appellant was detained at a forensic psychiatric institution since December, 1994 when he was admitted for an assessment as to his trial fitness and mental disorder. The psychiatrist who admitted the appellant found that he was not criminally responsible because of his mental disorder and the appellant continued in detention. The matter was deferred to the Review Board which granted a conditional discharge on the condition that the appellant reside at the institution. The Review Board directed that the disposition be reviewed in six months or by August 4, 1995. A review conducted on August 18, 1995 found that the appellant suffered from a substance abuse disorder and allowed the appellant to reside in a psychiatric boarding home but no transfer occurred. A third review found that he suffered from no major mental disorder and no psychosis. The custodial disposition included access to the community with delegated authority to the director. A fourth review granted a conditional discharge provided he resided where placed by the Director and reported to an outpatient clinic. When he was released into the community he was arrested and convicted of theft. A deportation order was not carried out. A fifth review resulted in a custodial order with delegated authority to the Director to increase access to the community. The Review Board relied on a medical report which diagnosed the appellant with psychoactive substance abuse disorder, antisocial personality disorder and borderline intellectual functioning and found that he was at high risk of re-offending if left unsupervised. At issue was whether

the Review Board lost jurisdiction over the appellant when it failed to review the original disposition order within the time period prescribed in that order of August 4 and whether the Board erred in law by finding that the appellant should not be discharged as he posed a significant threat to public safety given his antisocial behaviour and substance abuse rather than his mental condition.

HELD: The appeal was dismissed. The Review Board's failure to comply with its own procedural requirements did not result in a loss of jurisdiction. It was not shown that the Review Board had failed to comply with the mandatory legal requirement to hold a hearing within a year so to result in a loss of jurisdiction. The original order remained in force until the Review Board held the hearing on August 18, 1995. The Review Board had not erred in declining to declare that the appellant was not a significant threat to the safety of the public taking into consideration his mental condition. An absolute discharge as sought by the appellant was not justified in the circumstances. The term "mental condition under section 672.54 was a broad phrase and pertained to the overall mental state of the accused.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 672.54, 672.63, 672.72(1), 672.81(1).

Counsel:

D. Nielsen and J. Pozer, for the appellant.
M. Acheson, for the respondent (Director, Adult Forensic Psychiatric Services).
L. Hillaby, for the respondent (Attorney General of British Columbia).

Reasons for judgment were delivered by Cumming J.A., concurred in by Braidwood J.A. Reasons concurring in the result were delivered by Southin J.A. (para. 47).

¶ 1 **CUMMING J.A.**:— This is an appeal from a 11 December 1996 custodial disposition of the British Columbia Board of Review (the "Review Board"). The appeal is made pursuant to subsection 672.72(1) of the Criminal Code, R.S.C. 1985, c. C-46.

FACTS:

¶ 2 The appellant, a twenty-two year old man, has been detained at the Forensic Psychiatric Institute ("F.P.I.") for almost three years (excepting a few weeks in August of 1996), beginning 15 December 1994, when he was first admitted for trial fitness and mental disorder assessments.

¶ 3 On admission to F.P.I. in December 1994, the appellant was acutely psychotic; he appeared to be responding to voices and expressed suicidal ideas. The psychiatric report suggested that while he could be suffering from schizophrenia, he was most likely suffering from a drug-induced psychosis (specifically cocaine), along with a chronic dysphoria or a chronic depressive disorder. The

recommendations to the court by the assessing psychiatrist included: that the appellant was fit to stand trial; that his mental state at the time of the offences could have been affected by a cocaine induced psychosis; and that the use of other chemicals might have affected his judgment such that he might not have fully appreciated the consequences of his acts.

¶ 4 On 13 January 1995, the appellant was found not criminally responsible on account of a mental disorder (NCRMD) by the Provincial Court in Prince George of the offences committed from March 29, 1993 to June 28, 1994 namely: assault, mischief in relation to property, and possession of stolen property. The disposition was deferred to the Review Board. The appellant continued to be detained at F.P.I. pending the Review Board hearing.

¶ 5 In the first disposition order made by the Review Board, on 8 February 1995, the appellant was given a conditional discharge, with a condition that the appellant continue to reside at F.P.I., and that the Director might allow temporary residence in a residential alcohol treatment program. The order mandated a review of the disposition by 4 August 1995. The appellant remained at F.P.I. until the next hearing. He did not attend a residential alcohol treatment centre.

¶ 6 The review of the disposition did not occur until 18 August 1995. At that time, the Review Board ordered a conditional discharge that did not include a reviewable date. The Review Board found that the primary risk arising in the appellant's case was that he suffered from a substance abuse disorder that was in remission. A report by Dr. Riar that assessed the current risk posed by the appellant, and was cited by the Review Board, indicated that he did not "pose any increased risk of violence or criminal activities with his present state of mind," but that "his antisocial activities were directly related to his substance abuse and drug induced psychosis," and that there was a high probability that in the future he would engage in substance abuse and resort to crime to support the habit. The Review Board made an order that allowed the appellant to be placed at Willingdon House, a psychiatric boarding home in the community, at the earliest opportunity. This transfer never came about.

¶ 7 From November 3-9, 1995, the appellant took an unauthorized leave from F.P.I. and when he returned he tested positive for cocaine and canaboids.

¶ 8 A third Review Board hearing was held on 29 February 1996. A further report by Dr. Riar, made in January 1996, stated that the appellant did not suffer from a major mental disorder; that his behaviours in recent months were because of his antisocial personality; and that hospitalization provided him with detention only, as he did not require the treatments or programs at F.P.I. The majority members of the Review Board made a custodial disposition with delegated authority to the Director pursuant to s. 672.56 of the Code to increase the appellant's access to the community. In coming to its decision, the Review Board noted that the appellant suffered no signs of psychosis at that time and did not suffer from a major mental illness. However, the Review Board did find the appellant to be defiant, anti-authoritarian, deceitful, aggravating and callous in behaviour, and verbally threatening. The disposition was to remain in force until 18 August 1996.

¶ 9 The February 29th disposition was reviewed on 10 July 1996. The disposition made at that time came into force on 31 July 1996, and was to remain in force until 30 July 1997. The Review Board ordered a conditional discharge for the appellant, with certain conditions: that he reside in a place deemed appropriate by the Director and that he not change his place of residence unless permitted by the Director; and that he report to the Adult Forensic Outpatient Clinic nearest his approved place of residence. In its reasons for its decision, the Review Board noted that while the appellant had "not shown signs of a major mental illness since admission to the Hospital", he had "behaved generally in an aggressive and manipulative fashion."

¶ 10 The appellant was released into the community from August 9-27, 1996, after which he returned voluntarily to F.P.I. at the request of the treatment team. While in the community, the appellant was taken to hospital for injuries received in an assault. He was arrested on an outstanding charge of assault from an incident prior to his admission to F.P.I., was evicted from the hotel he was staying at for various infractions, and was charged with robbery. He was not implicated in the assault, but some weeks later was convicted of theft, serving twenty days in a work camp.

¶ 11 On 17 September 1996, the Court of Appeal ordered that the appellant's appeal of the Review Board's 29 February 1996 disposition be dismissed as abandoned.

¶ 12 On 26 September 1996, the appellant was ordered deported to Great Britain by the Immigration Board of Canada. This order has not been carried out.

¶ 13 A fifth Review Board hearing was held on 11 December 1996, resulting in a custodial order with delegation to the Director to increase access to the community as deemed appropriate. The disposition came into force on 11 December 1996 and remains in force until 10 December 1997. The Review Board ordered that the appellant be detained in custody in the F.P.I. subject to the following conditions:

1. THAT he be subject to the direction and supervision of the Director, Adult Forensic Psychiatric Services ("the Director");
2. THAT he reside in the Forensic Psychiatric Institute;
3. THAT he may have access to the community, including overnight access, at such times and in such manner as is deemed appropriate by the Director pursuant to s. 672.56(1);
4. THAT he not consume alcohol or use hallucinogens;
5. THAT he not use any drugs except as approved by a medical practitioner;
6. THAT the Director may monitor his compliance with this order which may include monitoring for the use of alcohol, hallucinogens or unprescribed drugs, where there are reasonable grounds to believe that a condition of this order has been violated;
7. THAT he keep the peace and be of good behaviour;

8. THAT he present himself before the Review Board when required.It is this fifth disposition that is the subject of this appeal.

REASONS OF The Review Board:

¶ 14 The Review Board, in its 11 December 1996 disposition, relied on a report by Dr. Gharkanian that diagnosed the appellant with Psychoactive Substance Abuse Disorder, Antisocial Personality Disorder, and Borderline Intellectual Functioning. The report suggested that the appellant, should he be left unsupervised or start abusing psychoactive substances again, could become a high risk for offending again in the future. The Review Board's disposition cited the appellant's antisocial behaviour, illicit drug use and inability to follow societal rules in the community as reasons for its detention order. The appellant's conduct in August 1996 was taken to demonstrate that "his level of risk while supervised in the community is currently unacceptable."

ISSUES:

¶ 15 The issues raised on this appeal are:

(1) whether the Review Board lost jurisdiction over the appellant by failing to review the February 8, 1995 disposition order within the time period prescribed in that order (that is, by August 4, 1995); and
(2) whether the Review Board erred in law by finding that the appellant should not be discharged because he posed a significant threat to the safety of the public, on the basis of his antisocial behaviour and substance abuse, rather than on his mental condition, contrary to s. 672.54.

ISSUE 1: JURISDICTION

¶ 16 Subsection 672.81(1) of the Criminal Code provides:

> 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).

¶ 17 The Review Board is required by s. 672.81 of the Code to hold a hearing no later than 12 months after making a disposition and every 12 months thereafter, as long as the disposition remains in force with respect to any person found not criminally responsible by reason of mental disorder of a criminal offence. The purpose of s. 672.81 is to protect an accused against arbitrary detention by ensuring that he or she has a right to an annual hearing. This section is Parliament's response to the concerns expressed by the Supreme Court of Canada in R. v. Swain (1991), 63 C.C.C. (3d) 481 (S.C.C.).

¶ 18 On 8 February 1995, the Review Board held a hearing and issued a disposition with respect to the appellant. By law, it was not required to hold another disposition hearing before 8 February 1996. However, a clause in the 8 February 1995 disposition ordered "that a review of this disposition shall be made on or before the 4th day of August, 1995 ...". The Review Board next met to review this disposition on 18 August 1995.

¶ 19 Section 672.63 states:

> A disposition shall come into force on the day that it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the date of expiration that the disposition specifies or until the Review Board holds a hearing pursuant to section 672.47 or 672.81. 1991, c.43, s. 4.

¶ 20 There was no clause in the order which limited the time for which the order ran or specified a time at which the order expired.

¶ 21 In my view, the Review Board's failure to hold a hearing on or before 4 August 1995, did not result in a loss of jurisdiction over the appellant Mr. Jones. Pursuant to s. 672.63, the 8 February 1995 order remained in force until the Review Board held a hearing which occurred on 18 August 1995.

¶ 22 The issue of loss of jurisdiction was not raised at the 18 August 1995 hearing nor was that decision appealed.

¶ 23 The appellant's argument, with respect, confused the statutory requirement for an annual hearing under s. 672.81 with the Review Board's failure to comply with its own, self-imposed, administrative or procedural requirement.

¶ 24 The decision of the Review Board on the jurisdictional issue In The Matter of Dean Charles Crosson, dated 11 April 1996 is inapplicable to the facts of the case at bar. The issue in Crosson and In the Matter of Donald Chen, British Columbia Review Board, dated 3 April 1996, was the Review Board's failure to hold the hearing within 12 months of the last disposition as required by subsection 672.81(1) of the Code. The majority of the Review Board in Crosson found the time requirements contained in that section to be mandatory in nature which resulted in a loss of jurisdiction on the part of the Review Board if such time requirements were not met.

¶ 25 The focus of legal argument in Crosson and Chen was the effect of the Review Board's failure to comply with statutory time requirements. The substantive issue in these cases arose from the jurisdictional limits placed on the Review Board by the express wording of subsection 672.81(1).

¶ 26 In the present case, there has been no failure to comply with the requirement to hold an annual review, nor has the Review Board failed to comply with any other legislative time requirement. Rather, this case can be characterized as a failure to comply with the administrative or procedural requirements

imposed by the Review Board itself, that is, that a hearing be held by 4 August 1995. In other words, the Review Board has not complied with one term of its own order.

¶ 27 A failure by the Review Board to comply with its own procedural requirements does not result in a loss of jurisdiction. Just as the Review Board in Crosson found that it could not create jurisdiction for itself that was not provided for by statute, nor can the Review Board, in this case, limit the jurisdiction that is otherwise conferred on it by statute.

¶ 28 The Review Board gets its jurisdiction from the Code, not, as the appellant asserts, from its own disposition. In other words, the Review Board cannot create, by its own order, a different jurisdiction than that set out in the Code. The Review Board has a mandate, pursuant to Part XX.1 of the Code, to exercise an ongoing jurisdiction over mentally disordered persons who are subject to a disposition order. The Review Board would err in declining to exercise that jurisdiction on the basis of self-imposed constraints and in doing so, would frustrate the primary purpose of the legislation, that is, the protection of the public.

¶ 29 Further, s. 672.63 of the Code has no relevance to the substantive issues in this case. Section 672.63 is not a section which creates or limits the Review Board's jurisdiction in reviewing dispositions. It is not a section that orders the Review Board to do anything; it simply makes provision for the duration of disposition orders. And, as stated above, there was no expiry date in the order.

¶ 30 A term in a disposition order requiring a hearing by a specified date is not, as argued by the appellant, rendered meaningless simply because of the failure to hold the hearing within that time frame and does not result in a loss of jurisdiction. Should an early review not be scheduled in the time limit set out in an order, an accused would have a remedy in the form of an application for mandamus to compel the Review Board to hold hearing in compliance with its order.

¶ 31 Nor does the failure to hold an early review within time limits imposed by the Review Board result in "arbitrary detention". An accused is assured of a review every 12 months through the provisions of s. 672.81 of the Code. As discussed above, this section was a direct response to the concerns surrounding arbitrary detention under the pre-Swain system. The issue of arbitrary detention was remedied by the Supreme Court of Canada in Swain and by Parliament's response in setting up an annual review.

¶ 32 In summary, the appellant has failed to establish that the Review Board has lost jurisdiction in this case. In particular, the accused has not shown that the Review Board failed to comply with any mandatory legislative requirement. I would reject the first ground of appeal.

ISSUE 2: DISCHARGE

¶ 33 It is by qualifying for a verdict under s. 16 of the Code that an accused comes under the jurisdiction of the Review Board after trial. Section 16 provides:

> (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

¶ 34 It is by application of s. 672.54 of the Code that an accused is governed by the Review Board. Section 672.54 prescribes the mandate of the Review Board:

> 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.

¶ 35 In the Ontario Court of Appeal case R. v. Jones (1994), 87 C.C.C. (3d) 350 (Ont. C.A.), Parliament's use of the two different legal terms, "mental disorder" and "mental condition", was effectively highlighted. In that case the accused/appellant, Daryl Bryne Jones, had been found not guilty by reason of insanity based upon psychiatric evidence of a major mental disorder, psychosis. By the time the Ontario Review Board order was appealed from, the appellant had been rediagnosed with a mental condition of personality disorder.

¶ 36 Although the index offence committed by the appellant in Jones was significantly more aggravated than the transgressions of the appellant before us, the approach taken by the Ontario Court of Appeal in that case is, in my opinion, appropriate and applicable here.

¶ 37 In Jones the Ontario Court of Appeal observed at p.361 that, notwithstanding the change of medical diagnosis, Mr. Jones was, owing to his mental condition, in need of control by the Review Board:

> An absolute discharge is simply not justified on this record. The medical evidence throughout has consistently shown that the respondent suffers from a mental illness and that he is a risk to commit violent offences if he persists in the use of street drugs. The testimony at the hearing was that he should be monitored for alcohol and drug use.

Then, after acknowledging the "significant threat" test of Orlowski v. British Columbia (A.G.) (1992), 75 C.C.C. (3d) 138 (B.C.C.A.), the Court continued at p.362:

> ... there is no need to speculate here. The respondent has no intention of undertaking not to consume alcohol. He does not consider that he has a problem. He denies that he is presently a substance abuser, despite all the evidence to the contrary in the hospital reports. He requires monitoring for substance abuse, but will not undertake to arrange for this help voluntarily. It is conceded that he will run afoul of the law very quickly, but it is the prevailing opinion that his crimes will not be violent, as long as he does not use drugs or alcohol.

¶ 38 In the case at bar, the appellant, Warren Jones, has undergone a similar change of medical diagnosis. At the time of his trial psychiatric opinion was that he most likely suffered from "a Drug Induced Psychosis concurrent with a Chronic Dysphoria or a Chronic Depressive Disorder" and that this condition had resulted in a psychosis at the time of the offence warranting a verdict of NCRMD. Subsequent F.P.I. psychiatrists changed the working diagnosis from time to time (in any event the original psychosis was resolved) until, most recently, it was concluded by them that his remaining medical condition was in the nature of a personality disorder rather than a major mental illness.

¶ 39 The Review Board has, over the years, assessed the appellant Warren Jones' mental condition when proceeding under s. 672.54 and has concluded that the risk he poses to the safety of the public is such that an absolute discharge is not justifiable.

¶ 40 In the reasons of 29 February 1996, Chairperson Dickson wrote:

> Your case is quite unusual in that you currently suffer from no signs at all of psychosis ... We're told by your treatment team that you do not suffer from a major mental illness and you are not receiving psychotropic medication and have not been for a very long time. However, in the opinion of your treatment team you do continue to suffer from this substance abuse disorder and you are quite unwilling to receive any counselling or assistance by way of drug and alcohol programmes, generally speaking.

* * *

The hospital's position, I have to say, is somewhat curious in that they make no representation. They take no position. What they say is that they are unable to assist you in a therapeutic sense ... you won't take any of the treatments or programmes ... you are a thorn in their sides ... in their view there is a very real and substantial risk that if you were to be released ... you would again resort and probably quite quickly to the use of drugs. Dr. Riar says that in his view a drug induced psychosis could well again repeat itself.

The Crown, in arguing for a custody order relied heavily on the decision of Jones from the Ontario Court of Appeal and said to us that if we find you present a significant threat or were left unable to say that you do not, and we find that despite the lack of psychosis that threat is connected to the mental condition which you present then we should properly under this legislation not give you an absolute discharge but should keep in place an order which keeps the community safe from you and the threat that you present. The Crown points out that really on the basis of what you've demonstrated so far it is very clear that you would go out again and start to abuse drugs and alcohol and in so doing place the community at risk.

* * *

the Crown ... is much concerned with the threat you might present if you were to act out violently in the way that you did in the past, whether it be as a result of drug induced psychosis or other problems arising out of your mental state.

(Emphasis added.)

* * *

... we are persuaded ... that yours is a case very similar in important respects to the Jones case from the Ontario Court of Appeal.

* * *

In your case we find that the threat you could present is, in the opinion of the majority, indeed significant. The violence that was involved in the index offence, although not at the highest end of the scale, it's not at the lowest end of the scale either. You beat this person in the schoolyard in a significant way, including kicking him in the head.

¶ 41 In the reasons of 31, July 1996, Chairperson Bubbs referred to Jones, supra, saying:

Counsel for the Attorney General argued that because there has been no improvement in the accused's behaviour or risk prediction the Review Board should continue to follow the Jones case, ... We agree that an absolute discharge is not indicated at this time, for Mr. Jones could become a significant threat to the safety of the public should he return to drug use ... As stated by Finlayson J.A. in Jones at p. 20:

> Confronted by a recalcitrant respondent and an institution that has thrown up its hands in frustration, it seems to me that the Review Board should have given some thought to devising a more effective structure for the respondent.

¶ 42 In the reasons of 11 December 1996, Chairperson Bubbs referred again to Jones, saying:

> Counsel for the Attorney General urged the Board to apply the reasoning of the Ontario Court of Appeal in Jones (December 1993). That case was discussed by a panel of the Review Board at the hearing of July 9, 1996 (Ex. 53). In essence the Ontario Court of Appeal overturned an absolute discharge granted to an accused person whose personality disorder and history of drug abuse was not unlike the case before us. In that case the Hospital had given up any hope of treating him successfully, and had not contested an absolute discharge. (Emphasis added)

¶ 43 In the case Peckham v. Attorney General of Ontario et al (1994), 93 C.C.C. (3d) 443 (Ont. C. A.), the distinction between the s. 16 term "mental disorder" and the s. 672.54 term "mental condition" was considered. The court found that "mental condition" is a broader phrase than "mental disorder" and pertains to the overall mental state of the accused. It further found that in making a s. 672.54 disposition a Board need not find a continuing manifestation of the originally diagnosed s. 16 mental disorder when considering the mental condition of the accused at the time of hearing. The Court said, at pp.452-3:

> Section 672.54 addresses the accused's mental condition at the time of the hearing. That hearing may occur many years after the initial finding of not criminally responsible on account of mental disorder. Nothing in the language of the section suggests that the Board must first decide whether the label attached to the accused's mental condition for the purposes of determining whether he could be held criminally responsible for his acts remains the operative diagnosis. Instead, the section contemplates a consideration of the accused's mental condition at the time he or she is before the Board. The original diagnosis along with the psychiatric information referable to the accused's mental state since the finding of not criminally responsible on account of mental disorder must be considered in arriving at a conclusion with respect to the present mental condition of the accused. That conclusion in turn plays a central role in the Board's determination of the appropriate order.
>
> Furthermore, the section speaks to the accused's mental condition and not to the existence of a mental disorder. The latter is defined in s. 2 of the Criminal Code as meaning a disease of the mind, and is clearly a more restrictive phrase than the phrase "the mental condition of the accused". By using the broader phrase, Parliament must have intended the Board to address the overall mental state of the accused without limiting itself to a determination of whether that condition, or at least some aspect of it, continued to fit within the confines of the legal concept of a mental disorder. (Emphasis added).

> Finally, the section as worded by Parliament mandates absolute release only where the Board is of the opinion that the accused is not a significant threat to the safety of the public. It must follow that the section contemplates, in all other cases, further restraints on the liberty of an accused either by way of conditions attached to a release order or further confinement in a hospital. The nature and extent of that deprivation does not depend on the continued existence of the mental disorder which led to the finding of not criminally responsible on account of mental disorder, but must be determined using the approach dictated by s. 672.54.

¶ 44 As in Jones, the appellant, Warren Jones:

> suffers from a mental illness for which there is no present treatment; an illness which is aggravated by his use of alcohol and drugs.

and, as in Jones:

> An absolute discharge is simply not justified on this record. The medical evidence throughout has consistently shown that the respondent suffers from a mental illness and that he is a risk to commit violent offences if he persists in the use of street drugs.

¶ 45 In order that an accused should be discharged absolutely the relief the appellant seeks here the Review Board must be of the opinion, taking into consideration the mental condition of the accused, that he is "not a significant threat to the safety of the public". I am not persuaded that the Review Board erred in declining to form the opinion that the appellant is not a significant threat to the safety of the public. On the contrary, their conclusion that he is was amply supported on the evidence.

¶ 46 For these reasons I would dismiss the appeal.

CUMMING J.A.

BRAIDWOOD J.A.:— I agree.

The following is the judgment of:

¶ 47 SOUTHIN J.A. (concurring in the result):-- I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Cumming.

¶ 48 I agree with his disposition of the first issue for the reasons he gives.

¶ 49 I also agree with his disposition of the second issue but for different reasons.

¶ 50 At para. 14 of his reasons, Mr. Justice Cumming has set out the substance of the psychiatric report relied upon by the Review Board in the disposition in issue before us.

¶ 51 As the terms used by Dr. Gharkanian are, I understand, terms of the psychiatrist's art, I have turned to Stedman's Medical Dictionary, 26th ed. (Baltimore: Williams & Wilkins, 1995) in order to elucidate them.

¶ 52 I find these definitions:

> psychoactive. Possessing the ability to alter mood, anxiety, behavior, cognitive processes, or mental tension; usually applied to pharmacologic agents.
> disorder. A disturbance of function, structure, or both, resulting from a genetic or embryologic failure in development or from exogenous factors such as poison, trauma, or disease.
> antisocial personality d[isorder]., a personality d. characterized by a history of continuous and chronic antisocial behavior with disregard for and violation of the rights of others, beginning before the age of 15; early childhood signs include chronic lying, stealing, fighting, and truancy; in adolescence there may be unusually early or aggressive sexual behaviour, excessive drinking, and use of illicit drugs, such behavior continuing in adulthood.
> behavior d., general term used to denote mental illness or psychological dysfunction, specifically those mental, emotional, or behavioral subclasses for which organic correlates do not exist. SEE antisocial personality d.
> personality. 1. The unique self; the organized system of attitudes and behavioral predispositions by which one feels, thinks, acts, and impresses and establishes relationships with others. 2. An individual with a particular p. pattern.

¶ 53 I have been unable to find any definition for "Borderline Intellectual Functioning" but I take that to mean, in layman's language, "mentally slow" or "not very bright" or some such term.

¶ 54 One of the problems in this matter is the lack of definitions in the Criminal Code. Thus, in s. 2 we find "mental disorder" means a disease of the mind. We do not, however, find any explanation of what a "disease of the mind" is.

¶ 55 According to Stedman's, the word "mind" means:

> mind. 1. The organ or seat of consciousness and higher functions of the human brain, such as cognition, reasoning, willing, and emotion. 2. The organized totality of all mental processes and psychic activities, with emphasis on the relatedness of the phenomena.

¶ 56 As to the word "disease", it is defined in The Shorter Oxford English Dictionary (London:

Oxford University Press, 1975) at p. 565, thus:

> Disease ... 2. A condition of the body, or of some part or organ of the body, in which its functions are disturbed or deranged. Also applied to plants. a. gen. Illness, sickness ME. b. An ailment 1526.

¶ 57 Using the definitions from Stedman's, I have translated the critical report to mean that if the appellant ingests some "pharmacologic agent" or agents, his behaviour will suffer a disturbance of function, that he continually and chronically disregards and violates the rights of others, and began doing so before he was 15, and that he is mentally slow.

¶ 58 I have to say that this description fits many, if not most, of the accused with records going back to their adolescence who come before this Court, even though they are not fixed with the label "antisocial personality disorder". As to "psychoactive substance abuse disorder", I do not know if alcohol is a "pharmacologic agent" for the purposes of the definition, but we certainly see many accused whose behaviour is altered by the ingestion of alcohol. Indeed, most people who drink alcohol to excess could be said to be suffering from that disorder.

¶ 59 I have described the appellant's mental state by using the definitions from the medical dictionary. But I could also describe his condition by saying that he is not nice, he is not very bright and, when he takes drugs, he becomes mean and commits criminal acts.

¶ 60 The problem for us is whether Parliament intended the scheme of review to keep a person like the appellant who has invoked s. 16 under the control of the Review Board for the rest of his life. I do not know.

¶ 61 Before us, the argument was whether the term "mental condition" was broader in its scope than the term "mental disease" in s. 2. As I understood counsel for the appellant, the argument was that it is not broader in scope and that as the appellant no longer suffers from a "mental disease" the Review Board can no longer keep him under its thumb.

¶ 62 Assuming that the appellant is right that "mental condition" is not broader in scope than "mental disease", I am of the opinion that, on the diagnosis of Dr. Gharkanian, the appellant is still suffering from a "mental disease" and always will. I am, of course, well aware that, at some time in the future, the psychiatric profession upon which so much reliance is placed in these matters, will change its analysis and definition of "mental disorder" and its opinion of the causes of various such disorders just as it no longer blames the onset of schizophrenia on the mothers of the victims of that disease.

¶ 63 Like Mr. Justice Cumming, I would dismiss this appeal.

SOUTHIN J.A.

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