SUPREME COURT OF CANADA

CITATION: Mazzei *v.* British Columbia (Director of Adult Forensic Psychiatric Services), [2006] 1 S.C.R. 326, 2006 SCC 7

DATE: 20060316
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BETWEEN:

Vernon Roy Mazzei
Appellant
v.
Director of Adult Forensic Psychiatric Services and Attorney General of British Columbia
Respondents
- and -
British Columbia Review Board, Ontario Review Board, Quebec Review Board, Nova Scotia Review Board, New Brunswick Review Board, Manitoba Review Board, Prince Edward Island Review Board, Saskatchewan Review Board, Alberta Review Board, Newfoundland Review Board, Northwest Territories Review Board, Yukon Review Board, Nunavut Review Board Attorney General of Ontario, Community Legal Assistance Society and Mental Health Legal Advocacy Coalition
Interveners

CORAM: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 67) Bastarache J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

* Major J. took no part in the judgment.

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Vernon Roy Mazzei *Appellant*

v.

Director of Adult Forensic Psychiatric Services and Attorney General of British Columbia *Respondents*

and

British Columbia Review Board, Ontario Review Board, Quebec Review Board, Nova Scotia Review Board, New Brunswick Review Board, Manitoba Review Board, Prince Edward Island Review Board, Saskatchewan Review Board, Alberta Review Board, Newfoundland Review Board, Northwest Territories Review Board, Yukon Review Board, Nunavut Review Board, Attorney General of Ontario, Community Legal Assistance Society and Mental Health Legal Advocacy Coalition *Interveners*

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Neutral citation: 2006 SCC 7.

File No.: 30415.

2005: November 14; 2006: March 16.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Criminal law — Mental disorder — Dispositions by Review Board — Terms of dispositions — Criminal Code providing that Review Board may make dispositions directing that accused found not criminally responsible be detained in custody in hospital subject to conditions — Scope of Board's power — Whether Board has jurisdiction to make conditions binding on parties other than accused such as hospital authorities — If so, whether Board can impose conditions relating to medical treatment of accused — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

In 1986, the accused, an aboriginal person, was found not guilty of several offences by reason of insanity. He was diagnosed as suffering from chronic paranoid schizophrenia, a serious antisocial behaviour, and organic brain damage. He was ordered to be held in strict custody. In 1992, pursuant to the new Part XX.1 of the *Criminal Code*, he was reclassified as "not criminally responsible" ("NCR") and fell under the jurisdiction of the British Columbia Review Board. After several unsuccessful conditional discharges, he was placed at the Forensic Psychiatric Hospital. The accused expressed the wish to attend a First Nations rehabilitation centre for his drug and alcohol addiction. At the hearing of the Review Board on April 3, 2002, the Board felt that the accused's treatment had reached an impasse and expressed concerns over the inadequate information provided by the accused's case manager and treatment team, as well as the accused's reluctance to cooperate with this treatment team. The Board ordered that the accused continue to be held in custody at the hospital. The disposition order required the

* Major J. took no part in the judgment.

Director of Adult Forensic Psychiatric Services, for the accused's next hearing, to provide an independent evaluation of the accused's diagnosis, treatment, and clinical progress; to provide an independent evaluation of his public safety risk in light of a new, refocused treatment plan; and, to undertake assertive efforts to enroll the accused in a culturally appropriate treatment program. The Director appealed to the Court of Appeal. It held that the Board did not have jurisdiction to make an order imposing medical treatment or to make conditions binding on anyone other than the accused. It struck the conditions imposed on the Director from the order.

Held: The appeal should be allowed.

Although the impugned order has been overtaken by subsequent orders and there is no longer a live controversy between the parties, the issue of the powers of Review Boards remains unresolved and the Court has exercised its discretion to hear the appeal. The appropriate standard of review when considering the Review Board's jurisdiction to impose the conditions is "correctness". If the Board acted within its jurisdiction, and if its interpretation of s. 672.54 of the *Criminal Code* was correct, it must still be determined whether the conditions were "reasonable" (s. 672.78(1)(*a*)). [15-17]

Review Boards have the power and authority to make their orders and conditions binding on parties other than the accused, namely, the Director, hospital authorities and treatment teams. This is indicated by the ordinary meaning and grammatical sense of the words used in s. 672.54, the structure and wording of the French text, and the provisions in Part XX.1 dealing with the enforcement of orders and appeals. The legislative scheme and Parliament's intent also support this interpretation. The legislative scheme involves: (1) the creation of specialized Review Boards in each

province and territory to oversee the management of NCR accused within the criminal justice system; and (2) the participation of provincial health authorities and facilities in delivering appropriate medical services where appropriate and necessary in order to facilitate the assessment and management of the threat to public safety posed by NCR accused and to improve their prospects for rehabilitation and community reintegration. In light of the Boards' mandate, Parliament could not have intended to charge these Boards with overseeing and implementing assessment and treatment without ensuring they could bind parties other than accused persons to their orders. [19-29]

The operational scheme of Part XX.1 and the way the courts have interpreted it reveal that Review Boards do not have the power to prescribe treatment. The authority to do so lies exclusively within the mandate of the provincial authority in charge of the hospital where the NCR accused is detained, pursuant to various provincial laws governing the provision of medical services to persons in the custody of a hospital facility. The role of Review Boards is merely to ensure that opportunities for medical treatment are provided. Granting Review Boards the power to impose treatment would interfere with the provincial legislative competence over health services. The composition of the Board and the expertise of its members support this interpretation of a Board's powers under s. 672.54. If a Board could prescribe treatment, the two members with no expertise in psychiatry could conceivably render a disposition over the objections of the third member who is required by the *Code* to be entitled to practise psychiatry. Granting Review Boards the power to prescribe treatment would also grant a similar power to courts despite their lack of relevant expertise, because a court hearing an appeal from a Board's order can make any disposition that the Board could have made. [30-38]

Although Review Boards do not have the power to prescribe treatment, they do have the power to make orders and attach conditions "regarding" or relative to the "supervision" of the medical treatment of an NCR accused. In order to fulfill their statutory role and mandate, i.e., making appropriate disposition orders aimed at protecting the public while safeguarding the liberty interests of the accused, they must have some supervisory power over the medical treatment of NCR accused persons. The scope of a Board's power to make, in a supervisory capacity, orders and conditions that are "related to" or "regarding" an accused's medical treatment arguably includes anything short of actually prescribing treatment. A Review Board must be able to form its own independent opinion of an accused's treatment, prospects for rehabilitation and reintegration, and risk to public safety, and this requires that it be entitled to order a re-evaluation of treatment approaches and an exploration of alternative treatments where necessary. The authority for this power is derived from the purpose of the legislative scheme, the mandate and expertise of Review Boards, and the wording of various sections of Part XX.1; it is also echoed in the jurisprudence. [39-47]

Properly interpreted, the second part of s. 672.55(1) is not a true exception to the prohibition against prescribing treatment, but represents an example of the Board's supervisory power over treatment decisions. Section 672.55(1) should have a narrow and limited application and scope. In essence, this power to make a condition "regarding" treatment under s. 672.55(1) is merely a reflection of the Board continuing to fulfill its mandate to provide "opportunities for treatment" in situations where the accused is in the community and no longer under the supervision of a provincial health authority. [50-55]

The conditions imposed on the Director should not have been struck from the Board's order. They constitute a valid exercise of the Board's powers and

jurisdiction under s. 672.54. They fall squarely within its authority to question the accused's treatment plan, to explore new treatment possibilities, to supervise his rehabilitation and to assess his risk to public safety. The conditions do not interfere with the accused's treatment plan or the Director's discretionary authority. All three conditions were reasonable in that they were amply supported by the evidence at the Board's hearing, and they were justified by the impasse in the accused's treatment and the perceived lack of accurate and useful information concerning the accused at the hearing of April 3, 2002. [56-66]

Cases Cited

Referred to: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20; *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21; *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46; *Manitoba (Attorney General) v. Wiebe*, [2005] 2 W.W.R. 707; *R. v. Lewis* (1999), 132 C.C.C. (3d) 163; *Beauchamp v. Penetanguishene Mental Health Centre (Administrator)* (1999), 138 C.C.C. (3d) 172; *Brockville Psychiatric Hospital v. McGillis* (1996), 2 C.R. (5th) 242.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(27), 92(7).

Criminal Code, R.S.C. 1985, c. C-46, Part XX.1, ss. 672.1, 672.38(1), 672.39, 672.41(1), 672.42, 672.54, 672.55(1), 672.58, 672.59(1), 672.62, 672.72 to 672.78, 672.81, 672.9 to 672.94.

Forensic Psychiatry Act, R.S.B.C. 1996, c. 156.

Mental Health Act, R.S.B.C. 1996, c. 288, s. 30.

Authors Cited

Concise Oxford English Dictionary, 11th ed. Oxford: University Press, 2004, "direct".

APPEAL from a judgment of the British Columbia Court of Appeal (Ryan, Levine and Smith JJ.A.) (2004), 28 B.C.L.R. (4th) 69, 200 B.C.A.C. 79 (*sub nom. Mazzei, Re*), 327 W.A.C. 79, 15 Admin. L.R. (4th) 274, 185 C.C.C. (3d) 196, [2004] B.C.J. No. 831 (QL) (*sub nom. British Columbia (Attorney General) v. British Columbia (Adult Forensic Psychiatric Services)*), 2004 BCCA 237, striking conditions from an order of the British Columbia Review Board. Appeal allowed.

Rod Holloway and *Garth Barriere*, for the appellant.

Angela R. Westmacott and *Deborah K. Lovett, Q.C.*, for the respondent the Director of Adult Forensic Psychiatric Services.

George H. Copley, Q.C., and *Lyle B. Hillaby*, for the respondent the Attorney General of British Columbia.

Joseph J. Arvay, Q.C., and *Mark G. Underhill*, for the intervener the British Columbia Review Board.

Maureen D. Forestell and *Joseph Wright*, for the interveners the Ontario Review Board, the Quebec Review Board, the Nova Scotia Review Board, the New Brunswick Review Board, the Manitoba Review Board, the Prince Edward Island

Review Board, the Saskatchewan Review Board, the Alberta Review Board, the Newfoundland Review Board, the Northwest Territories Review Board, the Yukon Review Board and the Nunavut Review Board.

Sara Blake and *Heather Mackay*, for the intervener the Attorney General of Ontario.

David W. Mossop, Q.C., for the intervener the Community Legal Assistance Society.

Anita Szigeti, for the intervener the Mental Health Legal Advocacy Coalition.

The judgment of the Court was delivered by

BASTARACHE J. —

1. Introduction

1 This appeal concerns the interpretation of Part XX.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, in particular s. 672.54, and a determination of the mandate of Review Boards and their authority to make orders affecting persons found "not criminally responsible on account of mental disorder" ("NCR"). The central question is the scope of the Boards' power to make conditions binding on hospital authorities, and in particular, conditions related to the provision of medical treatment.

1.1 *Summary of the Facts*

2 In 1986, the appellant Vernon Mazzei ("Mazzei") was found "not guilty by reason of insanity", pursuant to the former *Criminal Code* scheme dealing with mentally ill offenders, on counts of theft, robbery, unlawful confinement, breaking and entering, and assault with a weapon. In accordance with the applicable legislative scheme, Mazzei was ordered to be held in strict custody at the Forensic Psychiatric Institute, a secure inpatient facility located in Port Coquitlam, B.C., "at the pleasure of the Lieutenant Governor in Council". Mazzei was diagnosed by a number of psychiatrists; the consensus seems to be that he suffers from chronic paranoid schizophrenia, a serious antisocial personality disorder, and organic brain damage, all of which appear to have been exacerbated by long-term and chronic substance abuse. In 1992, pursuant to the new Part XX.1 of the *Criminal Code*, Mazzei was re-classified as "NCR" and fell under the jurisdiction of the British Columbia Review Board ("Board"). Mazzei's numerous Board hearings resulted in several conditional discharges; all but one of these orders led to Mazzei being returned to strict hospital custody, either because of breaches of conditions of discharge, or because his unchanged mental condition, antisocial behaviour and substance abuse continued to give rise to a threat to public safety. On October 1, 2001, while under a conditional discharge, Mazzei pleaded guilty to theft under $5,000; this was a breach of a previous Board order. On November 1, 2001, the Board ordered that Mazzei be placed at the Forensic Psychiatric Hospital ("Hospital"), but stated that this order should be reviewed within six months.

1.2 *The Impugned Board Order*

3 At a new hearing on April 3, 2002, the Board heard evidence that, as an aboriginal person, Mazzei wished to attend a First Nations residential rehabilitation centre to receive culturally appropriate treatment for his drug and alcohol addictions.

Mazzei's counsel urged the Board to take a new approach to his treatment, and to involve aboriginal resources and programs. However, the Board also heard evidence that Mazzei was "reluctant" to cooperate with his treatment team, and that he engaged in patterns of substance abuse and escape attempts (see Board's decision, at pp. 1-2). The Board expressed concern over the "late" and inadequate information provided by Mazzei's case manager and treatment team; his supervising psychiatrist's absence at the hearing; and his case manager's inability to answer many of the Board's questions (p. 2).

4 Ultimately, the Board ordered that Mazzei continue to be held in custody at the Hospital (until his next hearing, no later than four months), and imposed conditions allowing Mazzei limited community access and prohibiting the use of firearms, drugs and alcohol. However, the Board felt that Mazzei's medical treatment, clinical progress and reintegration prospects had reached a "troubling crossroads or impasse", and that Mazzei was "stuck in an untenable and unlikely-to-resolve situation" (p. 3). The Board indicated that Mazzei's current treatment plan "is meeting neither his nor the public's needs" (p. 4). Accordingly, the Board directed the respondent, the Director of Adult Forensic Psychiatric Services at the Hospital ("Director"), to reconsider Mazzei's current plan and explore new options. Specifically, the Board included the following three conditions in its disposition order, which are the subject of this appeal:

> 8. THAT for the accused's next hearing the Director undertake a comprehensive global review of Mr. Mazzei's diagnostic formulations, medications and programs with a view to developing an integrated treatment approach which considers the current treatment impasse and the accused's reluctance to become an active participant in his rehabilitation;
>
> 9. THAT for his next hearing the Board be provided with an independent assessment of the accused's risk to the public in consideration of the above refocussed treatment plan;

> 10. THAT the Director undertake assertive efforts to enroll the accused in a culturally appropriate treatment program . . . .

1.3 *The Court of Appeal's Decision* ((2004), 28 B.C.L.R. (4th) 69, 2004 BCCA 237)

5 The Director appealed this order to the British Columbia Court of Appeal ("B.C.C.A.") pursuant to s. 672.72, which provides for appeals by any "party" to a hearing (defined in s. 672.1 to include the Board, the accused, the person in charge of the Hospital and the provincial Attorney General). The Director alleged that the Board lacked the jurisdiction to impose conditions 8, 9 and 10. The B.C.C.A. unanimously allowed the appeal. Ryan J.A., writing for the court, found that according to the statutory scheme and the intent of Parliament, the role of the Board is restricted to the management of the NCR accused for the protection of the public, while the Director is responsible for the accused's medical treatment (para. 79). A Board cannot make an order imposing medical treatment without violating this division of roles and responsibilities. Ryan J.A. also stated that when making a disposition order under s. 672.54, a Review Board may only impose conditions which are reasonable and necessary, based on expert evidence. Ryan J.A. found that it is "implicit in the scheme" that hospital staff "would be the experts recommending and delivering the treatment"; as a result, an order requiring them to consider and deliver medical treatment to Mazzei "would be redundant" (para. 77). Furthermore, Ryan J.A. found that the jurisprudence indicates that the Board cannot make conditions binding on anyone other than the accused (para. 90). Ryan J.A. concluded that conditions 8, 9 and 10 constituted an excess of jurisdiction, and an "interference" in matters wholly within the Director's mandate; as such, they were struck from the order (para. 91). Mazzei now appeals this decision.

1.4 *Relevant Legislative Provisions*

6 The relevant legislative provisions are set out in the Appendix. Amendments to ss. 672.1 effective June 30, 2005 and to ss. 672.54 and 672.55 effective January 2, 2006 do not affect the interpretation of Part XX.1 of the *Code* for the purposes of this appeal.

1.5 *Summary of the Disposition of This Appeal*

7 For the reasons that follow, I conclude that Mazzei's appeal should be allowed. Review Boards have the power to bind hospital authorities and to impose binding conditions regarding or supervising (but not prescribing or imposing) medical treatment for an NCR accused. In this case, conditions 8, 9 and 10 were well within the Board's supervisory powers. These conditions are clearly linked to the Board's mandate to assess and manage Mazzei's threat to public safety, and were part of an appropriate disposition order aimed at protecting society while minimizing restrictions on his liberty.

2. Issues and Submissions of the Parties

2.1 *Issues on Appeal*

8 The issues at the heart of this appeal are: (1) whether a Review Board has the authority to make conditions binding on hospital authorities such as the Director, and if so, whether this may include conditions related to medical treatment; and (2), if this is the case, whether the three conditions imposed by the Board in this instance were consistent with that power.

2.2 *Positions of the Parties and Interveners*

9 The appellant Mazzei argues that Review Boards have the power to make conditions binding on hospital authorities, and specifically to prescribe or impose medical treatment. This power is derived from the Director's status as a participant in the Review Board disposition process and in fostering the rehabilitation and community reintegration of an accused. The extent of this power, especially with respect to medical treatment, is revealed by a contextual and purposive examination of the legislation. Pursuant to this Court's analysis in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, the purpose of s. 672.54 is to create a mechanism by which Review Boards assess and manage the risk to public safety represented by certain NCR accused persons, and craft appropriate disposition orders which protect society and facilitate the medical treatment of the accused, while restricting their liberty as little as possible.

10 The respondent Director and the respondent Attorney General of British Columbia argue that the Director is not subject to the Board's supervision but is instead governed by provincial statutes such as the *Mental Health Act*, R.S.B.C. 1996, c. 288, and the *Forensic Psychiatry Act*, R.S.B.C. 1996, c. 156. The Director argues that the Board has no power over the medical services provided to an NCR accused. The respondents argue that the Board's function is only meant to provide the accused with due process and fairness; its power is simply to obtain information to assess the risk posed by the accused, and make an appropriate disposition. That order must be concerned solely with managing the accused's safety risk; it cannot interfere with the doctor-patient relationship established between the hospital and the accused. Conditions in an order bind the accused and no one else, since they can only touch on issues of security, hospital privileges and/or community access, and cannot address medical treatment issues.

11 The intervener British Columbia Board argues that it has a statutory duty to ensure that an NCR accused is provided with appropriate treatment opportunities; this includes the need to question current approaches and explore new options. As a result, the Board must have the power to bind persons other than the accused. Ultimately, while the Board may not make conditions imposing treatment (outside of limited and narrow exceptions), it must have the power to scrutinize the current treatment plan and require the Director to explore alternative approaches. These arguments are echoed in the submissions from the interveners comprised of Boards in other provinces and territories.

12 The intervener Attorney General of Ontario ("Ontario") focuses on the differences in provincial treatment schemes, applicable laws concerning medical services and consent to treatment, and the quantity and availability of resources. Ontario also argues that while a Board has the authority to make conditions binding on hospital authorities, it does not have the power to enforce them. While the Board has no authority to prescribe treatment, it must craft dispositions which provide opportunities for treatment. The Board has the authority to gather existing information in order to assess an accused's safety risk, but it cannot require the production of "new" information.

13 The intervener Community Legal Assistance Society ("CLAS"), which often represents accused persons at Board hearings, submits that the interpretation of s. 672.54 must be based on common sense and pragmatism. CLAS advocates a results-oriented approach where the court identifies the "appropriate outcome" based on concepts seen as "obviously true" by the community. A common-sense and practical interpretation of s. 672.54 requires hospital authorities to be bound by orders which engage the requisite support and services. CLAS submits that the Board may issue binding conditions on the Director to treat Mazzei, if the order is the "least onerous and least restrictive" possible.

14 Finally, the intervener Mental Health Legal Advocacy Coalition ("MHLAC"), a "consumer advocacy" organization, many of whose members have been subject to Review Board orders, focusses on the self-identified needs of NCR accused and their participation in their own treatment. MHLAC argues that Review Boards must have the power to make conditions concerning medical treatment binding on hospital authorities, to the extent that the accused consents or requests this of the Board, and if the treatment is reasonable and necessary. Ultimately, MHLAC argues that in order to achieve a patient-centred mental health system, the Board must play a supervisory role with respect to treatment, and must therefore have the power to make binding treatment orders.

3. Preliminary Considerations

3.1 *Mootness*

15 It should be noted at the outset that this appeal is in fact moot, as the impugned order of the Board has been overtaken by subsequent orders; there is no "live controversy" between the parties (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 353-54). However, all parties agree (as they did before the B.C.C.A., and as did the B.C.C.A. itself) that because the impugned order is "capable of repetition, yet evasive of review" (B.C.C.A., at para. 3), the appeal should still be heard. The issue here (the Board's powers) remains unresolved and is likely to come before the courts again. Yet it is "evasive of review" in terms of requiring a "live" dispute between parties in an adversarial context; this is because new orders are continuously crafted, and as is the case here, a controversial order may be quickly overtaken by subsequent orders. This Court should therefore exercise its discretion (as per *Borowski*) to hear this appeal.

3.2 *Standard of Review*

16 The appropriate standard of review when considering the Board's decision that it had the jurisdiction to impose conditions 8, 9 and 10 is that of "correctness". Under s. 672.78(1)(*b*), a court of appeal may allow an appeal from a disposition order if that order is based on a "wrong decision on a question of law". Here, the Director appealed the Board's order because of an alleged excess of jurisdiction concerning its ability to issue binding orders relating to Mazzei's treatment. Because this is a "question of law" arising from the interpretation of s. 672.54, the standard of review is undeniably that of "correctness", in accordance with the wording of s. 672.78(1)(*b*). That is, the Board must be correct in interpreting its powers under s. 672.54, because it cannot make a "wrong" decision in that regard. This was the standard adopted by the B.C.C.A. at paras. 27-28. It is also implicitly echoed in this Court's jurisprudence: see *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20 ("*Penetanguishene*"), and *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21, at paras. 24-29.

17 If the Board acted within its jurisdiction, and if its interpretation of s. 672.54 was correct, it must still be determined whether conditions 8, 9 and 10 were "reasonable". This is mandated by s. 672.78(1)(*a*), which states that a court of appeal may allow an appeal from a Board disposition order if that order "is unreasonable or cannot be supported by the evidence", which corresponds to the administrative law standard of review of "reasonableness *simpliciter*". This was confirmed in *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33, at para. 33: "the Court of Appeal should ask itself whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination

. . . . If the Board's decision is such that it could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene". It should be noted that the (un)reasonableness of conditions 8, 9 and 10 in the present case was only an alternative ground of appeal by the Director at the B.C.C.A. (and it is only briefly discussed in the Director's factum before this Court). It was not explicitly raised as an issue in this appeal by the appellant Mazzei; furthermore, it is clearly a moot issue. Nevertheless, this Court should still address the reasonableness issue in order to provide guidance to courts and Review Boards in the future.

4. Analysis: The Interpretation of the Legislation

4.1 *The Power to Bind Persons Other Than the NCR Accused*

18 In my view, Review Boards generally have the jurisdiction to make orders and conditions binding on persons other than the accused. In this particular case, the issue under appeal at the B.C.C.A. was more specifically whether the Director can be bound by Board orders and conditions, and that is the issue before this Court; in my view, this question should be answered in the affirmative. The Director, and the treatment team and hospital administration by implication, are bound by Board orders and conditions. This stems from the wording of s. 672.54, the legislative scheme, Parliament's intent and the relevant case law.

4.1.1 The Wording of Section 672.54

19 Under s. 672.54, a Review Board (or a court) must craft an appropriate disposition order for persons found "NCR". The threshold determination is whether the

accused represents a "significant threat to the safety of the public". If there is no threat, the NCR accused must be "discharged absolutely" (s. 672.54(*a*)). If there is a threat, the Board must order that the accused be "discharged subject to such conditions as the court or Review Board considers appropriate" (s. 672.54(*b*)) or "detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate" (s. 672.54(*c*)). Ultimately, the order made must be "the least onerous and least restrictive to the accused", taking into consideration the need to protect the public from dangerous persons, the accused's mental condition, his reintegration into society and his "other needs".

20 A consideration of the ordinary meaning and grammatical sense of the words used in s. 672.54 supports the notion that Review Boards have the power to issue orders which could be binding on persons other than the accused. When the Board orders anything other than an absolute discharge, it either directs that the NCR accused "be discharged subject to such conditions . . ." or that the NCR accused "be detained in custody in a hospital, subject to such conditions . . .". It is the actual disposition (the conditional discharge or the hospital detention) which is "subject to" appropriate conditions — not the accused himself. The wording does not suggest, explicitly or implicitly, that the conditions refer to the accused's conduct and obligations. If Parliament had intended to ensure that conditions in disposition orders could only target and bind the accused, the statutory language would have been much more explicit. For example, the text could have indicated that the accused be discharged or detained "and be subject to such conditions . . ." (emphasis added). This wording would clearly indicate that it is the accused, and only the accused, who is targeted by the conditions imposed. The absence of such wording leaves the target of the Board's conditions open and indeterminate, such that orders and conditions may also bind other persons such as hospital authorities like the Director, depending on the circumstances.

21 This conclusion is reinforced by the French text of s. 672.54, which is worded and structured in a slightly different manner. While the English version indicates that the Board shall "direct" that the accused be discharged or detained subject to certain conditions (thus emphasizing the verb), the French text emphasizes the noun "*décision*" when it addresses the conditions in a disposition order. In the French text, the Board shall make "*une décision portant libération de l'accusé sous réserve des modalités*", or "*une décision portant détention de l'accusé dans un hôpital sous réserve des modalités*". The French version indicates that it is the decision itself which is "subject to" appropriate conditions, rather than the accused himself. As with the English text, if the accused were the sole target of the conditions, the French text would have employed words indicating that the *accused* would be "*sujet à*" or "*soumis à*" certain conditions.

22 Finally, it should be noted that the text of s. 672.54 indicates that a Review Board "shall . . . direct that the accused be [discharged conditionally or detained in a hospital]"; this also supports the notion that Review Board orders and conditions are intended to bind other parties besides the NCR accused, including hospital authorities like the Director. By specifying that Review Boards are mandated to "direct" what happens to an NCR accused, rather than merely "ordering" a conditional discharge or hospital detention, the wording of s. 672.54 suggests that Parliament intended that Review Boards should supervise the process of implementing a disposition order or condition. The verb "to direct" is synonymous with controlling, supervising or governing the actions of others, including ordering them to carry out a decision: see *Concise Oxford English Dictionary* (11th ed. 2004), p. 406, "direct". This would imply that Review Boards have the power to bind others to their orders and conditions.

4.1.2 The Legislative Scheme

23 Second, the legislative scheme as a whole also supports the conclusion that s. 672.54 grants Review Boards the authority to make orders and conditions binding on hospital authorities such as the Director. Whenever a Review Board or a court renders a decision under Part XX.1, the legislative scheme presupposes that hospital staff involved in the implementation of that decision or order shall abide by its terms. It would be illogical, as noted by the appellant and some of the interveners, for the Board to order the hospital detention of an accused without the ability to bind the person in charge of the hospital, and the treatment team and administrative staff involved in implementing this detention. If Boards are mandated to "make or review dispositions concerning any [NCR] accused" pursuant to ss. 672.38(1), with the specific mandate to make orders under s. 672.54 and to review such orders under s. 672.81, they cannot do so without the power to bind all hospital authorities involved.

24 As well, the provisions of the legislative scheme concerning the enforcement of orders and conditions issued by a Board do not support the respondents' view that a Board cannot make orders binding on anyone other than the accused. The respondents point out that the enforcement provisions of Part XX.1 (ss. 672.9 to 672.94) only contemplate consequences for the accused upon a breach of a disposition order or condition. However, this ignores the reality that the accused is under no obligation to abide by the terms and conditions of a Board's order other than his or her general submission to the State's criminal law power; as a result, specific enforcement provisions are required to ensure the NCR accused's compliance. In contrast, other parties involved (hospital authorities, for example) are already bound by provincial statutes to assume custody of the accused and provide treatment in accordance with the duties set out in those statutes, such as the British Columbia *Mental Health Act* and *Forensic Psychiatry Act*. The legislative scheme in Part XX.1 assumes that hospital authorities such as the

Director are expected to comply, and will comply, with Board orders and conditions as a result of these specific statutory obligations. Because there is no such compulsion with respect to the accused, Part XX.1 provides a specific enforcement mechanism for ensuring the compliance and cooperation of the NCR accused regarding the implementation of Board orders.

25 Finally, the provisions in Part XX.1 dealing with appeals (ss. 672.72 to 672.78) implicitly support the conclusion that the Director must be bound by Board orders and conditions. As "parties" to the proceedings under s. 672.1, both the Director and the NCR accused are bound by a Board's disposition order and the conditions found therein. Either party may appeal that disposition order in whole or in part, on a question of law, fact, or mixed law and fact (see s. 672.72(1)). A provincial court of appeal then has the discretion to allow the appeal if the disposition order (or a part thereof) is "unreasonable or cannot be supported by the evidence", is based on "a wrong decision on a question of law", or gives rise to "a miscarriage of justice" (s. 672.78(1)). The Director's ability to appeal dispositions in whole or in part assumes and confirms the intention of Parliament that the Director be bound by those dispositions. Thus, because of their status as "parties" to Board proceedings, and because of their wide rights of appeal, hospital authorities such as the Director must comply with Board orders and conditions.

4.1.3 Legislative Intent and Jurisprudential Development

26 Finally, Parliament's intent in enacting Part XX.1 and in setting out specific powers and a precise mandate for Review Boards also supports an interpretation of s. 672.54 which provides Review Boards with a wide latitude to make their orders and conditions binding on other parties such as hospital authorities. This legislative intent has

been extensively discerned and developed in the jurisprudence dealing with Part XX.1. The amendments in Part XX.1 were designed to respond to and overcome the problems and concerns identified by this Court in *R. v. Swain*, [1991] 1 S.C.R. 933, with respect to the former legislative scheme's lack of procedural protections and assurances of dignity and fairness for mentally ill offenders. The former scheme was found to be, in pith and substance, legislation aimed at "the protection of society from dangerous people who have engaged in conduct proscribed by the *Criminal Code* through the prevention of such acts in the future" (*Swain*, at p. 998). The medical treatment of mentally ill offenders, according to this analysis, "may be incidentally involved in the process" but it is "not the dominant objective of the legislation" (*ibid*.). Medical treatment was therefore part of the old scheme, but it was "not prescribed by the impugned provisions; rather, it constitutes the means to achieving their end, the protection of society" (*Swain*, at p. 1005). The problem with the former scheme was not its purpose or the way in which it incorporated a peripheral or ancillary concern for the medical treatment of mentally ill offenders; the problem lay in the lack of protections for procedural fairness and for ensuring the dignity and liberty interests of the NCR accused.

27 As revealed and developed in the jurisprudence dealing with Part XX.1, the new legislative scheme retains the former's overall purpose and its emphasis on the medical treatment of the NCR accused as merely an effect or an incident of Parliament's primary objective of protecting the public and managing an accused's safety risk, pursuant to its criminal law power. The new element added in Part XX.1 is an assurance of procedural fairness and dignity for the NCR accused, and a commitment to ensure that the NCR accused's liberty interests are to be infringed as minimally as possible. Writing for the majority in *Winko*, McLachlin J. (as she then was) affirmed that the dual purpose of Part XX.1 is: (1) "protect[ion of] the public", and (2) "fair treatment" of the accused (see, for example, at paras. 20, 21 and 44). This was repeated in *Penetanguishene*, at

paras. 19, 30 and 69, in *Pinet*, at paras. 1 and 19, as well as in *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46, at para. 18.

28 It should be noted that the notion of "fair treatment" is intended to convey an assurance of procedural fairness, rather than a concern for "medical" treatment. The appellant in this case has perhaps erroneously equated McLachlin J.'s concern in *Winko* (at paras. 20, 21 and 30) for "fair treatment", in the sense of "due process", with a concern for providing fair "medical" treatment (see paras. 16, 27 and 39-42). As discussed below, this confusion may have led to the mistaken belief that Review Boards are mandated to actively participate in the provision of medical services for NCR accused persons. Although both concepts are occasionally used concurrently (see paras. 42-43), in general they are to remain separate. Nonetheless, medical treatment does play an important role in Part XX.1. This is because the "twin goals" of protection of the public and fairness to the accused are made possible by an individualized "assessment-treatment" model (see *Winko*, at paras. 16 and 41-44). NCR accused persons are assessed according to their level of risk or threat to public safety; they are then placed or managed accordingly, the measures taken being designed to impinge on their liberty interests as little as possible. This management of the accused may or may not include medical treatment with a view to reducing the level of risk and facilitating rehabilitation and community reintegration; this will usually be the case for hospital detention orders under s. 672.54(*c*). Thus, while the "fair treatment" of the accused (i.e., ensuring that the accused is managed with dignity and in a procedurally fair manner) is one of the primary goals of Part XX.1, the provision of "opportunities [for] appropriate [medical] treatment" (see *Winko*, at paras. 39 and 43) is one of the tools used to achieve this goal. As McLachlin J. stated in *Winko* (at para. 44), s. 672.54 "seeks to <u>further the aims</u> of Part XX.1 . . . <u>through</u> the assessment-treatment model" (emphasis added).

29 Turning to the mechanism employed to further these goals, the legislative scheme involves: (1) the creation of specialized Review Boards in each province and territory to oversee the management of the NCR accused within the criminal justice system; and (2) the participation of provincial health authorities and facilities in delivering appropriate medical services where appropriate and necessary in order to facilitate the assessment and management of the threat posed by NCR accused persons to public safety, and to improve their prospects for rehabilitation and community reintegration. In order to fulfill their statutory mandate to oversee the assessment and "fair treatment" (in the "due process" sense) of NCR accused persons, Review Boards must have the authority and power to make their orders and conditions binding on the accused as well as on other parties involved, such as the person in charge of the hospital where the accused will be detained, managed and medically treated. Parliament could not have intended to create a statutory body charged with overseeing and implementing the "assessment-treatment" model without ensuring that it would have the power to compel others to abide by its orders and conditions; otherwise, the purpose of the legislation would be frustrated. These principles have been repeated and confirmed in this Court's post-*Winko* jurisprudence on Part XX.1: see *Penetanguishene*, *Pinet*, *Demers* and *Owen*.

4.2 *The Scope of the Power to Make Orders Related to Treatment*

30 Having established that the wording, scheme and legislative intent of Part XX.1 (and s. 672.54 in particular) clearly indicate that Review Boards have the power and authority to make their orders and conditions binding on other parties, including hospital authorities, it is now necessary to delineate the precise scope of this power in the context of the provision of medical services to an NCR accused. A consideration of the operational scheme of Part XX.1 as a whole, and its interpretation in the

jurisprudence, reveals that Review Boards have the power to make orders and attach conditions "regarding" or "supervising" the medical treatment of an NCR accused, and that such conditions are binding on hospital authorities; however, Review Boards do not have the power to actually prescribe such treatment or require that it be provided by hospital staff.

4.2.1 No Power to "Prescribe" Treatment

31 Despite the fact that Review Boards have the authority to make their orders and conditions binding on hospital authorities, this power does not extend so far as to permit Boards to actually prescribe or impose medical treatment for an NCR accused. Such authority lies exclusively within the mandate of the provincial authority in charge of the hospital where the NCR accused is detained, pursuant to various provincial laws governing the provision of medical services to persons in the custody of a hospital facility. It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused.

32 As indicated above, despite Mazzei's arguments to the contrary, the fact that "fair treatment" of the accused is one of the "twin goals" of Part XX.1 does not imply that the primary purpose of the legislation is to ensure that all NCR accused are to be provided with medical treatment or that Review Boards are mandated to actively participate in the provision of medical services. To reiterate, the primary purpose of the legislative scheme is to protect the public while minimizing any restrictions on the NCR accused's liberty interests; as such, the expression "fair treatment" coined in *Winko* refers only to an assurance of dignity and procedural fairness when assessing and

managing the safety risk posed by NCR accused persons. The provision of medical services in this context is merely a logical and inevitable (but ancillary and incidental) effect of Part XX.1's focus on public safety and community reintegration. The provision of medical services under Part XX.1 is therefore to be engaged *only* in order to help achieve the goals of public safety and maximization of liberty interests (except, of course, for other medical services performed by hospital staff pursuant to the hospital's responsibilities for the health of its patients, with respect to other illnesses or conditions not directly related to or part of the mental illness or condition of the NCR accused which has led to his or her "NCR" designation). The medical treatment of the NCR accused can only occur with a view to reducing the accused's level of threat to public safety and creating a situation where it is no longer significant, thereby permitting reintegration into society. According to McLachlin J. in *Winko* (at paras. 39-40), medical treatment "is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition. . . . Public safety will only be ensured by stabilizing the mental condition of dangerous NCR accused."

33 Thus, the role of Review Boards is merely to ensure that *opportunities* for medical treatment are provided to an NCR accused, where necessary and appropriate, with a view to reducing the level of risk (see *Winko*, at para. 41). Providing opportunities for effective medical treatment furthers the objective of public safety by attempting to reduce the safety risk posed by the NCR accused; it also furthers the objective of safeguarding the accused's liberty interests by working towards community reintegration and the cessation of most if not all restrictions on the accused's liberty. The provision of opportunities for medical treatment is therefore consistent with (and incidental to) the primary purposes of the legislation, without overriding or supplanting those aims.

34 Review Boards cannot exceed this authority by actually *imposing* a particular course of treatment, or by *requiring* hospital authorities to administer that treatment. Such an exercise would constitute interference with the authority and responsibility of hospital authorities to provide medical services to persons in their custody according to *their* view of what is appropriate and effective. Legislative authority to enact laws governing the administration of medical services and treatment for all persons in a hospital facility (including NCR accused persons) rests with the provinces under s. 92(7) of the *Constitution Act, 1867*, not with Parliament. Prevention of crime and protection against dangerous persons through its s. 91(27) criminal law power is the only possible reason or rationale for Parliament's involvement in the medical treatment of NCR accused persons. Indeed, an NCR accused who is discharged absolutely under s. 672.54(*a*) may require psychiatric treatment, but no such treatment may be ordered by a Review Board. Section 672.54 has no application if such a person does not present a significant threat to public safety; that person is no longer justifiably subject to the criminal law power of the State, and any medical treatment to deal with his or her mental condition must be ordered pursuant to some other legislative authority. It is logical that such authority could only be found in areas of provincial legislative competence over health services.

35 This legislative division of powers is mirrored in the practical realities of the statutory scheme which assigns different roles and responsibilities to Review Boards and to provincial hospital authorities. Review Boards are mandated under s. 672.38(1) to "make or review dispositions" concerning NCR accused persons. Their dispositions must reflect the twin goals of public protection and fair treatment of the NCR accused; they must also be consistent with the "assessment-treatment" model created by Part XX.1, which focuses on assessing and managing risks to public safety by providing opportunities for effective and appropriate treatment. In contrast, the hospitals where

NCR accused persons are detained are defined as places "for the custody, treatment or assessment of an accused", pursuant to s. 672.1. Thus, the competing statutory definitions and mandates of Review Boards and hospital authorities reflect a certain division of labour and authority. This is reinforced by the absence of any global definition of "treatment" in Part XX.1; what constitutes medical treatment should be governed by provincial law, given that it is provincial hospital authorities who will determine and deliver medical services. For example, under s. 30 of the British Columbia *Mental Health Act*, an NCR accused detained in a provincial mental health facility or hospital "must receive care and treatment appropriate to the condition of the person as authorized by the director". Parliament thus intended to leave specific treatment decisions to provincial health authorities, while Review Boards would remain responsible for crafting dispositions which ensure that treatment *opportunities* are provided to the NCR accused. Review Boards were therefore not intended to exercise any powers which could potentially interfere with hospitals' discretion concerning the provision of medical services.

36 The notion that Review Boards lack the jurisdiction to actually require that medical services or treatment be provided by hospital staff has been discussed and confirmed in the jurisprudence. For example, in *Manitoba (Attorney General) v. Wiebe*, [2005] 2 W.W.R. 707, the Manitoba Court of Appeal agreed with the B.C.C.A.'s decision in the present appeal, concluding that "it is no business of a court or the Board in fulfilling its mandate under sec. 672.54 of the *Code* to prescribe a specific course of medical treatment" (para. 32). The Manitoba Court of Appeal appeared to agree with the arguments of the Manitoba Review Board in that case that "issues relating to the care and treatment of the mentally ill are matters of provincial jurisdiction" and that "it is not Parliament's responsibility to treat detainees but rather that of the provinces" (para. 28).

37 The composition and expertise of Board members also supports the conclusion that Review Boards cannot make orders or conditions specifically prescribing medical treatment for an NCR accused. The membership of the Board must include at least one member entitled to practise psychiatry, and if there is only one such member, it must also include at least one other member who has training in mental health issues and is entitled to practise medicine or psychology (s. 672.39). While this would appear to suggest a certain level of expertise with respect to medical treatment issues, this expertise cannot justify an interpretation of s. 672.54 whereby Review Boards can make orders actually prescribing treatment. The fact that at least one or two members may have some expertise or training in psychiatric and/or psychological issues does not enable the Board to "step into the shoes" of the accused's physician or treatment team. This is clear, considering that a quorum of the Board for purposes of making a disposition order under s. 672.54 consists of three members, only one of whom must be entitled to practise psychiatry (s. 672.41(1)), and that any Board order is decided by "a majority of the members present" (s. 672.42). Thus, if a Board were authorized to make an order actually prescribing medical treatment for an NCR accused, it could conceivably do so pursuant to a majority vote of two Board members who do not have any psychiatric training or expertise, and over the objections of a psychiatrist; it is therefore hard to see how the Board's expertise in matters of psychiatric treatment would justify its ability to make binding orders actually prescribing medical treatment in such circumstances.

38 These observations are consistent with the granting of broad powers to reviewing courts following an appeal from a Board order. Under s. 672.78(3)(*a*), a provincial court of appeal is entitled to "make any disposition under section 672.54 or any placement decision that the Review Board could have made" if it allows the appeal. If the appellant's position is accepted (i.e., that Boards have the ability to prescribe

treatment), it is arguable that a court of appeal could also prescribe medical treatment under s. 672.78(3)(*a*) if the original Board order failed to do so. Appellate judges, however, need not have any expertise, training or experience in medical or psychiatric issues whatsoever. It is difficult to conceive that Parliament would have intended Review Boards to have the jurisdiction and authority to issue binding treatment orders and conditions, since this would also enable reviewing courts to do the same, without having the relevant and necessary expertise.

4.2.2 The Power to Supervise Medical Treatment

39 Although Review Boards may not actually prescribe or impose a particular course of medical treatment for an NCR accused, they still possess the authority to make orders and conditions in a "supervisory" role or capacity with respect to the NCR accused's medical treatment and clinical progress. Review Boards are in effect empowered to make orders and conditions "related to" or "regarding" an NCR accused's medical treatment (or the supervision of such treatment) while in the custody of a provincial hospital; Review Boards also have the power, as discussed above, to make such orders and conditions binding on all parties involved, including hospital authorities. In essence, conditions "regarding" medical treatment or its supervision are those conditions that Review Boards may impose to ensure that the NCR accused is provided with opportunities for appropriate and effective medical treatment, in order to help reduce the risk to public safety and to facilitate rehabilitation and community reintegration. The scope of this power would arguably include anything short of actually prescribing that treatment be carried out by hospital authorities. It would therefore include the power to require hospital authorities and staff to question and reconsider past or current treatment plans or diagnoses, and explore alternatives which might be more effective and appropriate. The authority for this power is derived from the purpose of the

legislative scheme, the mandate and expertise of Review Boards, and the wording of various sections of Part XX.1; it is also echoed in the jurisprudence.

40 First, it is clear that the overall purpose of Part XX.1 supports the notion that Review Boards should have the power to make orders and conditions regarding an NCR accused's medical treatment, or to supervise that treatment. Given that Part XX.1 is at least partly aimed at providing opportunities for appropriate medical/psychiatric treatment to the NCR accused, as part of the overall goals of protecting the public while safeguarding the liberty interests of the accused, Review Boards must have the power to impose conditions which relate to those opportunities and to the provision and supervision of medical services. If Review Boards did not have this power, then the legislative goal of providing opportunities for medical treatment, where appropriate, would be frustrated.

41 Second, if Review Boards are to fulfill their statutory role and mandate in terms of making appropriate disposition orders aimed at protecting the public while safeguarding the liberty interests of the accused, they must have some supervisory power over the medical treatment of NCR accused persons who are detained in hospitals. By the very definition of a verdict of "not criminally responsible on account of mental disorder", the accused's mental condition is effectively the reason why the accused is now subject to Part XX.1, and in most cases it is the very reason why the accused represents a threat to public safety and why the accused's liberty interests have been curtailed in accordance with that risk. It is therefore logical that a Board, in achieving the goals of public protection and fairness to the NCR accused, should have the power to supervise the medical treatment provided to the accused, since a major aim of that treatment is to reduce the accused's safety risk and to provide the NCR with the maximum liberty possible.

42 In fulfilling its statutory mandate and role under Part XX.1, it is necessary and essential for a Review Board to form its own independent opinion of an accused's treatment plan and clinical progress, and ultimately of the accused's risk to public safety and prospects for rehabilitation and reintegration. In so doing, a Board must be entitled to order a re-evaluation of current or past treatment approaches, and an exploration of alternatives where necessary — i.e., where no progress has been made or is likely to be made. Such supervisory powers are an inherent part of a Board's mandate; if there is a treatment "impasse", then a Board's function could not be properly carried out unless it were able to impose conditions to deal with this lack of progress and to seek out more effective treatment opportunities. The role of a Board is to assess the risk to public safety posed by certain NCR accused persons, to provide opportunities for appropriate and effective medical treatment with a view to controlling and reducing that risk, to work towards the ultimate goal of rehabilitation and reintegration, and to safeguard the liberty interests of the accused in this process. These goals simply cannot be accomplished without accurate, independent, and up-to-date information on an accused's mental condition, treatment plan, clinical progress, and prospects for rehabilitation. This justifies a Board's power to supervise the medical treatment provided thus far, and to suggest or explore alternative approaches where necessary. Review Boards may therefore validly require hospital staff to re-examine a diagnosis or a treatment plan, and to consider alternatives which might be more effective or appropriate, — thus requiring hospital authorities to justify their position regarding any "treatment impasse".

43 The composition of Review Boards and the expertise of their members also supports the notion that Boards enjoy a supervisory power over medical treatment. As previously discussed, the composition of a Board ensures that there is a certain degree of expertise and experience amongst members with respect to psychiatric issues,

especially in the context of a Board's central risk assessment function. Parliament clearly intended Review Boards to have some expertise in assessing and managing the safety risks posed by some NCR accused persons. While this expertise and experience cannot justify actually prescribing medical treatment, it can help justify a Board's supervisory power over treatment issues and the power to make orders and conditions "regarding" treatment; it is also consistent with the "wide latitude" and discretion accorded to a Board in the exercise of its functions (see *Winko*, at para. 27).

44 Finally, the conclusion that a Board can make orders or conditions "regarding" treatment is supported by the jurisprudence. For example, while the Manitoba Court of Appeal in *Wiebe* found that Review Boards do not have the power to prescribe medical services to be provided by hospital staff, it still accepted that Boards may validly make conditions regarding the supervision of the medical services actually provided (or not provided) to an NCR accused. In *Wiebe*, the treatment plan proposed to the Manitoba Review Board was effectively "for 'no treatment,' and nothing else" (para. 31), because the physician treating the NCR accused essentially believed that the accused's mental condition was not capable of treatment. The Court of Appeal found that in such cases, a Board could make conditions which question a given treatment plan, consistent with its supervisory jurisdiction, in order to ensure that the accused is not improperly denied opportunities for appropriate medical treatment. The Court of Appeal also summarized and appeared to endorse the Manitoba Board's argument that there is "a distinction between the Board considering treatment — as it relates to the mental condition of the detainee or conditions proposed to be attached under sec. 672.54 — and ordering specific treatment", and that the Board could accomplish the former, but not the latter (para. 30 (emphasis added)). The Court of Appeal in *Wiebe* ultimately sent the matter back to the Board, requiring it to consider not only the views of the accused's current physician, but also the views and proposals to be submitted by other experts.

45 The appellant Mazzei has pointed to a number of other cases in the jurisprudence to support the notion that the Board may impose conditions related to the questioning and supervision of medical treatment, and may make such orders binding on hospital authorities: see *R. v. Lewis* (1999), 132 C.C.C. (3d) 163 (P.E.I.S.C., App. Div.); *Beauchamp v. Penetanguishene Mental Health Centre (Administrator)* (1999), 138 C.C.C. (3d) 172 (Ont. C.A.); *Brockville Psychiatric Hospital v. McGillis* (1996), 2 C.R. (5th) 242 (Ont. C.A.), *Pinet* and *Penetanguishene*. The Director and the Attorney General of British Columbia argue that these cases do not support Mazzei's position, since the conditions imposed by Review Boards in those cases were only concerned with the level of security for the detention of an NCR accused and with the liberty interests of the accused — not with treatment issues.

46 In my opinion, this is not a full answer to the claim that the jurisprudence in fact supports the notion that Review Boards can make binding orders related to the supervision of medical treatment. I am of the view that the same result would and should have been reached in the cases cited by Mazzei if the impugned conditions had dealt specifically with the supervision of medical treatment. If it is accepted that the overall purpose and intent of the legislative scheme authorizes Review Boards to make orders and impose conditions concerning the level of security for the detention of the accused and restrictions on the accused's liberty, and that such orders and conditions would be binding on hospital authorities, then orders and conditions related to (but not specifically prescribing) medical treatment would also be valid and binding on hospital authorities. This is because such treatment would be aimed at the overall purpose of the legislation (that is, protection of the public and maximization of liberty interests). Thus, the jurisprudence submitted by Mazzei tends to support the claim that Boards are empowered to make binding orders scrutinizing or supervising medical treatment.

47 The B.C.C.A. itself in the present case appeared to endorse the notion of a distinction between the (invalid) power to prescribe treatment, and the (valid) power to *supervise* the provision of medical services and ensure that opportunities for effective and appropriate treatment are available, even though it ultimately concluded that the conditions imposed by the Board in this case fell within the former category. The B.C.C.A. confirmed that Part XX.1 "does not give the Board the authority to diagnose and treat an NCR accused or to interfere in his or her treatment plan"; but it went on to state that the legislation "gives the Board the power . . . to question the treatment the accused is receiving" (para. 89 (emphasis added)). Thus, the B.C.C.A. may have formulated the correct test for articulating the scope of the Board's authority, but as discussed below, I would respectfully find that it applied this test incorrectly with respect to conditions 8, 9 and 10.

4.2.3 The Role and Scope of Section 672.55(1)

48 There is one final issue which must be addressed before proceeding to an application of these principles to the facts of this case. This final issue concerns the proper interpretation of s. 672.55(1), which reads as follows:

> **672.55** (1) No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused.

49 In their submissions, the parties and interveners have put forward competing interpretations of s. 672.55(1) in order to either support or refute the claim that Review

Boards can order or prescribe treatment. The Director and the Attorney General of British Columbia generally argue that this provision prevents Review Boards from exercising such a power, preferring a narrow interpretation of the section. They argue that under s. 672.55(1), if a treatment team recommends a certain treatment which the Board considers reasonable and necessary, and if the accused consents, then this treatment could be added as a condition to the disposition order. However, because this condition would merely be a way of helping the hospital staff to carry out its duties in treating the accused, it would not be "binding" on the Director, and would be subject to his or her discretionary authority. Mazzei also adopts a narrow interpretation of s. 672.55(1), but argues that it can have a wide application. Counsel for the appellant provided a hypothetical example. In deciding to move the accused from a situation of hospital detention to a conditional discharge order in the community, a Review Board could, for example, include a condition requiring the accused to continue taking his medication. This would be a valid condition as a result of s. 672.55(1), so long as the accused consented to the condition and so long as the Board considered it reasonable and necessary. Counsel for the appellant seemed to suggest that this would amount to a commitment on the part of the accused to continue a particular course of treatment (which was started in the hospital) while under conditional release in the community (given that he would no longer be subject to the hospital's jurisdiction and authority). This commitment would be given in consideration for the increase in liberty contemplated by the Board, rather than as an actual "prescription" for "treatment" ordered by the Board. As such, Mazzei does not argue that s. 672.55(1) justifies the reading in of a power to prescribe treatment within s. 672.54, but is instead a "stand alone section" with a specific purpose and application. The intervener Board favours a wider interpretation of s. 672.55(1), but a narrow application. In his oral submissions, counsel for the Board argued that this provision actually allows the Board to prescribe or order medical treatment for an NCR accused if the three preconditions (consent,

necessity, and reasonableness) are met, as an exception to the general prohibition against ordering or prescribing treatment. However, counsel for the Board submitted that this power should only be used very rarely, if at all, and the Board's experience in practice has confirmed that it invokes s. 672.55(1) very infrequently.

50 The question is therefore whether the second part of s. 672.55(1) ("except that") constitutes a true exception to the general prohibition against prescribing treatment in the first part of the provision. If it does, then it can be said that Review Boards do have the power to order or prescribe treatment for an NCR accused where the three preconditions are satisfied (consent, necessity and reasonableness); if not, then Boards can never go so far as to order treatment, though they may exercise "supervisory" powers over treatment decisions, as discussed above. In my view, the second part of s. 672.55(1) is not a true exception to the prohibition against ordering treatment, and merely represents an example or manifestation of the Board's supervisory power over treatment.

51 The wording of the provision indirectly supports and is consistent with the two main conclusions discussed above — namely, that Review Boards do not have the power to specifically order or prescribe treatment, but that they may exercise supervisory powers over treatment decisions. The first part of s. 672.55(1) reinforces the general prohibition: "No disposition . . . shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment . . .". The second part of the provision introduces a new idea: ". . . <u>except that</u> the disposition <u>may include a condition regarding</u> . . . treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused". If this second part was meant to act as a true exception to the general prohibition in the first part, the wording would have been much clearer. For example, Parliament could have used one of the following versions:

> No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment, unless the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused. [Emphasis added.]
>
> OR
>
> No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include such a condition where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused. [Emphasis added.]

Either of these alternatives would have clearly indicated that Parliament wished to establish a specific exception to the general prohibition against ordering or prescribing treatment, so long as the elements of consent, necessity and reasonableness are present.

52 Instead, however, Parliament has deliberately adopted distinct wording in the second part of s. 672.55(1). Whereas the first part of the provision prohibits a disposition *order* from "direct[ing]" that treatment "be carried out" or that the accused "submit" to treatment, the second part specifies that a disposition order may "include" a "condition regarding . . . treatment". In my view, the language in the first part clearly prohibits direct action by the Board to order or prescribe treatment, while the second part refers to treatment in a more indirect manner, and is more consistent with or reflective of the Board's supervisory power over treatment decisions, as discussed above. If Parliament did not intend a "condition regarding . . . treatment" to be somehow distinct from an order directing that treatment be carried out or that the accused submit to treatment, the actual wording of s. 672.55(1) would in effect be unnecessarily awkward and redundant, especially where much clearer and simpler formulations exist, as noted above. In my view, the precise wording selected by Parliament is significant and

relevant, and the interpretation of s. 672.55(1) should reflect that specific legislative distinction.

53 This interpretation is reinforced by referring to the French text of s. 672.55(1), which refers to a Board or court being able to include "*une condition relative à un traitement*", clearly implying a more indirect level of intervention (i.e., supervision over treatment decisions, not actual prescription of treatment). As well, where Parliament has intended for treatment to be specifically imposed or prescribed in respect of an accused, it has used different wording and a different operational scheme. For example, s. 672.58 deals with the power of a court (but not a Review Board) to: "on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days . . . [or] that the accused submit to that treatment by the person or at the hospital specified" for an accused person found "unfit to stand trial". It is noteworthy that such an order can only be made for the purpose of rendering the accused fit to stand trial (s. 672.59(1)), and that it must be undertaken with the consent of the person responsible for administering the treatment (s. 672.62(1)), and if necessary, without the consent of the accused (s. 672.62(2)). In the absence of such explicit statutory language and operational structure, the second part of s. 672.55(1) cannot be seen as providing a true "exception" to the general prohibition found in the first part of the section. Furthermore, while the prohibition in the first part of s. 672.55(1) clearly contemplates medical treatment in the form of drugs or therapies recommended, approved, delivered and supervised by hospital staff, the second part of s. 672.55(1) arguably refers to a "commitment" by the accused himself to *continue* a certain course of treatment, while in the community, which was undertaken or recommended while still under hospital detention, as suggested in the hypothetical illustration provided by counsel for the appellant. This commitment to continue a certain course of treatment, as a condition to be fulfilled in order to achieve an increase in liberty (by moving from

hospital detention to conditional discharge in the community, for example), is not equivalent in nature or in scope to prescribing or ordering that medical treatment be provided by health professionals, which is specifically prohibited by the first part of s. 672.55(1). The second part of the section refers to "treatment" only in the sense of the accused's own commitment to continue a certain course of treatment in the community, when he or she is no longer subject to the hospital's jurisdiction or authority.

54 Thus, a condition "regarding" treatment in the context of s. 672.55(1) does not constitute an exercise of power by Boards to require a hospital authority to provide certain medical services or to require the accused to submit to treatment, which are explicitly prohibited; it therefore cannot support the notion that Boards have the authority to order or prescribe treatment in respect of an NCR accused under s. 672.54. This interpretation of s. 672.55(1) is consistent with the distinction established earlier between "prescribing" treatment and "supervising" treatment decisions; by allowing Boards to include a condition "regarding" treatment where the accused consents and where the Board considers it to be reasonable and necessary, the second part of s. 672.55(1) in effect constitutes one example or manifestation of the Board's supervisory powers under s. 672.54. Those supervisory powers are not solely grounded in or dependent upon s. 672.55(1); as explained above, they derive from a consideration of the Board's role and mandate, the structure and wording of the legislative scheme as a whole, the legislative purpose, and Parliament's intent as interpreted and developed in the jurisprudence.

55 Furthermore, in my view, s. 672.55(1) should have a very narrow and limited application and scope, as argued by the Board. Review Boards will likely resort to this power to include conditions "regarding" treatment only rarely and in specific situations, where for example the Board is contemplating a significant decrease in the restraints on

an accused's liberty which is effectively conditional upon him or her committing to continue a particular course of treatment (which was already undertaken or approved by the hospital treatment team while the accused was subject to a hospital detention order) while in the community. The purpose of requiring such a commitment is to ensure that the accused's threat to public safety is appropriately managed while in the community, given that he is no longer under the hospital's supervision. This means that the power to include a condition "regarding" treatment under s. 672.55(1) does not eliminate, reduce or ignore any discretionary authority of the Director or other relevant hospital authority. In the example provided by counsel for the appellant, the Board could validly order Mazzei to continue taking his medication (if he consents, and if it is reasonable and necessary), but it is implicit that such medication would already have been recommended, approved and/or implemented by the Director during the accused's hospital detention. That is, the Board would merely be ordering Mazzei to continue a course of treatment already approved by the relevant hospital authority; the Board would not be able to itself decide on a new course of treatment or prescribe therapy which had not been part of Mazzei's treatment plan during his hospital detention. Thus, the discretionary authority of the Director has not been undermined, but is rather confirmed and respected. In essence then, the limited power to make a condition "regarding" treatment under s. 672.55(1) is merely a reflection of the Board continuing to fulfill its mandate to provide "opportunities for treatment" in situations where the accused is in the community and no longer under the supervision of a provincial health authority. One might ask why Parliament would have chosen to adopt s. 672.55(1) if supervisory powers were already provided for. In my view, this provision was meant to specify that supervisory powers continue even where treatment plans are at issue, but that they must not override the powers and responsibilities of the Director to prescribe treatment as such.

5. Application to the Facts

56 In this case, the Board's disposition order required the Director to: (1) provide an independent evaluation of Mazzei's diagnosis, treatment, and clinical progress; (2) provide an independent evaluation of Mazzei's public safety risk in light of a new "refocussed" treatment plan; and (3) undertake assertive efforts to enroll Mazzei in a culturally appropriate treatment program. In light of the legislative scheme and the Board's mandate discussed above, how should these conditions be characterized? As valid requests for information under the Board's supervisory powers, or as an invalid interference with the Director's treatment decisions? I am of the view that all three conditions constitute valid exercises of the Board's power to request information for the assessment and management of Mazzei's safety risk, and its power to supervise his treatment, including the scrutiny of past approaches and the exploration of alternatives. Furthermore, all three conditions were "reasonable" given the circumstances of this case and the evidence before the Board at Mazzei's hearing.

5.1 *Jurisdiction to Impose the Conditions*

5.1.1 Condition 8: Reassessment of the Current Treatment Plan

57 Condition 8 in the April 3, 2002 order required the Director to "undertake a comprehensive . . . review" of Mazzei's diagnosis and current treatment, so as to develop "an integrated . . . approach which considers the current treatment impasse and the accused's reluctance to become an active participant in his rehabilitation". This condition falls squarely within the Board's authority to "question the treatment the accused is receiving", as acknowledged by the B.C.C.A. (at para. 89), and to require the Director to reconsider the current treatment plan and to explore alternative approaches

which may be more appropriate or effective for Mazzei. There is nothing in this condition which prescribes treatment or which interferes with the medical services approved and implemented by the Director and hospital staff; nor does this condition interfere with the Director's ultimate discretion and authority with respect to the specific treatment provided to Mazzei; it merely requires the Director to reconsider the approach taken thus far and to explore other options given the apparent failure of the current approach. It does, however, represent a clear and acceptable limit on the Director's ability to act as the sole judge of the efficacy of a treatment approach, and as a valid exercise of the Board's supervisory powers over the provision of opportunities for appropriate medical treatment.

58 This condition is also consistent with the Board's statutory mandate to make an appropriate disposition order which achieves the twin goals of Part XX.1: protection of the public and safeguarding Mazzei's liberty interests. In fulfilling this mandate, the Board is required to gather accurate information in order to assess Mazzei's risk to public safety. This is reflected in the factors enumerated in s. 672.54, such as the need to consider "the mental condition of the accused". Requiring the Director to undertake a review of past and current treatment approaches, and the reasons for the apparent "impasse", is consistent with this scheme. It is a supervisory power which is incidental and necessary to the Board's mandate to obtain all necessary information it requires in order to arrive at an accurate assessment of an accused's risk to public safety and prospects for community reintegration. Forming its own opinion on the appropriateness or efficacy of a particular treatment plan is a necessary component of this power.

5.1.2 Condition 9: Independent Risk Assessment

59 Condition 9 required the Director to provide an "independent assessment" of Mazzei's risk to the public "in consideration of the above refocussed treatment plan", to be used at Mazzei's next hearing. One possible objection to this condition is that it implies that the Director must actually submit a new "refocussed" treatment plan in light of the Board's dissatisfaction with the current approach as indicated in condition 8; this would arguably move condition 9 closer to the kind of invalid condition actually prescribing treatment. However, this condition must also be interpreted in light of the Board's statutory mandate and the need to gather relevant information in order to craft an appropriate disposition. Independent advice would be justified in light of the aforementioned treatment impasse. The Board must be entitled to demand new independent information to be provided where there is a significant difference of opinion between the accused and the treatment team with respect to the current approach, and an apparent breakdown in communication and trust. Thus, in ordering an independent assessment of Mazzei's threat to public safety, in light of the failure of past treatment approaches and the prospect of new alternative options, the Board was clearly exercising a valid power to supervise the progress of Mazzei's rehabilitation.

60 There is nothing in this condition which exceeds the Board's jurisdiction to make binding orders and impose conditions "regarding" treatment. The condition here is merely designed to require the Director to assist the Board in acquiring and analyzing the relevant information required for an appropriate and accurate assessment of Mazzei's threat to public safety, especially in light of the new "integrated treatment approach" envisioned by condition 8 which would presumably help reduce this risk by managing and treating Mazzei's mental condition more effectively and appropriately.

5.1.3 Condition 10: Culturally Appropriate Treatment

61 Condition 10 required the Director to "undertake assertive efforts to enroll the accused in a culturally appropriate treatment program". This condition is perhaps the most controversial in that it comes closest to "prescribing" treatment. However, upon closer inspection, condition 10 is still clearly within the Board's jurisdictional authority, since it is more in the nature of an order requiring the Director to explore new possibilities and consider their effectiveness. The Director is being asked to seriously investigate the possibility of enrolling Mazzei in a culturally appropriate treatment program; in this context, "undertak[ing] assertive efforts" would arguably include making inquiries with those who administer the program in question, consulting with the person in charge of the program, performing an assessment of the likelihood of eligibility and enrolment, etc. Condition 10 is therefore consistent with the Director's obligation to provide accurate and relevant information to the Board, and to investigate and provide opportunities for appropriate medical treatment. The wording of the condition merely requires the Director to "undertake assertive efforts" (emphasis added) to enroll Mazzei in a culturally appropriate treatment program; it falls short of specifically prescribing such enrollment. The Director is merely asked to obtain more information on appropriate programs and on Mazzei's eligibility.

62 In my view, condition 10 does not interfere with Mazzei's treatment plan in any way, nor with the treatment team's and the Director's discretionary authority with respect to Mazzei's treatment. All parties appear to have agreed that a culturally appropriate treatment program would likely be beneficial to Mazzei; the only dispute was over who should bear the responsibility for exploring this option. Requiring the Director to seriously investigate culturally appropriate treatment does not remove or undermine the Director's discretionary authority over Mazzei's clinical progress. All the Director is being asked to do is to undertake "assertive efforts". If the Director can demonstrate that such efforts were undertaken, but ultimately feels that Mazzei does not

belong in such a program or would not benefit from it, or that a more appropriate treatment course already exists within the Hospital, then the Board will have to be satisfied with this position (unless, of course, the Board considers that position unreasonable, according to the circumstances and according to the evidence before it, as per its supervisory powers over treatment decisions, discussed above). So long as the Director complies with the Board's order, and demonstrates that culturally appropriate treatment has been explored and that efforts were made to consider Mazzei's enrolment, then the Board would not be able to go further in asserting its powers. The Director would still retain a discretionary authority over Mazzei's treatment and clinical progress, subject to the Board's supervision when necessary, but nonetheless free from actual interference by the Board.

63 It is clear that the Board would not have been able to prescribe such a treatment program or require the Director to *actually* enroll Mazzei in such a program, even with the consent of Mazzei himself under s. 672.55(1), as suggested by the appellant and by some of the interveners. Such a condition would likely represent an excess of the Board's jurisdiction; as discussed above, conditions "regarding" treatment under s. 672.55(1) are meant to have a much more limited and narrow application, and the application of s. 672.55(1) here would not be appropriate, nor would it be necessary.

5.2 *The Reasonableness of the Conditions*

64 Having decided that the Board was correct in interpreting its powers under s. 672.54, and that conditions 8, 9 and 10 were consistent with those powers, it must still be determined whether these three conditions were in fact "reasonable", given the circumstances and the evidence before the Board at Mazzei's hearing. In my view, all

three conditions were reasonable in that they were amply supported and justified by the facts, the circumstances, and the available evidence at the Board hearing.

65 In particular, all three conditions were motivated and justified by the circumstances of Mazzei's situation and his hearing before the Board; the conditions effectively respond to the alleged "treatment impasse" which the Board felt had been reached with respect to Mazzei's situation. The Board's decision to seek out a global review (in condition 8) was primarily motivated by its frustration with the lack of progress made in respect of Mazzei's treatment plan and rehabilitation efforts, regardless of who bore the blame for this impasse. It was also a direct response to the perceived lack of information on Mazzei's mental condition, and to the inability of his case manager to answer the Board's questions with respect to medical issues (see Board's decision, at p. 2). Likewise, the new risk assessment contemplated in condition 9 was motivated by the apparent impasse in Mazzei's clinical progress, and by the Board's frustration with the lack of accurate and useful information available to it at the hearing, as evidenced by the late reports filed by the treatment team and the absence of Mazzei's supervising psychiatrist at the hearing (see Board's decision, at p. 2). This frustration was compounded by the significant difference of opinion between the Director and Mazzei on who should bear the blame for the stalled clinical progress. In addition, the decision to explore a First Nations residential rehabilitation program in condition 10 also reflects the Board's duty to provide "opportunities for <u>appropriate</u> treatment" (see *Winko*, at para. 43 (emphasis added)), and its obligation to consider the "other needs" of the accused when crafting a disposition order under s. 672.54. Such "other needs" would arguably include the need for treatment which is culturally appropriate and responsive to an accused's aboriginal culture and heritage.

66 Therefore, not only was the Board correct in its interpretation of its powers and jurisdiction under s. 672.54, but the actual conditions it imposed were consistent with those powers and were reasonable given the circumstances of Mazzei's treatment impasse, and the evidence (or lack thereof) available to the Board at the hearing.

6. Conclusion and Disposition

67 Based on this analysis, Mazzei's appeal should be allowed; the B.C.C.A. erred in striking the three impugned conditions from the Board's April 3, 2002 order. Review Boards have the power to make conditions regarding the provision and supervision of medical treatment, and to make such conditions binding on other parties such as hospital authorities. This power is justified by the statutory role and mandate of Review Boards; yet it is a limited mandate, since Review Boards cannot go so far as to actually prescribe or impose medical treatment, or require hospital authorities to deliver that treatment. However, conditions 8, 9 and 10 in the present case do not exceed these limits, as they constitute valid exercises of the Board's supervisory role in providing opportunities for appropriate medical treatment, and in fulfilling the goals of Part XX.1 — protecting the public and safeguarding the liberty interests of the accused. As well, all three conditions were reasonable and supported by the evidence available to the Board at Mazzei's April 3, 2002 hearing. Because the three conditions were overtaken by subsequent Board orders, the central issue in this appeal is moot, and there is therefore no practical remedy for the appellant. No costs were sought by the parties, and no costs award should be made.

APPENDIX

Relevant Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46

672.1 . . .

"hospital" means a place in a province that is designated by the Minister of Health for the province for the custody, treatment or assessment of an accused in respect of whom an assessment order, a disposition or a placement decision is made.

. . .

"party", in relation to proceedings of a court or Review Board to make or review a disposition, means

(*a*) the accused,

(*b*) the person in charge of the hospital where the accused is detained or is to attend pursuant to an assessment order or a disposition,

(*c*) an Attorney General designated by the court or Review Board under subsection 672.5(3),

(*d*) any interested person designated by the court or Review Board under subsection 672.5(4), or

(*e*) where the disposition is to be made by a court, the prosecutor of the charge against the accused;

. . .

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.

672.55 (1) No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include a

condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused.

. . .

672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified.

672.59 (1) No disposition may be made under section 672.58 unless the court is satisfied, on the basis of the testimony of a medical practitioner, that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.

. . .

672.62 (1) No court shall make a disposition under section 672.58 without the consent of

(*a*) the person in charge of the hospital where the accused is to be treated; or

(*b*) the person to whom responsibility for the treatment of the accused is assigned by the court.

(2) The court may direct that treatment of an accused be carried out pursuant to a disposition made under section 672.58 without the consent of the accused or a person who, according to the laws of the province where the disposition is made, is authorized to consent for the accused.

. . .

672.72 (1) Any party may appeal against a disposition made by a court or a Review Board, or a placement decision made by a Review Board, to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.

. . .

672.78 (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(*a*) it is unreasonable or cannot be supported by the evidence;

(*b*) it is based on a wrong decision on a question of law; or

(*c*) there was a miscarriage of justice.

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

(*a*) that paragraphs (1)(*a*), (*b*) and (*c*) do not apply; or

(*b*) that paragraph (1)(*b*) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

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

(*b*) refer the matter back to the court or Review Board for re-hearing, 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.

Appeal allowed.

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Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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Solicitors for the interveners the Ontario Review Board, the Quebec Review Board, the Nova Scotia Review Board, the New Brunswick Review Board, the Manitoba Review Board, the Prince Edward Island Review Board, the Saskatchewan Review Board, the Alberta Review Board, the Newfoundland Review Board, the Northwest Territories Review Board, the Yukon Review Board and the Nunavut Review Board: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

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