BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1985 c. C-46, as amended S.C. 2005 c. 22

REASONS FOR DISPOSITION
IN THE MATTER OF

ALLAN DWAYNE SCHOENBORN

HELD AT: **Forensic Psychiatric Hospital**
Port Coquitlam, BC
February 12, 26, April 29, 30, 2015

BEFORE:	**CHAIRPERSON:**	**B. Long**
	MEMBERS:	**Dr. R. Stevenson, psychiatrist**
		N. Avison

APPEARANCES: **ACCUSED/PATIENT: Allan Dwayne Schoenborn**
ACCUSED/PATIENT COUNSEL: S. Hicks
DIRECTOR'S COUNSEL: D. Lovett, Q.C.
ATTORNEY GENERAL: W. Dawson, Q.C.

B. Long, N. Avison concurring:

INTRODUCTION

[1] Allan Dwayne Schoenborn was found not criminally responsible on account of mental disorder (NCRMD) on February 22, 2010 on three counts of first degree murder. The index offences occurred on April 6, 2008. The victims were the accused's three children. They were 5, 8, and 10 years old. The accused committed the index offences in response to psychotic delusions that his children were at risk of a life of drugs, physical and sexual abuse. He killed his children in order to protect them from this harm.

[2] The accused is 47 years of age. He is diagnosed as having a delusional disorder, a substance abuse disorder, and paranoid personality traits. The details of his personal history have been reviewed in prior Reasons for Disposition and will not be repeated for the purpose of these reasons.

[3] The symptoms of Mr. Schoenborn's psychotic illness have been in remission for many years. However, there have been major challenges in his treatment partially as a consequence of significant negative attention spawned by the notoriety of the index offences. These issues have been further complicated by the accused's underlying personality structure that includes anger management problems.

[4] Mr. Schoenborn has been detained at the Forensic Psychiatric Hospital (FPH) since the NCRMD verdict. He was initially made subject to a strict custodial disposition without possibility of escorted community access. By the time the accused next appeared before the Board on April 5, 2011, he had made significant progress and had been placed in the least secure Hawthorne Unit at FPH. The Director recommended that the Board add a condition to the accused's disposition to allow for escorted community access at the discretion of the Director. The Board agreed. The majority reasons of the panel stated:

> "[61] In summary, the expert psychiatric evidence that the accused can benefit from supervised, escorted access to the community, and that within a period of twelve months he might be ready for unsupervised access to the community, was not contradicted.

> [62] The Review Board accepted Dr. Brink's expert evidence in this specific aspect of the disposition as it does in the majority of its orders. We acknowledge that this facility, which acts as both treatment provider and agency of social control, has the skills, resources and prudence to achieve clinical progress without exposing the community to unacceptable risk.
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> [63] The Board considered the conditions to be imposed in the custody order with great care. It reviewed again the victim impact statement, and relevant evidence before it. It carefully considered the governing jurisprudence under which its authority is exercised. In this case, the Board determined that the custody order imposed on Mr. Schoenborn could include a clause permitting him escorted access to the community at the discretion of the Director, taking into account an assessment of Mr. Schoenborn's mental and behavioural condition and stability, and any risk he might pose before each proposed outing, along with the expectation that any such outings are closely and appropriately supervised and escorted, and are for a proper purpose and a specific duration." (Exhibit 20)

[5] In concurring reasons, the psychiatric member of the panel added:

> "[77] Dr. Brink is of the opinion that Mr. Schoenborn is ready for escorted passes into the community. Dr. Brink believes this type of pass is clinically indicated at this stage. He noted that he would not recommend or grant an escorted outing, if he was of the opinion Mr. Schoenborn required the presence of forensic security officers. At this time, Dr. Brink is not in support of unescorted passes into the community. He cited his desire to observe further improvement in Mr. Schoenborn's anger management skills before he would consider that.
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> [78] Given these opinions of Dr. Brink, who is an experienced forensic psychiatrist, and whose risk assessment was not challenged by evidence, a condition which allows the Director to grant supervised, escorted assessment outings was included in the disposition." (Exhibit 20)

[6] As matters transpired, the Board's order was short-lived. A further disposition review was held just 16 days later on April 21, 2011. The circumstances that prompted this review were explained in the Reasons for Disposition as follows:

> "[8] What was not known by the panel on April 5, 2011, or disclosed to it in the course of the hearing, was that the victim, Darcie Clarke, was living in the community in which the Forensic Psychiatric Hospital is situated. This fact came to light in the media. It resulted in considerable media comment, and community concern. (Exhibit 25).
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> [9] On April 13, 2011, the Review Board informed the parties of its intention to convene the current hearing of its own motion to consider if

> the new evidence of the location of Ms. Clarke would affect any aspect of the Board's disposition of April 5, 2011." (Exhibit 25)

[7] By the time of the April 21, 2011 hearing, Mr. Schoenborn no longer wanted this privilege. His reasons were set out as follows:

> "[13] The accused's intention to reject or reverse his previous wish for community access crystallized in his counsel's letter to the Board of April 18 (Exhibit 24), … "Mr. Schoenborn informed me that he is aware of the information about Darcy (sic) Clarke's whereabouts and her fear of his having access to the community. He advised me that he does not want to cause her any fear or further hardship. Therefore, he is not requesting access to the community at this time and is content to remain in hospital on a strict custodial order." …" (Exhibit 25)

[8] The Board acceded to the accused's request, stating:

> "[20] No evidence was offered to suggest that in the preceding 16 days the accused's clinical or risk management features had appreciably changed from those accepted and considered by the previous panel. Section 672.54 mandates that the Board shall make a disposition that is the least onerous and least restrictive to the accused upon considering the need to protect the public from dangerous persons, the mental condition of the accused, the accused's reintegration into society and his other needs. It may be that (escorted only) community access continues to be clinically appropriate for the accused. However, we do not consider that s. 672.54 requires the Board to include a condition in a custody disposition that may advance the accused's reintegration into the community, which the accused, with the assistance of counsel, explicitly declares he does not want. That the evidence supports a further custody disposition is unchallenged. In view of the clear position of the accused on the issue of community access we conclude that in the unique circumstances of this matter a narrow custody disposition without the possibility for escorted community access serves the twin objectives of Part XX.I of the Code, namely, protecting the safety of the public and treating the accused fairly. …" (Exhibit 25)

[9] The terms of Mr. Schoenborn's disposition have not altered since then.

[10] Over the intervening years, the accused has continued to experience negative attention brought about by the notoriety of the index offences. This has included taunts, name-calling, and threats. On April 7, 2011, Mr. Schoenborn was seriously assaulted by two co-patients as retribution for the index offences. He had to be transferred to a medium security unit for his own protection. The accused has been required to remain

at that security level since then for this reason. The Director did not renew the recommendation for escorted community access during this time frame.

[11] The Director's position has now altered. The Director has concluded that Mr. Schoenborn is ready for this next step in his integration into the community and recommends adding a condition to the accused's disposition that would allow him escorted community access, at the discretion of the Director.

[12] Whether the Board should make this change to the accused's disposition was the sole issue at this hearing.

EVIDENCE AT THE HEARING

[13] The new exhibits added to the disposition information began with reports from the principal members of the accused's treatment team. This consisted of his psychiatrist Dr. Hediger, psychologist Dr. Cooper, and case manager Ms. Lee. The Crown tendered additional documents relating to the accused's criminal record and search efforts made by the police to find the accused after the index offences. Lastly there were a number of documents filed by the Crown and Director setting out the qualifications of expert witnesses called by each party with sample risk assessments.

[14] The Board heard oral evidence from Dr. Hediger, Dr. Cooper, Ms. Peri Hanzouli, Ms. Lee, Dr. Schweighofer, Dr. Brink, and Mr. Schoenborn.

Dr. Hediger

[15] Dr. Hediger has been the accused's treating psychiatrist since 2012. He prepared a detailed report (Exhibit 38) that included a summary of the accused's progress over the last year and a formal risk assessment.

[16] Dr. Hediger reviewed the accused's diagnosis. This continues to be a delusional disorder, a substance abuse disorder, and paranoid personality traits. Dr. Hediger said that the delusional disorder had responded well to medication and psychotherapeutic treatment. Substance use in hospital had not been an issue. Mr. Schoenborn's paranoid personality traits had also improved.

[17] Dr. Hediger considered Mr. Schoenborn's insight into his delusional disorder to be good. The accused acknowledged the presence of his illness and the problems that it had caused in interpreting his environment. He accepted the need for treatment that includes psychiatric medication. He recognizes that he had responded well to treatment. The accused's insight into his history of alcohol abuse was also good. He acknowledged that his excessive use of alcohol had been a problem. While Mr. Schoenborn's insight into his paranoid personality traits was improving, there remained room for further improvement.

[18] Dr. Hediger noted that Mr. Schoenborn remains free of psychotic symptoms. There has been no evidence of delusions, hallucinations, paranoid thoughts, homicidal/suicidal ideation, or mood or anxiety disorder. The accused's behaviour has remained settled with no consistent concerns. There had been one episode of minor conflict with another patient. Otherwise, the accused is described as fairly quiet and reserved. He generally interacted appropriately with others.

[19] In the opinion of Dr. Hediger, Mr. Schoenborn has coped reasonably well with the privileges that have been provided to him in hospital. He has demonstrated restraint when provoked by other patients. He has made good progress with anger management skills. There has been a significant reduction in the number, intensity and frequency of verbal and physical altercations over the last 7 months. In Dr. Hediger's opinion, although Mr. Schoenborn has further work to do in developing coping strategies, he is ready for the privilege of escorted community access, at the discretion of the Director, as the next step in his community reintegration.

[20] Dr. Hediger acknowledged that the core issue in considering the addition of this privilege is public safety. All hospital strategies in administering this privilege will take this into account. He noted that if the accused were to go into the community, it would only be in the company of trained staff.

[21] Dr. Hediger reviewed the accused's prior history of elopement, explaining that this was a specific risk factor that he has carefully considered. He noted that the accused's history of these behaviours had occurred in the context of symptomatic

illness or other untreated conditions. He stressed that risk of elopement would be specifically reviewed before any community outing.

[22] The Crown cross-examined Dr. Hediger at length. He was vigorously challenged on a range of topics including his opinion of the accused's progress, the accused's risk of elopement and reactive violence, and the accused's formal risk assessment using the HCR-20 framework. This is a well-known risk assessment instrument with which the Board has substantial experience. Dr. Hediger did not qualify, resile or retreat in any way from the evidence provided in his report or testimony given during his examination in chief by the Director.

Dr. Cooper

[23] Dr. Cooper is a psychologist and has been providing anger management therapy to Mr. Schoenborn since the summer of 2013. He conducted approximately 25 sessions with the accused over the last year. Dr. Cooper reviewed Mr. Schoenborn's history of angry behaviours. He observed that apart from the reduction in the total number of incidents of anger, the episodes of anger that had occurred had diminished in severity and intensity. They had also required less external intervention to resolve.

[24] Dr. Cooper stated that the accused has progressed well in therapy and had made gains in insight. Mr. Schoenborn had succeeded in meeting his goal of reducing "anger incidents" through use of anger management strategies that he has learned. Dr. Cooper acknowledged problems in motivating the accused to keep a log regarding the books that he has been directed to read. There were other problems with cognitive distortions in interpreting the intentions of others as well as behaviour when angry. Dr. Cooper found that the accused was invested in wanting to change. He agreed with Dr. Hediger that Mr. Schoenborn's risk of reactive anger could be safely managed on an escorted community outing.

[25] In cross-examination by the Crown, Dr. Cooper specifically rejected the suggestion that anger was Mr. Schoenborn's dominant presentation. He was firm that the accused had made real improvements over the last year. He agreed with Dr. Hediger's opinion that the accused's history of anger needed to be interpreted in light of the presence of symptomatic illness, substance use, and coping with frustration. Like

Dr. Hediger, he did not resile from his report or testimony that he provided during his examination in chief by the Director.

Peri Hanzouli

[26] Ms. Hanzouli is the supervisor of the staff supervised community outing (SSCO) process at FPH. She provided a detailed description of the program. She explained that when a patient's treatment team decides that the person is ready for SSCOs, they make application to the hospital's Program and Privileges Committee. This is a multidisciplinary team that includes a psychiatrist, a social worker, and a member of rehabilitation services. The Programs and Privileges Committee carefully reviews the individual's case, then makes a recommendation to the Director, who makes the final decision as to whether the patient should be approved for SSCOs.

[27] If escorted community access is approved, the SSCO team meets with the treatment team, typically at a treatment planning conference. The specific needs of the patient and the goals of the treatment team in providing escorted community access are reviewed. The SSCO team meets with the patient in order to get to know the individual. The SSCO team conducts its own chart review in order to gain a better appreciation of the patient's historical risks. Next a risk mitigation plan is prepared in conjunction with the treatment team and nursing staff. This is a documented process that involves as many people as possible. Information is gathered about known risks and potential triggers. A plan is formulated for the specific destination for the outing, and the anticipated activity. This process is repeated in advance for every different situation that the patient is likely to face. All parties must sign off on the plan before any outings occur. The entire process is carefully documented.

[28] The first stage in escorted community outings is the assessment SSCO. This is an evaluation that is performed during the first outing with just the patient and at least two professionally qualified staff members, such as a recreational therapist or occupational therapist. The assessment outing also provides an opportunity for staff to get to know the patient in a setting that is considered low risk and in an environment where the patient is unlikely to come into contact with many other people. Once outside the confines of FPH, the patient is not permitted to go further than an arm's length from

staff, except when using the bathroom. The outing destination is carefully screened for details such as number of bathrooms, number of stalls per bathroom, number of exits per bathroom, likelihood of children being present at the location, and so on. The destination might be a café or a supermarket. The outing could also simply involve going for a short walk. The destination is always within a 15 minute drive of FPH so that the hospital can be accessed quickly in the event that rapid assistance is required. An assessment SSCO lasts about 45 to 60 minutes.

[29] On the day of the scheduled outing, SSCO staff meet with the patient on the unit in order to explain what is expected to occur and review the expectations of the patient. The patient signs a document acknowledging the expectations. Unit staff are consulted in order to review the patient's presentation that morning and how they feel about the patient going on the outing. A final decision is then made as to whether the patient will go on the SSCO. If the patient goes on the SSCO, staff subsequently provide a written report that includes recommendations to the treatment team as to potential future outings.

[30] Any patient approved for SSCOs must go on a minimum of 3 assessment outings before they can be considered for the next phase of the program. Ms. Hanzouli explained that while 3 is the minimum number of outings, there can be as many as 30 or 40, depending on the needs of the individual. These can occur over a period of 6 to 12 months, or even longer. If the patient is deemed to have been settled on the assessment outings phase, SSCO staff may recommend the patient be considered for the next type of outing, called a small SSCO.

[31] Small SSCO destinations are usually within 30 minutes drive of FPH. There are a maximum of 4 patients with 2 staff. The process is otherwise identical to the assessment outing. The frequency and number of small SSCOs is determined by the treatment team. If these outings are deemed successful, the patient may be approved for a large SSCO.

[32] There are up to five patients on a large SSCO. Unlike the assessment SSCO and small SSCO, the patient may be permitted to go outside of line of sight of staff.

Supervision is more relaxed. Otherwise, the process is the same as for assessment and small SSCOs.

[33] Ms. Hanzouli stated that she is not aware of any instance of a patient becoming violent during an assessment SSCO. She acknowledged that there had been 2 escape attempts over the previous 10 years. This led to changes in the SSCO process that were implemented 4 years ago. There have been no incidents since then.

[34] In answer to questions from the Board, Ms. Hanzouli said that if someone recognized Mr. Schoenborn during an SSCO and insulted him or otherwise tried to confront him, staff would immediately intervene to defuse the situation as well as support the accused, including an immediate return to the hospital if necessary and appropriate.

Lianne Lee

[35] Ms. Lee has been Mr. Schoenborn's case manager since his admission to FPH. She said that the accused has not been involved in any verbal or physical altercations with staff or co-patients since his last appearance before the Board on February 12, 2014. She agreed with the opinions expressed by Dr. Hediger and Dr. Cooper that the accused has made significant progress with anger management since his admission to FPH. Mr. Schoenborn's reactions to disagreements or arguments with co-patients and staff have grown progressively less intense and severe with quicker returns to baseline. Overall, he has become less irritable, more settled, and calmer. He is easily redirected and readily accepts intervention and limit setting. Ms. Lee acknowledged that the accused has presented with some behavioural challenges but overall is not considered to be a significant management problem.

[36] Ms. Lee was subjected to lengthy cross-examination by the Crown. Early in the cross-examination, the Crown attempted to introduce into evidence a summary of incidents that she had culled from Ms. Lee's reports. The Board declined to admit this document since the matters were already in evidence and simply amounted to argument by the Crown. Many of the Crown's questions consisted of asking Ms. Lee to read portions of her prior reports that had recorded incidents that involved the accused. These were clearly not proper questions and the Board admonished the Crown several

times in response to objections from the parties. This in turn prompted a family member of the victim Darcie Clarke to interrupt the proceedings by standing up, yelling that "Bill C-14 has changed and she's doing her job", and storming out of the hearing room. The Board was obliged to take a break to restore decorum to the proceeding.

Dr. Anton Schweighofer

[37] Dr. Schweighofer is a psychologist tendered by the Crown as an expert witness with particular experience in the preparation and use of structured professional judgments such as the HCR-20.

[38] His evidence included:

- a lengthy description of other risk assessment instruments that were primarily or exclusively used in correctional settings and had not been used in this case;
- that the risk assessments conducted by Dr. Hediger and Dr. Brink did not meet "accepted best practices" because they failed to list and review every risk factor enumerated in the HCR-20;
- that the risk assessments conducted by Dr. Hediger and Dr. Brink were ethically questionable and potentially biased because Dr. Hediger and Dr. Brink were Mr. Schoenborn's treatment providers. The appropriate practice was the one followed in the correctional system, where risk assessments were prepared by experts unacquainted with the individual in question;
- When assessing change in an individual, a period of longer than 7 months was typically required to make a judgment.

[39] At no time did Dr. Schweighofer express any opinion as to Mr. Schoenborn's risk. His evidence was restricted to criticizing the opinions of Dr. Hediger and Dr. Brink.

Dr. Johann Brink

[40] Dr. Brink was called by the Director in rebuttal to the evidence of Dr. Schweighofer. He is the medical clinical director of the Forensic Psychiatric Services Commission in British Columbia. He is designated as the person in charge of FPH for the purposes of the Mental Disorder provisions of the *Criminal Code*. For all practical purposes, he is the Director. Dr. Brink was also Mr. Schoenborn's first treating psychiatrist following the NCRMD verdict.

[41] In summary, Dr. Brink strongly disagreed with the evidence offered by Dr. Schweighofer. He rejected the opinion that the risk assessments prepared by Dr. Hediger, and earlier by himself, were deficient or lacking because they had not recited and discussed every factor listed in the HCR-20. He disagreed that Mr. Schoenborn's risk should have been assessed by an expert unconnected with his treatment. He pointed out that no person was better acquainted with the fluctuating challenges, strengths, and responses to treatment than the treating psychiatrist. This left the treating psychiatrist at a huge advantage in preparing a risk assessment.

[42] The Crown conducted a vigorous and prolonged cross-examination of Dr. Brink. He did not resile from or qualify any of his evidence.

Allan Dwayne Schoenborn

[43] The accused did not offer any evidence but was willing to answer questions from the parties and the Board. Once again the Crown conducted a lengthy, aggressive, and sometimes provocative cross-examination. Amongst other things, the Crown attempted to have Mr. Schoenborn admit that he:

- was fundamentally a violent person;
- had a persisting and significant problem with anger management;
- had a history of thoughts of killing people;
- intended to escape if given community access;
- had carefully planned and executed the index offences.

[44] The accused denied these suggestions. He maintained a calm demeanour throughout his evidence.

SUBMISSIONS OF THE PARTIES

Director

[45] The Director, represented by Ms. Lovett, submitted that the Board should add a condition to the accused's disposition that would provide for escorted community access at the discretion of the Director. She noted that:

- the court that found Mr. Schoenborn NCRMD concluded that he had committed the index offences in response to psychotic delusions and specifically rejected the Crown's theory that the accused had been motivated by anger and a desire to retaliate against his former wife;
- the evidence of the accused's overall progress since the NCRMD verdict demonstrated significant improvement in anger management, particularly over the last year;
- Dr. Hediger's opinion was that Mr. Schoenborn had progressed to the point where he could safely be considered for SSCOs;
- there was a careful process of dynamic assessment conducted before an accused may be permitted to go on an SSCO;
- the proposed SSCOs would be subject to the discretion of the Director and would only be approved in the context of public safety continuing to be the first and foremost priority;
- the fundamental difference in treatment between mentally disordered offenders and persons found guilty of criminal offences.

Crown

[46] The Crown, represented by Ms. Dawson, strenuously opposed the Director's recommendation for escorted community access and applied to add additional victims to the existing no contact condition of the disposition. Ms. Dawson's submissions included these arguments:

- the accused was a violent man who had not come to grips with his anger, violence and the brutal murders that he had committed;
- the Board should not rely on the opinion of one psychiatrist, Dr. Hediger, in order to fulfil its duty to protect the public;
- was the Board "prepared to gamble on public safety on a triple murderer who is not even motivated to take any further programs beyond baking, which clearly does not address any of his criminogenic needs";
- the amendments to the *Criminal Code* in 2014 that removed the requirement to make the least restrictive and onerous disposition have significantly altered the test to be applied by the Board and required that substantially greater weight be placed on public safety;
- Dr. Brink failed to give evidence in a tempered, professional, and impartial manner;
- Dr. Brink should not be considered an impartial witness but an advocate with a vested interest;

- Dr. Hediger's risk assessment was deficient because it failed to list and discuss every factor listed in the HCR-20;
- the opinions of Dr. Hediger and Dr. Brink did not constitute proper risk assessments upon which the Board could rely;
- Dr. Hediger showed bias in favour of Mr. Schoenborn by employing "effusive" descriptions of the accused's improvements that were not supported by the evidence;
- the accused was "a very high flight risk… who would put the public in serious danger should he manage to escape";
- SSCOs would constitute a social experiment at the expense of public safety;
- the accused would deliberately cooperate during assessment SSCOs so that he could later escape when he progressed to small or large SSCOs;
- should the Board make provision for "social outings", it should require FPH to provide 48 hours notice of the intended location to ensure that the family does not attend at that location and experience more trauma than they already have.

Accused

[47] Mr. Schoenborn, represented by Mr. Hicks, agreed with the Director's recommendation. Mr. Hicks argued that:

- the law prior to the amendments to the *Criminal Code* as well as Board practice has always made public safety the paramount factor;
- the least restrictive and onerous approach to Board decisions continues to apply;
- Mr. Schoenborn's composure in the face of a difficult cross-examination from the Crown demonstrated his capacity to not react to provocation;
- SSCOs would only be provided at the discretion of the Director;
- Dr. Schweighofer's evidence was irrelevant, or should be given little weight, and in any event had been rebutted by Dr. Brink's evidence.

ANALYSIS

[48] The Board's decision is governed by s. 672.54 of the *Criminal Code*:

> "**672.54** When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, 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 necessary and appropriate in the circumstances:

> (*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;
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> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
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> (*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."

[49] The Board must also take into account a victim impact statement to the extent that it may be relevant to consideration of the criteria set out in s. 672.54:

> "**672.541** If a verdict of not criminally responsible on account of mental disorder has been rendered in respect of an accused, the court or Review Board shall
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> (*a*) at a hearing held under section 672.45, 672.47, 672.64, 672.81 or 672.82 or subsection 672.84(5), take into consideration any statement filed by a victim in accordance with subsection 672.5(14) in determining the appropriate disposition or conditions under section 672.54, to the extent that the statement is relevant to its consideration of the criteria set out in section 672.54;"

[50] The guiding authority in interpreting s. 672.54 continues to be the landmark decision of the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. The following passages from the majority decision of McLachlin J., often quoted, nevertheless bear repeating:

> "21 Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a special stream. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions, or unconditionally discharged. The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.
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> …

> 30 These procedures and the principles underlying them represent a fundamental departure from the common law approach to those who commit offences while mentally ill. … Part XX.1 offers a new alternative. The NCR accused is to be treated in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. Under the new approach, the mentally ill offender occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public.
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> …
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> 42 By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.
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> ...
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> 94 In asserting that NCR accused must be treated "the same" as criminally responsible offenders who commit the same criminal act, the appellants assume that the infringement of their liberty is meant to serve the same function that it does for those found guilty of criminal offences. As I noted, this is mistaken. Any restrictions on the liberty of NCR accused are imposed for essentially rehabilitative and not penal purposes. In the words of Taylor J.A., unlike the sanctions faced by a convicted person, the scheme that addresses NCR accused "exacts no penalty, imposes no punishment and casts no blame"…"

[51] The threshold determination of significant threat to public safety and the type of disposition were not in issue at this hearing. The parties were agreed that the accused remained a significant threat and that he should continue to be detained in hospital. The Board agreed that the evidence fully supported this position.

[52] The only issue was whether the Board should add a condition to the disposition that would permit the accused to have escorted community access, at the discretion of the Director.

Amendments to s. 672.54

[53] Part XX.1 of the *Criminal Code* was amended by the *Not Criminally Responsible Reform Act* (commonly referred to as Bill C-14) (the *NCRRA*) and came into force on July 11, 2014. The repealed portion of s. 672.54 required the Board to make "the least onerous and least restrictive" disposition compatible with the accused's circumstances. That phrase was changed to "necessary and appropriate". The first of four factors that the Board must take into account was changed from "the need to protect the public from dangerous persons" to "the safety of the public, which is the paramount consideration". The Crown argues that these changes have materially altered the philosophy the Board must apply in choosing a disposition and favours a much more restrictive approach.

[54] This issue was carefully considered by the Board in *Re Lacerte (aka Mazzei)*, BCRB, July 15, 2014. The Board rejected the argument that the amendments had altered the basic approach that the Board must apply to making a disposition:

> "[48] We are of the view that this change of language does not affect substantively the nature of the analysis and determination we must make when considering disposition.
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> [49] The term "necessary" reflects the objects of the legislation and in particular, of the considerations set out in s. 672.54. A disposition is "necessary" to the extent it addresses the protection of the public, the re-integration of the accused into society, his mental condition and the other needs of the accused, all of which are identified in s.672.54 as the goals we must consider when making a disposition. In contrast, and by way of example, a disposition would not be "necessary" if imposed to punish an accused, since this is not an identified purpose of a disposition under Part XX.1.
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> [50] The term "appropriate" reflects the need to ensure that a disposition is crafted to address the particular needs of an accused, including his need for treatment, and takes into account the reintegration of an accused into the community. It requires the Board to take into account an accused's individual situation.
>
> [51] An appropriate disposition must also address the liberty interests of the accused, which the Supreme Court in *Winko* directed must be considered when interpreting Part XX.1 of the *Criminal Code*. The Board must not interpret the language of Part XX.1 of the *Criminal Code* so as to trammel the liberty of an accused, except to the extent required to carry out its purposes. This requirement to make a disposition which interferes

as little as possible with an NCRMD accused's liberty is equivalent to a direction to impose the least restrictive and onerous disposition possible in the circumstances. Imposing a disposition which is more restrictive or onerous than necessary is obviously overly broad, would unnecessarily trammel an accused's liberty, and thus would not be an appropriate disposition.

[52] In *Winko,* public safety was said to be the Board's primary concern when making a disposition. The NCRRA incorporated express language to that effect into s. 672.54 which is declarative of the pre-existing law.

[53] To summarize, the NCRRA amendment to s. 672.54, to substitute the words "necessary and appropriate" for "least restrictive and onerous", does not change the substantive nature of the legal question before the Review Board at a hearing. We are still required, as we were before the NCRRA came into force, to make the least onerous and restrictive disposition which reflects the objects set out in s. 672.54 and which is crafted, so far as possible, to meet the particular needs of an accused.

[54] We note that this conclusion accords with Parliament's legislative intent. In testifying before the Senate Standing Committee On Legal And Constitutional Affairs on February 27, 2014, the then Minister Of Justice and Attorney General of Canada, the Hon. Peter MacKay stated as follows:

> "The second change is to the disposition-making provision as it relates to the terms "least onerous and least restrictive." … Bill C–14 proposes to replace those terms with a clearer phrase: "necessary and appropriate in the circumstances." This proposed wording is consistent with how this requirement was described in 1999 Supreme Court of Canada decision *Winko v. British Columbia (Forensic Psychiatric Institute)*, such that "the NCR accused's liberty will be trammeled no more than is necessary to protect the public safety." This amendment is not intended to eliminate the requirement that a disposition be the "least onerous and least restrictive," but rather to make the concept easier to understand."

[55] *Lacerte* was applied by the Board in *Re Davis*, unreported, British Columbia Review Board, July 15, 2014 and *Re Baranyais*, unreported, British Columbia Review Board, September 11, 2014. We note that the Ontario Review Board came to a similar conclusion in *Re Vallee,* unreported, ORB File No. 5161, August 21, 2014:

> "55. The Board unanimously finds that changes to the Criminal Code legislation which came into force on July 11, 2014 do not change the test to be applied by this Board in determining the correct disposition. In order to make a disposition that is necessary and appropriate this Board must

> consider what is the least onerous and least restrictive disposition that can properly manage the risk posed to the public by the accused while at the same time meeting the needs of the accused for rehabilitation and reintegration."

[56] There is a rule of practice in British Columbia, first stated in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), that a judge should follow the decision of another judge of the same court on a question of law, unless

> "a) subsequent decisions have affected the validity of the impugned judgment;
>
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority."

[57] *Re Hansard Spruce Mills* was explained *R. v. Sipes,* 2009 BCSC 285 as follows:

> "[9] *Re Hansard Spruce Mills* has been consistently applied by judges of this Court for over fifty years. The reasons of Wilson J. are consonant with the practice that is usually followed by trial judges across the country. ...
>
> [10] The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court."

[58] The decision in *Sipes* cautioned against the rote application of *Re Hansard Spruce Mills*, adding that the discretion to follow the decision in question should take into account all relevant factors that bear upon the best interests of justice in the context of the particular case.

[59] The Crown did not cite any authority in support of its submission. None of the exceptions enumerated in *Re Hansard Spruce Mills* apply in this matter. There are none of the additional factors enumerated in *Sipes*. In the circumstances, the Board

concluded that it should follow the decision in *Lacerte*. The argument advanced by the Crown is therefore dismissed.

Critique Evidence - Dr. Schweighofer

[60] Dr. Schweighofer did not express any opinion about Mr. Schoenborn's risk. His evidence was restricted to criticism of Dr. Hediger's reports and to some extent Dr. Brink's earlier report. The purpose of Dr. Schweighofer's evidence, as articulated by the Crown, was to assist the Board in deciding "whether or not Dr. Hediger's risk assessment was of sufficient quality to permit the Board to make a decision". The type of evidence given by Dr. Schweighofer is generally known as critique evidence.

[61] The basic principles governing the admissibility of expert opinion evidence were reviewed by the Supreme Court of Canada in *R. v. Mohan* [1994] 2 S.C.R. 9. The court found that admission of such evidence depended on the application of four criteria:

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule;
(d) a properly qualified expert.

[62] Bearing this in mind, we note that the use of critique evidence has been subject to significant judicial criticism. In *Hejzlar v. Mitchell-Hejzlar,* 2010 BCSC 1139, the court ordered the preparation of a psychologist's report by a Dr. Posthuma in a family law proceeding. The plaintiff, wishing to challenge the opinion contained in Dr. Posthuma's report, sought to introduce a report from a Dr. Korpach. Much like Dr. Schweighofer's evidence, Dr. Korpach's report was restricted to "comments … limited to aspects pertaining to the methods, procedures, and process of the assessment, and the sufficiency and accuracy of Dr. Posthuma’s conclusions and recommendations."

[63] The court acknowledged that multiple cases had accepted evidence of this type without comment or dealing with the question of relevancy or admissibility. The court reviewed a number of other decisions where the issue was considered, noting that in these cases the evidence was found inadmissible or given little weight.

[64] The court concluded:

> "[12] It may well be that a critique such as was prepared by Dr. Korpach will be invaluable to counsel prior to the cross-examination of the expert ... . However, such a report to counsel would not be in evidence…. I am satisfied that a critique is not relevant to the issues which are before the Court, being what is in the best interests of the child … .
>
> [13]…. Whether or not it was the intent of Dr. Korpach to do so, it appears that the primary purposes of the critique was to cast doubt on conclusions reached in an attempt to lead the Court to conclude that contrary conclusions should be reached and to lead the Court to believe that Dr. Korpach might well have come to a different opinion.
>
> [14] A s. 15 report is prepared for the benefit of the Court and, ... is akin to a probation officer in a criminal trial – to assist the Court "by being its eyes and ears during their investigation and advising the court as to future planning"… . On the other hand, an expert preparing a critique can hardly be said to be independent and neutral. Rather, he or she is hired ... for the purpose of attempting to weaken the credibility of the conclusions drawn.
>
> [15] I am satisfied that the admittance of such critiques is contrary to the nature and purpose of the requisition of a s. 15 report. Cross-examination is the primary method of challenging such reports. A critique is not a commentary on any substantive matters which are before the Court." (*Emphasis added*)

[65] We note at this juncture that the expert evidence of Dr. Hediger and Dr. Brink is presumptively neutral, and pursuant to the provisions of the *Forensic Psychiatry Act*, R.S.B.C. 1996, c.156, was prepared for the express purpose of providing expert evidence to the Board (see: *Mazzei (Re)* [2006] B.C.R.B.D. No. 93, at paragraphs 29-30). Their evidence may be considered analogous to the court ordered report that was attacked in *Hejzlar*.

[66] The Ontario Court of Appeal recently considered the issue of critique evidence in *M. v. F.,* 2015 ONCA 277. Like *Hejzlar*, this was a family law case where a critique report was used to attack the opinion of a psychologist who had made recommendations to the court. The reasons noted the practice of some courts in admitting such evidence and then discounting its weight, while other courts found that such evidence was not admissible because it failed to meet the criteria set out in *Mohan.* The court discussed *Mayfield v. Mayfield* (2001) 18 R.F.L. (5th) 328 (Ont. S.C.),

where critique evidence was ruled inadmissible and considered to be "rarely" admissible as a general rule. The court noted that *Mayfield* had been endorsed in *Sordi v. Sordi,* 2011 ONCA 665, and stated:

> "[33]… It would be difficult to find that such evidence meets the criteria of *Mohan*.
>
> [34] I too support the view that critique evidence is rarely appropriate. It generally – as here - has little probative value, adds expense and risks elevating the animosity between the parties."

[67] The threshold issue of admissibility was not raised by the parties, perhaps because the formal rules of evidence are more relaxed in administrative law proceedings such as Board hearings. There were strenuous and understandable objections from the Director and the accused with respect to the Crown's failure to give any notice of the content of Dr. Schweighofer's evidence, as required by s. 657.3(1)(b) of the *Criminal Code* and alternatively s. 40 *Canada Evidence Act*, R.S.C. 1985, c. c-5. This inexplicable lapse forced the Board to adjourn the hearing on February 26, 2015 so that the Crown could provide a summary of Dr. Schweighofer's anticipated evidence. The Board was not able to resume the hearing until April 29, 2015.

[68] Whether Dr. Schweighofer should have been permitted to give any evidence was not argued and in any event became moot once the hearing resumed and he testified. Nevertheless, even under the most expanded rules of admissibility, it is difficult to appreciate how Dr. Schweighofer's evidence would meet the second factor of the *Mohan* test (necessity in assisting the trier of fact), when it was open to the Crown to obtain and present its own expert on the substantive issue of the accused's risk.

[69] We add that Dr. Schweighofer's expertise was largely restricted to the use of risk assessments in correctional settings. The decision in *Winko* repeatedly stressed the significant differences between correctional settings and mental health treatment. Dr. Schweighofer admitted that he had never conducted a risk assessment using the HCR-20 in respect of an unfit or NCRMD accused in Review Board proceedings. His opinion that risk assessments should not be conducted by the treatment provider was at complete odds with *Winko,* where the court held:

> "61 It follows that the inquiries conducted by the court or Review Board … will closely examine a range of evidence … and, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. …" (Emphasis added)

[70] These considerations, combined with the significant limitations surrounding the use of critique evidence, persuaded the Board that no weight should be attached to Dr. Schweighofer's evidence.

[71] Before leaving this issue, it is worth commenting upon the impact of this line of inquiry upon the proceedings. As already mentioned, the Board was required to adjourn the hearing because of the Crown's failure to provide a summary of Dr. Schweighofer's evidence. This caused a delay of 2 months. After hearing the evidence of Dr. Schweighofer, the Director felt compelled to present the rebuttal evidence of Dr. Brink. This was understandable as the Director could not know what significance the Board might attach to Dr. Schweighofer's testimony. Although Dr. Brink's evidence in chief was relatively brief, he was subjected to an aggressive and lengthy cross-examination by the Crown. The Crown's questions became increasingly remote, prompting the Director and the accused to repeatedly object to the relevance of the questioning. At one point the Director characterized the line of inquiry being pursued by the Crown as "going down the rabbit hole" in reference to Lewis Carroll's *Alice in Wonderland*. At the time, and now with the benefit of hindsight, that analogy seems entirely apt. Finally, we note that the time consumed in hearing Dr. Schweighofer's and Dr. Brink's evidence amounted to one entire day. We contrast this with the time it usually takes to complete a disposition review. This is typically about two hours and rarely more than half a day.

Escorted community access - SSCOs

[72] We now turn to the sole substantive issue before the Board, namely whether Mr. Schoenborn should be permitted to have escorted community access at the discretion of the Director.

[73] We begin by commenting upon the credibility and quality of evidence of Dr. Hediger and Dr. Brink in view of the strenuous position taken by the Crown. Both of these witnesses are highly experienced and respected forensic psychiatrists that are well known to the Board. To the Board's knowledge, their professional competence has

never been attacked or questioned in other Review Board proceedings. We found absolutely nothing in the evidence of either of these witnesses, or in any of the other evidence available to the Board, to suggest that their evidence met anything other than the highest professional standards. Both witnesses were vigorously challenged by the Crown. They were not shaken in the slightest. The Board concluded that their opinions were balanced and persuasive.

[74] In particular, the Board attaches additional weight to the opinion of Dr. Hediger by virtue of his treatment relationship with Mr. Schoenborn. He is the expert in the best position to assess the accused's risk of violence and elopement. *Winko* stresses the importance of the evidence of those experts who examined the accused.

[75] We note the evidence of Dr. Cooper and Ms. Lee. Both of these witnesses also have the advantage of knowing the accused as treatment providers. Both agreed that the accused had made significant progress in anger management.

[76] We take into account the evidence of the accused. He was subjected to a lengthy, emotionally charged, and aggressive cross-examination by the Crown. Significantly, after sitting silently through three days of extended proceedings, he did not lose his composure and maintained a calm demeanour in this high-pressure setting. This was consistent with the evidence of Dr. Hediger, Dr. Cooper and Ms. Lee that the accused had made significant progress with anger management. We note that Mr. Schoenborn had not been provided with any extra medication to promote his tranquility.

[77] We have considered the evidence of Ms. Hanzouli. She provided a helpful description of the careful process that is used in providing escorted community access. The evidence is that this is a dynamic assessment that is continually updated by a range of professionals in contact with the accused while always taking into account public safety. Lastly, we note that this privilege is not mandatory, but provided at the discretion of the Director, having regard to all of the circumstances in the instant.

[78] The Board therefore concluded that the recommendation of the Director to be given the discretion to provide the accused with escorted community access should be accepted.

[79] The Crown submitted that in the event the Board ordered escorted community access, it should require the Director to provide 48 hours notice of the intended location. The Director opposed, arguing that apart from enormous administrative challenges, it would have the potential to put staff and the accused, as well as, potentially, members of the public, at considerable risk in the event such information were to fall into the wrong hands. We agree entirely with the Director's submission.

No Contact Order

[80] The Crown applied to add 4 persons to the no contact condition in the disposition. These are family members of the victim Darcie Clarke. The Crown explained that they were frightened of Mr. Schoenborn, although there was no evidence introduced that their concern was based on anything that had occurred since the index offences were committed more than 7 years ago.

[81] Neither the Director nor Mr. Schoenborn objected to the addition of these names. Considering the authority of *Osawe (Re)*, 2015 ONCA 280, which requires the Board to inform the parties that it might not be willing to accede to a joint submission, the Board agreed to add the listed names to the no contact order. However, this should not be interpreted as the Board's agreement that the criteria of s. 672.542 of the *Criminal Code* have been satisfied in the event that Mr. Schoenborn or the Director wish to reconsider the matter in the future.

Dr. R. Stevenson, concurring:

[82] I fully agree with my colleagues and would add the following observations and comments.

[83] With respect to Dr. Schweighofer’s testimony, he indicated that he did not review Mr. Schoenborn’s chart. Accordingly, he was not in a position to critique the evidence that Dr. Hediger’s risk assessment should be read as the product of a cumulative narrative drawing upon all of the information available to the treating psychiatrist, and to the Board, in previous materials. Dr. Schweighofer opined that the standard of presenting the HCR-20, in his experience, was one of providing an itemized

and fully explicated accounting of every risk factor in order to make the conclusions clear and transparent to the reader. Although I think there is validity to this perspective, it presumes that the Board is unfamiliar with previous risk assessments and other content in the accused's record. In addition, there are two fundamental questions that he did not address: firstly, was the necessary content on which to base a valid risk assessment available in the cumulative record and, secondly, given access to that information, would he have reached a different conclusion from Dr. Hediger or Dr. Brink with respect to risk. As the Chair has pointed out, it would have been more helpful to the Board if Crown had produced its own expert evidence that Mr. Schoenborn's risk was unmanageable.

[84] Crown acknowledged Mr. Schoenborn's ability to maintain appropriate decorum during questioning about his index offences and various historical behaviours. It was my impression that she asked very few, if any, questions that directly addressed the specific issue before the Board, *viz*., the likelihood of significant harm to the public in the instance of (as thoroughly outlined by Ms. Hanzouli and affirmed by every member of the treatment team) a time-limited, staff-escorted, carefully orchestrated community outing close to the hospital, with a fresh analysis of risk issues immediately prior to, and during, any such event. Crown did, on several occasions, draw the Board's attention to the longer term possibility of more extended passes away from the hospital, eventually without staff escort. However, the Director did not request, and did not express any foreseeable intention to provide liberties that are broader than the so-called SSCOs. If in future the accused requests, or the Director recommends, any broadening of community access privileges, the Board will have to again revisit the relevant risk issues, assess any additional evidence presented at a new hearing, and determine whether that discretion should be granted to the Director with due consideration for the context and circumstances at that time.