Case Name:

# Mazzei (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
Vernon Roy Mazzei a.k.a. Vernon Roy Lacerte
a.k.a Robert Allen Kipp

[2002] B.C.R.B.D. No. 99

**British Columbia Review Board**
**B. Walter, Chairperson, R. Routledge and**
**J. Budden, Members**

July 19, 2002.
(50 paras.)

**Appearances:**

Vernon Roy Mazzei, accused/patient.
D. Nielsen, counsel for the accused/patient.
B. Fisher, counsel for AFPS.
P. Golding and Dr. E. Murphy, for the hospital/clinic.
L. Hillaby, for the Attorney General.

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CHAIRPERSON:--

1.0 INTRODUCTION

¶ 1 On July 19, 2002 the British Columbia Review Board held a hearing to review the disposition of Vernon Roy Mazzei (a.k.a Vernon Roy Lacerte a.k.a. Robert Allen Kipp). The hearing was convened pursuant to s. 672.63 of the Criminal Code. Mr. Mazzei was the subject of a hearing and disposition on April 3, 2002, which disposition was intended, by the Review Board, to be further reviewed on or before August 3, 2002. That disposition is under appeal to the British Columbia Court of Appeal (C.A. 029739). The hearing of July 19, 2002 resulted in a further disposition of custody subject to certain conditions. These are the reasons for that disposition.

## 2.0 REVIEW OF BACKGROUND AND EVIDENCE

¶ 2 The accused was charged in March of 1986 with extortion, two counts of theft over $1000, unlawful confinement, break and enter, and assault with a weapon. Mr. Mazzei was psychotic and intoxicated at the time: Exhibit 3. On November 20, 1986 he was given a verdict of Not Guilty by Reason of Insanity and remanded to the custody of the Forensic Psychiatric Institute. At the time of the index offences Mr. Mazzei was an inpatient, on leave from the Forensic Psychiatric Institute. The Review Board has commented repeatedly in the course of its hearings and reasons on the serious nature of the index offences: see for example Exhibit 8; Exhibit 49; Exhibit 65.

¶ 3 The accused has been assessed with brain damage possibly secondary to his significant history of solvent abuse and head trauma: Exhibit 2. He also carries a diagnosis of chronic paranoid schizophrenia, antisocial personality traits and is seriously drug dependent. This combination of persistent afflictions has impeded Mr. Mazzei's treatment progress and his reintegration into society, due to his consistently demonstrated inability to comply with disposition and treatment expectations; specifically his inability to remain abstinent, mentally stable, and non-aggressive despite repeated attempts to re-establish him in the community.

¶ 4 A longitudinal review of the cumulative disposition information provides some insight into Mr. Mazzei's difficulties:

* April/May/June 1992: Physically aggressive and threatening behaviour.
* October 1992: Solvent & marijuana use.
* January 1993: Accused on unauthorized absence for 4 days; using heroin, solvents and marijuana.
* March 5, 1993: Accused goes on unauthorized absence; returned one day late, intoxicated.
* March/April 1993: Further unauthorized absence and solvent abuse.
* May 1993: Accused is considered a high risk of harm to self or others: Exhibit 16.
* July 1993: unauthorized absence; returned after four days.
* October 1993: unauthorized absence.
* December 1993: Accused tests positive for THC.
* February 1994: Marijuana use.
* April 1994: British Columbia Review Board observes accused is responding well to his behavior modification programs and is attending drug and alcohol and anger management programs.
* June 1994: unauthorized absence; returned having used cocaine and alcohol.
* August 1994: unauthorized absence; returned by police after two days having used alcohol and marijuana.

* October 1994: British Columbia Review Board requests neuro-psychological, cognitive assessment; substance use characterized (again) as the critical barrier to absolute discharge.
* March 1995: Accused discharged to Willingdon House.
* March 30, 1995: Accused on unauthorized absence from Willingdon House.
* April 26, 1995: Accused on unauthorized absence.
* April 27, 1995: Accused fails to attend British Columbia Review Board hearing.
* June 1995: Accused tests positive for codeine and phenobarb.
* August , 1995: Accused on unauthorized absence; returned August 31.
* January 1996: Accused compliant and abstinent since August 1995, even while on visit leave to Nanaimo; non-psychotic while medicated: Exhibit 54.
* March 96: British Columbia Review Board detains and observes accused has been non-psychotic since 1991; recent drug scans have been negative for substances; accused invited to seek absolute discharge following a respectable period of abstinence "otherwise his cycle of readmissions will be interminable.": Exhibit 57.
* July 1996: Accused remains stable and abstinent.
* December 1996: Physical altercation with co-patient; accused attends First Nations Program.
* April 1997: Tests positive for THC; altercation with co-patient.
* June 1997: Accused remains non-psychotic but has difficulty complying with rules considered high risk of non-compliance: Exhibit 62.
* July 1997: Review Board orders conditional discharge.
* December 1997: Accused charged with trafficking in narcotics; probation.
* January 1998: Accused returned to Forensic Psychiatric Institute via court order for breach of conditions of discharge.
* January 16, 1998: Accused tests positive for cocaine.
* April 1998: Evidence at Review Board hearing indicates accused is Hepatitis C positive; admits to cocaine use in November 1997; off medication Haldol since September 1997. Board asks treatment team to help accused find an appropriate program to battle his addiction.
* July 13, 1998: British Columbia Review Board orders custody for four months. Board again notes its requirement for a neuro-psych assessment has not been complied with; notes accused's lack of commitment to alcohol/drug treatment.
* July 1998: Accused has conflicts with and is threatening toward staff; experiences side effects of Haldol.
* August/September 1998: Psychotic symptoms diminish; altercations with peers.
* November 2, 1998: Accused is discharged by the Review Board.
* December 1998: Accused is on unauthorized absence; acknowledges heroin and cocaine use on return.
* January 1999: Discharged.

* April 1999: Accused returned to Forensic Psychiatric Institute due to marijuana, cocaine and opiate abuse.
* June 99: Custody for six months; Review Board notes accused's drug abuse is escalating; he is more irritable and belligerent toward staff.
* November 1999: Accused discharged; Board expresses need for more proactive assertive support from Director.
* Accused does not follow through with drug and alcohol treatment in community.
* May 2000: Accused admitted to Royal Columbia Hospital having overdosed on Ativan.
* June 2000: Accused requests admission to Forensic Psychiatric Institute due to suicidal ideation; admitted to Lions Gate Hospital; mentally stable.
* October 18, 2000: Dr. Kerr provides a detailed review and analysis of accused's treatment history; notes absence of symptoms; improved insight; considered low risk.
* November 2, 2000: British Columbia Review Board orders conditional discharge; though director "not opposed" to absolute discharge. Evidence indicates Director was unaware of extent of accused's actual cannabis and cocaine use and non-compliance; extent of drug use considered as contributory to high risk for violence; accused admitted to Forensic Psychiatric Institute after hearing due to decompensation and admitted intravenous drug use.
* December 14, 2000: Accused discharged.
* April 1, 2001: Accused begins to talk about Round Lake.
* May 2001: Accused requests return to Forensic Psychiatric Institute due to escalating cocaine, heroin and prescription drug abuse.
* June 8, 2001: accused discharged.
* July 2001: Accused admits using marijuana, alcohol, cocaine; accused increasingly disorganized, erratic, bizarre.
* August 2001: Accused sentenced to 1 year probation regarding theft under $5000; assault charge stayed; restrained from contact with K.O., for one year.
* August 20, 2001: Accused admitted to Forensic Psychiatric Institute for one day; accused is essentially using Forensic Psychiatric Institute as detox.
* October 1, 2001: Accused returned to Forensic Psychiatric Institute via Enforcement Order.
* November 1, 2001: British Columbia Review Board Orders 6 months custody
* Accused remains apparently abstinent; attends treatment at New Westminster; some physical altercations; drug use is becoming more entrenched and severe.
* January 2002: Accused on unauthorized absence one day; uses cocaine.

## 3.0 THE HEARING AND DISPOSITION OF APRIL 3, 2002

¶ 5 Despite the Board's collaborative scheduling process, which at all times seeks to accommodate parties and is indeed predicated on witness availability, the Director, without forewarning or request for adjournment, chose not to attend this hearing. The sole attending witness on behalf of the Director could

not speak to the critical aspects of the Board's inquiry mandate; nor was anything amounting to a treatment plan submitted. In its absence there was no incentive or indeed process for Mr. Mazzei to settle his behavior. The evidence available indicated that the accused had eloped in January 2002 and that he had used cocaine and marijuana while absent. Since his return the accused had been reactive and oppositional. There was a notable absence of dialogue between the accused and his treatment team.

¶ 6 The Review Board felt that the 16 (or so) year old status quo could not be allowed to simply subsist. In making a short order of custody for 3 months, the Board imposed certain conditions intended to alleviate the apparent impasse. Three of these conditions are the focus of the Director's appeal to the British Columbia Court of Appeal. The rationale for these conditions and their intended objectives are discussed at 6.0 below.

3.1 Evidence of the Director AFPS (via Dr. Murphy)

¶ 7 The evidence of the Director may be summarized as follows:

* On July 13, 2002 accused demonstrated verbally abusive and threatening behavior and agitation and was medicated and secluded until July 16, when he was transferred to the A2 unit.
* Dr. Murphy endorses diagnoses of paranoid schizophrenia; drug abuse; anti-social personality (A.S.P.) traits (impulsive, oppositional, criminal behavior). No change in diagnosis, programs or progress are expected.
* The accused's schizophrenic symptoms are controlled at a baseline level with medication. Drug induced intoxication can trigger similar symptoms. Though the accused complains about side effects, Clopixol is the best medication for his schizophrenia at this time. Because the Accused does not believe he has schizophrenia he would likely not comply with oral meds.
* The accused's drug problems have been intermittent but growing more intense over time. Treatment for these must be voluntary in order to be effective. He has been encouraged to get involved with drug treatment. The accused has been seeing a drug and alcohol counselor in New Westminster intermittently for 5-6 months to help him meet the criteria for admission to a residential treatment program.
* The accused's ASP traits are dealt with through consistent treatment and appropriate, clear, well known management plans, structure and clear progressive expectations and consequences.
* The accused has demonstrated a pattern of elopement/drug use/readmission to the Forensic Psychiatric Institute.
* The accused's pattern of verbal violence when psychotic or intoxicated and his risk of physical violence have remained consistent over 20 years.

* The accused's diagnoses and treatment approach are essentially unchanged since 1992 or earlier. There is no problem with the accused's treatment plan; it is consistent with psychiatric theory. Dr. Murphy predicts the accused's future progress will mirror the last 20 years. There will be no sustained dramatic changes over time.
* As to risk, Dr. Murphy does not believe the accused can be safely managed in the community at this time due to his recent relapse to substance use and an aggressive episode in July. His risk of injury to self or others is as it was in 1993 - high.
* In order to achieve discharge the accused would have to demonstrate a period of non-violent, stable behavior; continue alcohol and drug treatment and meet criteria for residential treatment; comply medically to control his psychotic symptoms; follow through on behavioral expectations. This is currently only feasible from the base of the hospital.
* There is no reason to expect enhanced rapport given the custodial, involuntary nature of the setting. His relationship with FPS is ambivalent.
* There have been no actual serious physical altercations since 1992.
* It has essentially been left to Mr. Mazzei to arrange for his drug and alcohol treatment. If he follows through it would lessen his risk; access criteria are set by the program and generally include a period of sobriety.
* Mr. Mazzei has in recent years shown more interest in his first nations culture.
* The treatment approach has not effectively achieved his reintegration or substantially reduced his risk to public safety If left to his own devices he would likely cause serious harm before the intervention of civil mental health authorities.

¶ 8 We also had disposition information from Mr. Golding indicating:

* The accused's cooperation and demeanor improved after the last hearing; he transferred to Dogwood unit and started the New West Program.
* The accused failed to return from day leave June 21; He returned July 9 having used marijuana, cocaine; he is uncooperative since his return.

3.2 The Evidence of Mr. Mazzei, summarized:

¶ 9

* Mr. Mazzei talked about how he connected with his community drug and alcohol counselor and his participation in the "CARE" program.
* He would like to move to Penticton, take his meds as well as natural medications, and go to Round Lake.
* He would attend Round Lake but not in winter.

* He has not struck staff in 14 years.
* He has schizophrenia and is addicted to cocaine.

4.0 SUBMISSIONS

4.1 The Director, AFPS

¶ 10 The Director submitted that the evidence unfortunately leaves no option but to further detain the accused because:

* There has been no appreciable or significant change in terms of the accused's attraction to substances in many years.
* The treatment team can do nothing more to assist Mr. Mazzei to obtain drug treatment; this is essentially an area which falls to his own motivation to achieve.
* Mr. Mazzei is at high risk for non-compliance and decompensation. His history suggests he will relapse to substance use.
* His risk can not be managed in the community at this time.
* Mr. Mazzei's risk of harm to others justifies further detention.
* The accused's lack of cooperation has prevented the Director from developing or implementing a viable discharge plan.

¶ 11 The Director's legal arguments in support of its position for deleting clauses 8, 9 and 10 of the April 3, 2002 disposition, which are the subject of appeal, are dealt with separately below.

4.2 The MAG

¶ 12

* The public safety requires a detention order based on Dr. Murphy's current assessment of Mr. Mazzei's risk.

4.3 The ACCUSED

¶ 13

* The accused has not been physically aggressive since 1992; an assault charge against his girlfriend (since) was withdrawn.
* Mr. Mazzei is verbally threatening when psychotic or abusing drugs. The frequency of this has not changed.
* He is able to survive and can access drug treatment in the community; he does not need to be in custody to access the treatment services he needs.

* Alternatively, if custody is ordered, the Board should continue clauses 8, 9 and 10 of the current disposition to ensure the active participation of the treatment team in his transition to residential treatment.

## 5.0 DISPOSITION

¶ 14 As outlined in the course of these Reasons for Disposition, the Review Board has once again reviewed the entire evidentiary record and considered it in light of the criteria contained in s. 672.54 of the Criminal Code, to wit: the protection of the public; the mental condition of the accused; the reintegration of the accused into society; the accused's other needs.

¶ 15 In examining those dimensions we have once again apprised ourselves of the accused's various diagnoses and their response to the treatment and services that have been provided or offered over the years. Sadly, Mr. Mazzei's combination of afflictions have rendered these treatment attempts less effective than might be hoped.

¶ 16 Though Mr. Mazzei's psychosis is controlled, it is not speculative to predict, given his dubious acceptance of his Axis I diagnosis, his lack of insight/cognition, his uncomfortable side effects and his past pattern of behaviour, that he would at some point in the near future discontinue his medications. Relapse to paranoid thinking would surely follow as it did in 2001.

¶ 17 Mr. Mazzei's attraction and addiction to a multiplicity of substances remains as virulent as ever; indeed it may be deepening and intensifying. In the past the Review Board has repeatedly tried to encourage Mr. Mazzei and given him the benefit of the doubt that his protestations and his motivation regarding substances were sincere, only to see him relapse. His use of drugs can lead him to think along psychotic themes and certainly disinhibits or strips him of his rather limited and compromised social coping techniques. His ongoing addictions potentiate his risk factors. There is no historic basis for any confidence whatsoever that Mr. Mazzei, if left to his own devices in the community, would be able, despite his recent sessions with Vera Jones, gain access to the residential treatment which he states he now desires, (as long as he does not have to go in winter). Clearly, his insight and motivation remain ambivalent.

¶ 18 In our view Mr. Mazzei's best and perhaps only chance of meeting the criteria for admission to residential treatment, which we accept generally requires a preceding period of sobriety, are from the platform of close supervision and enforced abstinence at FPI.

¶ 19 On that issue we have however, seen fit to continue the core direction and intent underlying the impugned clause 10 of Mr. Mazzei's previous disposition. A new clause 9 of our disposition will require: "THAT the Director continue to undertake all reasonable efforts to assist the accused and support him in his efforts to achieve admission to a culturally appropriate residential treatment program".

¶ 20 We impose this requirement on the understanding, notwithstanding such treatment is essentially insight based or voluntary in nature, and the criteria for admission are beyond the administrative purview of the Director, that Mr. Mazzei is in effect a disadvantaged and compromised individual who is in all respects captive, dependent and under the de-facto guardianship of the director: Winko, par. 54. Because of his legal status it is well within the Director's forensic mandate to take all reasonable and instrumental measures to maintain Mr. Mazzei in a sober state and to actively assist him in the administrative steps required to advocate for and gain his admission into an appropriate program. To achieve this objective, the Review Board has afforded visit leaves of up to 60 days' duration. Success in this area is perhaps Mr. Mazzei's most prominent need if he is to have any hope of a future elsewhere than in an institutional, mental health or penal environment. Certainly all efforts to integrate him into community to date have failed.

## 6.0 DECISION RELATING TO CLAUSES CONTAINED IN Mr. MAZZEI PREVIOUS DISPOSITION (EXHIBIT 105)

¶ 21 On the basis of our review of the evidence and the forgoing analysis we conclude that, if he were to be discharged, Mr. Mazzei could pose a foreseeable, non-speculative threat such as justifies our continued jurisdiction over him: Winko. Given his multiple needs we currently see no less restrictive alternative but to maintain his detention in the hope that he will finally be able to access and to embrace the treatment he requires to move ahead.

¶ 22 Clauses 8, 9 and 10 of Mr. Mazzei's previous disposition (Ex. 105) are the subject of appeal. Nevertheless, their continuation in the current disposition and the Review Board's legal authority to impose them were the subjects of considerable argument at the hearing. It also became apparent in the course of the hearing that the clauses were not well understood. Accordingly, although we have seen fit to delete two of the impugned clauses in our new disposition and to modify the third, it is at least appropriate that we address their underlying objectives and respond to the legal challenges to the Tribunal's jurisdiction.

Clause 8: The requirement that the Director undertake a global review of the accused's diagnostic and treatment history.

¶ 23 It was, and is, painfully evident that the FPI treatment and programs extended to the accused for many years were not meeting his nor society's needs. Neither his addiction nor his psychosis appeared effectively treated. No treatment plan which responded to the accused's increasing anger, reactivity, addiction and institutionalization was offered at the previous hearing. The dialogue between Mr. Mazzei and the hospital had become one of resignation.

¶ 24 The Board's order to review the accused's file was by no means based on any disagreement with, or doubt about, the director's assessment or diagnostic expertise. What the board was trying to address is perhaps best exemplified by the significant contrast between Mr. Mazzei's various in-custody assessments and that of Dr. Kerr, dated October 18, 2000, at Exhibit 88.

¶ 25 Dr. Kerr's report takes a positive, success-oriented assessment perspective, rather than a purely negative, anecdotal, deficit-focused, lockstep approach. This difference in assessment perspectives is not explained simply by the fact that Dr. Kerr was unaware of the extent of Mr. Mazzei's drug use. To us this contrast underscores the clinical and indeed ethical importance of periodic, comprehensive, objective review of historic and future plans, including from a relational perspective. Rather than challenging the director's diagnostic expertise the Board was expressing its concern about the dysfunctional and adversarial relationship between Mr. Mazzei and his treatment team. Despite its power, resources and expertise, the team appears unable to meaningfully engage Mr. Mazzei. Our rationale for clause 8 was to try to engage the accused and to end the standoff; to reconceptualize the institutionalized, lockstepped case planning template which exists in relation to this accused and which has obviated any recent progress. Such a direction in no way minimizes Mr. Mazzei's behaviours or responsibilities in the equation.

¶ 26 It strikes us that the current approach to the case is in fact threatening the legal and policy objectives of the Criminal Code in relation to the accused; objectives which are equally incumbent upon the Director who is governed by the scheme.

¶ 27 The condition was therefore well within the ambit and authority of the Review Board.

Clause 9: The requirement for an independent risk assessment.

¶ 28 It is trite to restate that risk assessment is essential to the Review Board's mandate and decision making at each hearing; that the Tribunal relies mightily on the representatives of the Director to provide information to assist it in that function. Nothing amounting to a risk assessment was provided at the April 3 hearing. Mindful of its legal obligation, the Board ordered such information. After 10 years of operation under the current legal framework the Director should, whether it agrees with it or not, be able to understand and accept this legal requirement. What was called for was not the mechanical act of filling out an HCR 20 checklist but an actual, balanced, critical analysis/assessment of the instrumental risk factors.

Clause 10: The requirement that the Director undertake efforts regarding drug and alcohol treatment.

¶ 29 This requirement should be self evident/explanatory. Mr. Mazzei, is afflicted with cognitive, psychiatric and personality deficits. He is also incarcerated in a designated and secure place of custody for purposes of the Criminal Code: S. 672.1.; see also Winko, par. 54.

¶ 30 His addiction issues have been considered central to his progress in terms of compliance, behaviour, reintegration and social safety. To expect a compromised, disadvantaged, custodial patient to undertake his own procedural arrangements with respect to gaining entry into a residential treatment program is in our own view inappropriate and irresponsible. Our requirement of the Director was not based on any misunderstanding that such programs operate independently of FPS or that admission is ultimately based on criteria outside the control of the Director.

¶ 31 Arguments and submission on this front were marshaled in support of the Director's position to discontinue or delete clauses 8, 9 and 10 of the previous disposition.

¶ 32 The arguments are essentially jurisdictional in nature and are those currently before the BC Court of Appeal. However, perhaps in the alternative, the Director also argued that at least conditions 8 and 9 had been substantially satisfied by Dr. Murphy's report at Exhibit 108.

¶ 33 We acknowledge these issues are best determined at an appellate level. We welcome and await the Court of Appeal's direction. As an intervenor to the appeal, the Board has responded in the context of its factum; however, to the extent that these arguments were made at this hearing we consider it not inappropriate to briefly outline the Board's response and rationale, especially insofar as the underlying controversy remains a live one and will continue to arise in other cases.

1. That Part XX.1, C.C. does not grant the Review Board the Authority to impose conditions on the "Director".

¶ 34 The Review Board rejects this contention on a number of grounds. None of the plain language of s. 672.54, or any other aspect of the Criminal Code, judicial interpretation, the underlying policy purposes of Part XX.1, or the Forensic Psychiatry Act: ([R SBC 1996] ch. 156.) in any way support this position.

The Nature and Effect of the Forensic Psychiatry Act, R.S.B.C.

¶ 35 The Forensic Psychiatry Act is essentially a provincial funding Statute. It establishes a discrete Forensic Service system (independent of the public hospital system), and authorizes its public funding. Such an approach is considered warranted by the need for an independent or arms length (in the sense of objective) forensic service. "Forensic" means service further to the administration of justice. Although this Act has not been amended since the promulgation of Part XX.1 of the Code, its mandate must of necessity include the Review Board due to the legal status of its accused patients and of the Board. The Forensic Psychiatry Act neither extends authorities to the Director, nor does it limit the procedural or substantive authorities of the Review Board, which is an integral part of Federal criminal legislation: Winko, par. 33. As the Forensic Psychiatry Act was in place well before Part XX.1 and the Review Board, as provincial legislation it obviously cannot prospectively fetter the intent of Parliament: M&D Farm v. Manitoba Agriculture [1999] 9 W.W.R., 356 (S.C.C.).

The Case Law does not support the argument

¶ 36 The Johnson decision which was extensively quoted is entirely off the point; even the passages quoted in no way obviate the authority of the Board to impose conditions on parties other than the accused in furthering the duties and obligations (i.e. balancing safety vs. individual liberty interests) imposed on it. NCR and Unfit To Stand Trial accused persons are by definition functionally

compromised. It would be absurd to expect them to be the sole agents of achieving these frequently competing objectives.

¶ 37 In marshalling the resources, requirements and programs needed to achieve these ends the Review Board (as an agent of Parliament) must be able to resort to and rely upon the other "parties" before it, especially those who are given corresponding, delegated, de facto guardianship authorities over an accused. Such obligations and responsibilities are the essence of party status: see Chalmers; Baker; Tulikorpi (Ont. C.A.)

¶ 38 The bulk of judicial interpretation unequivocally supports the interpretation that, although the Board would likely wish to refrain from routinely 'micro managing' or unduly interfering in the clinical and administrative specifics of an accused's case in favour of deferring to treatment providers, nothing in fact prevents the Board from intervening in or directing any aspect or detail of the accused's care: "Although it would likely be appropriate in most circumstances to leave details of detention up to the professional caregivers"... the Board "would not be acting outside its jurisdiction in imposing detailed conditions...": Pinet, (1995) 100 C.C.C. (3d) 343.

The format or wording of the Disposition is a matter of Administration

¶ 39 We also point out that currently, any standard disposition made by this Board already routinely directs or addresses a substantial proportion of its conditions to the "Director". Examples include the duties of the Director to supervise, to accommodate, to periodically assess, to exercise discretion in relation to privileges and liberties, and to test. It is nothing more than historic usage and administrative practice that our conditions are worded as they are. All or most conditions could indeed be drafted in a manner which is directed entirely toward the "Director". This is in fact practice in other jurisdictions. The Review Board will consider at a policy level whether this should, along with reference to the Inquiries Act (RSC. c. I-13) where necessary, become the standard practice in B.C also. The result would be that the majority of our disposition conditions (other than prohibitions on the accused) would begin with the words "The Director shall...".

¶ 40 The point is that the format of the dispositions in effect across the country varies considerably. The particular language or format chosen in any one jurisdiction is not regulated; the substantive content is paramount.

2. That the BCCA's refusal to suspend the Order of April 3, 2002, supports the Board's lack of jurisdiction to impose conditions on the Director.

¶ 41 This interpretation of the Director's unsuccessful attempt to stay the impugned order is rejected.

The Appeal Provisions are not designed to address conditions or jurisdictional disputes

¶ 42 The provisions providing for the suspension of dispositions pending appeal (s. 672.76, .77) are

intended for exactly that: to suspend the implementation of a substantive disposition, (i.e. Absolute, Conditional Discharge, Detention), not simply a condition(s) of a disposition.

¶ 43 Appeals of dispositions per se, and especially their suspension, are reasonably and specifically predicated on changes in an accused's mental state; otherwise public safety might be at risk. The appeal provisions were not intended to address or provide a venue for jurisdictional arguments based not on any disagreement with the disposition outcome, but on a perceived affront to the Director's authority.

3. That the relationship between the Board and the Director is based on "cooperation" not authority.

¶ 44 While the Board tries to approach all parties with respect and dignity and to work cooperatively with them on such administrative or procedural matters as the scheduling and the conduct of hearings, the above statement is in our view a mischaracterization of the relationship. The Review Board is in all respects a tribunal charged with regulating, apportioning and determining Charter protected rights and interests. It is considered a "Section 7 tribunal.": See some discussion of this in a case comment by M. Rankin, Q.C. on Ocean Port Hotel in the Advocate, Vol. 60, Part 1, Jan. 2002.

The Director's description of the relationship with the Review Board violates natural justice

¶ 45 It would be an alarming message indeed to any accused whose s. 7, s. 9 or s. 11(d) Charter rights are in issue, to understand that the Board and the Director are in fact in a cooperative relationship, however desirable that may appear. How could our hearings be considered fair and impartial if that were true? The Director's interpretation of the relationship would raise doubts about the structural independence of the Review Board. As noted by the Supreme Court of Canada in R. v. Lippe (1991), 64 C.C.C. (3d) 513 (S.C.C.):

> [W]hether or not any particular judge harboured pre-conceived ideas of biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. As this court stated in Valente, supra, the appearance of impartiality is important for public confidence in the system. ...If a judicial system loses the respect of the public, it has lost its efficacy.

¶ 46 To describe the relationship of the Review Board with the Director as being one of cooperation potentially amounts to a denial of natural justice and would expose every accused's disposition to judicial review. It would certainly vitiate the entire purpose of Part XX.1, which, along with its other fundamental objectives, includes holding accountable and scrutinizing those providing treatment services on an involuntary, legally mandated, coercive basis in the context of fair hearings.

The Director has the obligations of any other "party"

¶ 47 The Board's relationship with the Director is that of any Court or tribunal with any litigant or

party before it; it includes/encompasses all the rights and obligations which flow from party status.

¶ 48 For the Board to accept the Director's argument would be an abdication of its adjudicative and decision making role. If the Director has unfettered discretion to provide only the information it deems fit, it could essentially predetermine the outcome of each and every hearing by simply choosing what information to provide and how or to decline to do so; essentially gutting the scheme. We of course do not imply that the Director deliberately withheld information in this case.: See Bell Canada v. CRTC (1989) 60 D.L.R. (4th) 682 (S.C.C.) Par. 50.

¶ 49 As it is the very essence of the Board's mandate to determine whether an accused continues to require coercive treatment, we conclude that, subject to s. 672.56, no aspect of the treatment or management of an NCR or UST accused is beyond the purview or ambit of the Review Board; the types of conditions contained in the disposition appealed from are necessary and incidental to the Review Board's mandate: See Napoli (1981), 20 B.C.L.R. 371 (CA).

¶ 50 While, in light of the short duration of the order under appeal and other intervening circumstances, there may be an explanation for non-compliance in this case, the Director is not at liberty to ignore any order of the Board that it does not agree with. The proper venue to challenge an order is via appeal or judicial review; otherwise even a void or unconstitutional order stands unaffected and in full force until set aside:

> "This result is as it should be. If people are free to ignore ... orders because they believe that their foundation is unconstitutional anarchy cannot be far behind. The citizen's safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.": Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 at 976.

B. WALTER, CHAIRPERSON
R. ROUTLEDGE, PANEL MEMBER
J. BUDDEN, PANEL MEMBER

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