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

SARAH BARANYAIS

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
September 11, 2014

BEFORE:

CHAIRPERSON:	B. Walter
MEMBERS:	Dr. R. Stevenson, psychiatrist
	A. Markwart

APPEARANCES:

ACCUSED/PATIENT:	Sarah Baranyais
ACCUSED/PATIENT COUNSEL:	S. Hicks
DIRECTOR AFPS:	Dr. M. Dilli K. Field
DIRECTOR'S COUNSEL:	
ATTORNEY GENERAL:	L. Hillaby

INTRODUCTION

[1] On September 11, 2014, the British Columbia Review Board (the Board) convened an annual hearing at the Forensic Psychiatric Hospital (FPH), to review the disposition of Sarah Baranyais, the accused, who is now thirty-three years of age. This was Ms. Baranyais' tenth appearance since her verdict of not criminally responsible on account of mental disorder (NCRMD) dated November 21, 2005.

[2] At the hearing, the Director of Adult Forensic Psychiatric Services (AFPS) and the Attorney General recommended a further discharge subject to the same conditions found in Ms. Baranyais' last disposition dated September 14, 2012 (Exhibit 50). Ms. Baranyais sought absolute discharge.

BACKGROUND AND HISTORY OF PROCEEDINGS

[3] Ms. Baranyais' personal and psychiatric history, as well as her progress, has been documented in the Board's past reasons for disposition. The pertinent evidence in the record is summarized below.

[4] Ms. Baranyais suffered a head injury in a motor vehicle accident in the 1980s, in which she sustained brain damage. Nevertheless, according to psychological testing, she operates at an average level of intelligence. She suffers some impairments of memory and attention, though these do not have a significant negative impact on her functioning. They likely contribute, to some extent, to her emotional and behavioural problems, but overall, her executive functioning and judgment are considered satisfactory (exhibit 16). Her cognitive issues are not considered major concerns or obstacles to her progress.

[5] On April 8, 2004, Ms. Baranyais, without warning, assaulted her mother. At the time of the index offence, there existed a record of previous police contacts involving paranoid and apparently delusion-driven behaviours, including Ms. Baranyais' beliefs that her mother and other family members were imposters. This condition is known as Capgras syndrome.

[6] Aside from the index offence of assault (s. 266 of the *Criminal Code*), Ms. Baranyais has no other known violent or criminal history.

[7] On assessment of Ms. Baranyais, after the index offence, Dr. Chale identified an at least two year history of mental illness, including an admission to hospital in Kamloops under *Mental Health Act* certification. He also reported a more recent history of multi-

substance use, including cannabis, ecstasy, cocaine and ongoing alcohol abuse. He further documented reported homicidal thoughts and statements directed at Ms. Baranyais' landlady. Dr. Chale made a diagnosis of schizophrenia and alcohol abuse. Ms. Baranyais' animus toward, and her desire to harm or even kill her mother, remained overt and persistent. She was considered a threat to both her mother and her sister (Exhibit 2).

[8] Ms. Baranyais has a prominent family history of mental illness. She had no follow-up treatment from 2004 until after the index offence. She was considered non-compliant with treatment, and lacking insight into, or acceptance of, her illness. This remains perhaps the most significant feature of her presentation. After her verdict, Ms. Baranyais was allowed to remain in the community under conditions.

[9] Prior to her first Review Board hearing, Ms. Baranyais was dilatory in terms of reporting for appointments to her Kamloops forensic treatment team. Her delusional beliefs persisted. She refused to consume her prescribed medications. Following her first Review Board hearing, at which she was conditionally discharged, her mental state deteriorated rapidly due to non-compliance. She was hospitalized in the community where she attacked Dr. Chale, whom she had incorporated into her delusional beliefs.

[10] Ms. Baranyais was admitted to FPH on February 3, 2006 in an acutely delusional state. Dr. Wang assumed treatment responsibility. She quickly incorporated FPH staff into her delusional belief system. Ms. Baranyais was considered too ill and unmanageable to be treated in the community. At a mandatory hearing of the Board on March 22, 2006, she remained acutely psychotic, although her anger toward her mother had abated somewhat. She was detained (Exhibit 14).

[11] During the following year, Ms. Baranyais continued to harbour false beliefs about the identities of family members and Dr. Chale. However, as she presented with no aggressive or other behavioural management problems at FPH, she was initially permitted community outings escorted by her mother. By January 2007, she had progressed to the open Hawthorne unit of FPH and commenced unescorted outings into the community. Although her insight or acceptance of her illness remained limited, the intensity of her delusional beliefs decreased.

[12] In August 2007, Ms. Baranyais was provided with overnight visit leaves to reside in her own trailer in Kamloops. Despite her incomplete insight she was apparently

compliant in the consumption of her medication. Her mental state was considered stable despite her ongoing delusions and denial of her illness.

[13] On December 13, 2007, Ms. Baranyais was conditionally discharged by the Board. Within four months, she had breached the conditions of her discharge by failing to report to the treatment team as directed and by changing her residence without prior approval. Ms. Baranyais had apparently left Kamloops and relocated to Vancouver with a male partner with whom she had been cohabitating. She had been non-disclosive about the relationship. On admission to FPH, under an Enforcement Order of the court (s. 672.93, *Criminal Code*), she once again endorsed delusional beliefs about family members and Dr. Chale. She admitted using alcohol as well as her partner's medication.

[14] On June 4, 2008, Ms. Baranyais was detained by the Board. Over the following months, she endorsed homicidal thoughts about Dr. Chale. She became more delusional, non-engaged and even more insightless. Nevertheless, she presented no management problems. She once again progressed to the Hawthorne unit and started to participate in a work program.

[15] In April 2010, Ms. Baranyais started overnight visits leaves to Coast Cottages on the Riverview Hospital grounds. Her illness was considered refractory or treatment resistant.

[16] On September 22, 2010, Ms. Baranyais was conditionally discharged to Coast Cottages. She commenced a program of self-administration of her medications. Although she denied any intent to harm Dr. Chale, her delusions, lack of insight and denial of her illness persisted. She demonstrated that she was capable of compliantly administering her own medication. She was considered at her baseline mental state.

[17] After two years at Coast Cottages, Ms. Baranyais was, in March 2013, provided with the opportunity to occupy her own independent or semi-independent apartment under Coast auspices, where she remains to date. Her transition to her new residence was non-problematic. She continued her volunteer work activities and was able to embark on a fitness regime, which helped her lose some weight. She was considered somewhat socially isolated and lonely. She appeared to slowly endorse the possibility of continuing her medications even if discharged absolutely. She was more engaged with her outpatient treatment team. The evidence suggests she has maintained her baseline level of mental stability.

EVIDENCE AT HEARING

[18] On behalf of the Director, the Board was presented with evidence from Ms. Baranyais' treatment team, Dr. Dilli (Exhibit 54) and Ms. Field (Exhibit 55), who also provided extensive oral testimony. Ms. Baranyais testified on her own behalf.

[19] The Director's evidence indicates that Ms. Baranyais is content with her current circumstances, is cooperative, pleasant and has maintained her relatively positive progress. She remains medically compliant and without complaint of side effects except for some morning drowsiness. Her mental state remains stable. Dr. Dilli said that with probing, Ms. Baranyais has revealed some anxiety and mild, non-debilitating depression. There are no concerns regarding drug or alcohol use. Ms. Baranyais maintains her fitness regime. The treatment team is trying to assist her to increase her social engagement and activation.

[20] Ms. Baranyais maintains contact with her mother and an uncle from a distance. She testified her relationship with her mother is "pretty good". They speak weekly and Ms. Baranyais no longer lends her money. She denied any animosity toward her sister Jody but admits to some resentment. They have not spoken since 2004. She has no interest in contact and does not want to be around her sister. She says Jody mistreated and hit her as a child and their mother declined to intervene. She no longer believes Dr. Chale is an imposter and has no animosity toward him.

[21] Despite Ms. Baranyais' positive progress, Dr. Dilli opines that she is not ready to be discharged absolutely to her own devices. As I was able to interpret his evidence, Dr. Dilli's concerns are set out below.

[22] First, Ms. Baranyais has not formulated or taken steps to implement any clear or concrete plans for her life after absolute discharge. In that regard, Dr. Dilli feels Ms. Baranyais needs to establish a stable living situation, which, as I understand it, refers to her residential environment or circumstances. I gather Dr. Dilli is concerned that Ms. Baranyais has not finally decided whether, in the longer term, she intends to find accommodation in the lower mainland, for example in Maple Ridge, or whether she will relocate to the Queen Charlotte region, where members of her family reside.

[23] On this issue, Ms. Baranyais testified that she enjoys her current apartment environment but would like to move to her own property or to an apartment. The evidence suggests she could remain in her current housing even if absolutely discharged. She

plans to stay there for at least a year during which period she says she would explore the options of moving to Maple Ridge or relocating to the Queen Charlottes. She wants to explore housing markets within her financial means. She said she might purchase land on Queen Charlotte Island and then rent it out for parts of the year. Her description of how she would go about finding property was somewhat vague or childlike and did not inspire confidence. It does appear that her long-term goal is to return to the Queen Charlottes; a goal from which Dr. Dilli would like to dissuade her.

[24] Second, Dr. Dilli testified that it is of concern to him that Ms. Baranyais has been taken advantage of by others, though he did not elaborate on this idea or its implications. He tied this somewhat vague statement to Ms. Baranyais' apparently strong desire or intention to become a parent. If she were to become pregnant, Dr. Dilli posits that she would cease taking her medication, whereupon she would be highly likely to relapse to more overt and intense symptoms. Her risk to others would, in turn, increase. Dr. Dilli testified that it is not desirable for Ms. Baranyais to have children. Ms. Field echoed that Ms. Baranyais' aspiration to become pregnant is fairly strong at this point in her life. Ms. Field said that according to Ms. Baranyais, she has miscarried in the past. Exhibit 2 indicates Ms. Baranyais has, in the past, self reported six or seven pregnancies. Her assertions have not been medically confirmed.

[25] Although Dr. Dilli's report says that Ms. Baranyais is free of evidence of psychosis, the same document also indicates that Ms. Baranyais continues to harbour beliefs or questions about the identities of her mother, sister and others. Dr. Dilli identified these as significant historic and ongoing delusions. He said these beliefs can be "triggered" and could exacerbate. He also mentioned a belief about Ms. Baranyais giving birth to the "messiah", which she denied, or which, alternatively, she does not consider a delusion or part of an illness. Dr. Dilli opines that Ms. Baranyais' interest in motherhood is related to her delusional system and partly motivated by "jealousy" of her siblings. He characterized this as a "dominant theme". He did not elaborate on this analysis and he did not respond when asked whether Ms. Baranyais has the capacity to care for a child. Dr. Dilli said if she did have a child, he would be concerned about the stress occasioned by intervention or scrutiny from child protection authorities as well as the stress of caring for a child. He said if her delusions exacerbate, she might feel the need to act out toward others.

[26] Ms. Baranyais admitted she would like to have a child before she reaches age forty or “the sooner the better”. She also agreed that if she became pregnant she would cease consuming her prescribed Clozapine, in consultation with her physician. Otherwise, Ms. Baranyais does not believe pregnancy or parenthood would be inordinately stressful. She said she would “like a father in the picture”.

[27] Third, Dr. Dilli continues to accept as “established”, Ms. Baranyais’ historic diagnosis of schizophrenia. He does not consider what he called her “minor” cognitive issues of major concern. He believes that treatment of her schizophrenia has not been fully effective in managing the illness, although she is doing much better on Clozapine. He considers the illness in “partial remission” with ongoing residual delusional symptoms. Ms. Baranyais’ insight remains “superficial” or, as Ms. Field termed it, “ambivalent”.

[28] Dr. Dilli acknowledged that Ms. Baranyais has no history of violence prior to the index offence. Except for that incident and the attack on Dr. Chale, both while she was more ill, she has demonstrated no violence in “six years”, by which I assume he intended to say eight and a half years, as, according to the evidentiary record, the last such incident occurred in February 2006. She has shown that she can remain non-violent even while experiencing residual symptoms, which Dr. Dilli testified have “dampened” in their intensity. He said some of Ms. Baranyais’ delusional material, such as her beliefs about her sister Jody, are fixed and may never resolve. Nevertheless, Ms. Baranyais has made no effort to contact her sister. He also acknowledged that Ms. Baranyais’ beliefs that Jody abused her in childhood may or may not be delusional.

[29] Dr. Dilli has seen further improvement in the past year. He said that he currently has no concerns with Ms. Baranyais at her baseline state. Noted improvements include that she is pleasant, happy and content, her self-care is satisfactory, she is more social and she is working on her diet and weight. She is not a menace. Ms. Field said Ms. Baranyais’ finances are adequate and well managed. Her overall health regime, including her morning drowsiness, is self-directed and well managed.

[30] As to Ms. Baranyais’ desire for absolute discharge, and despite his concerns, Dr. Dilli acknowledged that her transition to independent living presented no problems. He has no complaints or doubts about the administration of her mediation. Ms. Baranyais’ medication compliance is tested on a monthly basis to ensure it is at therapeutic blood levels. Dr. Dilli testified that when treated, Ms. Baranyais is pleasant and pro-social.

There have been no reported behavioural problems or violence in the community. She is not as socially engaged as she could be.

[31] Both Ms. Baranyais and Ms. Field testified regarding Ms. Baranyais' desire to function without medication despite her good response to a very low dose of Clozapine. Ms. Field expressed doubt about Ms. Baranyais' long-term commitment to medication compliance and acknowledged she might seek to be allowed a "drug holiday". The treatment team is not contemplating this. Dr. Dilli first said he did not know how quickly Ms. Baranyais would relapse to intense delusions without medication, but then said a "professional" could note deterioration after a few days. Although Ms. Field is not medically qualified, she testified that if Ms. Baranyais were to abandon her medication she would quickly decompensate to paranoid ideas regarding others in her environment, including about family members and the general public.

[32] Ms. Baranyais does not believe she currently has many symptoms of schizophrenia. She says she became violent because of delusional beliefs about her mother, which she referred to as Capgras syndrome, but which she currently denies. She does not believe she is ill at this time. She endorses no real help or benefit from her medication and does not notice any difference on it. She admits she would like a trial of no medication but knows her doctor does not support this. Ms. Baranyais disclosed a current, and in our view, active delusional belief that her brother is related to an FPH staff member.

[33] Ms. Field has not yet taken any steps to have Ms. Baranyais' treatment and supervision transition to a community mental health team. She had some doubts about the accused's eligibility for such services, one assumes, because of Ms. Baranyais' relatively high functioning. Ms. Field is open to exploring the possibility and would assist in a transfer of care. Ms. Baranyais acknowledges she could benefit from such support and says she would attend as directed. Alternatively, she would be seen by her family physician. Ms. Baranyais said if she did not receive an absolute discharge it would be no "big deal".

SUBMISSIONS

[34] Mr. Hillaby, on behalf of the Attorney General, submitted that, on the basis of Ms. Baranyais' concerning behaviour, including homicidal ideation toward others, and based on his belief that, when she is ill, such ideas gain prominence, Ms. Baranyais should remain under the Board's jurisdiction. He submits that when her delusions are not

addressed, Ms. Baranyais has demonstrated she can resort to violence. Targets would be the persons within her environment.

[35] Mr. Hillaby submitted that Ms. Baranyais' need for structure to promote follow-up treatment, and her need to develop greater insight and social activation, render absolute discharge not supportable. He suggested that, as Ms. Baranyais does not believe she derives benefit from her medication, she has no strong allegiance to treatment. He argued that her discharge subject to conditions does not overly interfere with Ms. Baranyais' liberties, but is necessary and appropriate to maintain her progress.

[36] On behalf of Ms. Baranyais, Mr. Hicks argued that recent legislative changes to the definition of significant threat in the *Not Criminally Responsible Reform Act* (*NCRAA*), are not compatible with the *Charter of Rights and Freedoms* (the *Charter*) and that the phrase "necessary and appropriate" in the amended s. 672.54 incorporates the former "least onerous and least restrictive" consideration.

[37] Mr. Hicks submitted that, despite the persistence of her symptoms, Ms. Baranyais has behaved well in the community. He said the historic violence, over six years ago, was relatively minor and only occurred while Ms. Baranyais was unwell.

[38] Currently Ms. Baranyais is not, nor does she have any desire to be, in contact with the targets of her historic grievances. Even her residual symptoms have not caused problems. She has reconciled with her mother, the victim of the index offence. She is medically compliant and treatment adherent. She no longer meets the threshold for the Board's jurisdiction.

ANALYSIS AND DECISION

[39] Until recently the Board's disposition decision making under Part XX.1 of the *Criminal Code* was governed by s. 672.54, which provided:

> "Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, 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 <u>least onerous and least restrictive</u> 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 <u>a significant threat to the safety of the public</u>, 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." (underlining added)

[40] Section 672.54, required the Board, on the basis of the considerations or criteria articulated, to first determine whether the accused before it posed a "significant threat to the safety of the public" and, if so, then to impose "the least onerous and least restrictive" disposition. Absent a finding of significant threat, an accused was and is entitled, in law, to be discharged absolutely.

[41] The constitutionality of the former Part XX.1 was challenged in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 (*Winko*). The Court concluded that Part XX.1 did not run afoul of, or violate s. 7 of the *Charter,* in part because of the fundamental threshold function established by the concept of significant threat:

> "… As this Court noted in *Swain*, *supra*, the only constitutional basis for the criminal law restricting liberty of an NCR accused is the protection of the public from significant threats to its safety. When the NCR accused ceases to be a significant threat to society, the criminal law loses its authority*: Swain*, *supra*, at p. 1008. Part XX.1, as noted, is founded on this assumption. It follows that if the court or Review Board fails to positively conclude, on the evidence, that the NCR offender poses a significant threat to the safety of the public, it must grant an absolute discharge. Any doubt on this score is removed by the injunction that the court or Review Board shall make the order that is the least onerous and least restrictive to the accused, consistent with the evidence." (para. 47)

[42] Moreover, the Court helpfully went on to define the level and nature of the threat required to justify restricting an NCRMD accused's liberty:

> "To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given "dangerousness" a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". To engage these provisions of the *Criminal Code*, the threat posed must be more than speculative in nature; it must be supported by evidence: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL) (C.A.), at para 21. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature: *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406

(B.C.C.A.), at p. 413. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty." (para. 57)

[43] The Court also went on to offer further justification and elaboration of significant threat:

> "The phrase "significant threat to the safety of the public" satisfies the test of providing sufficient precision for legal debate. The standard of "public safety" was found not unconstitutionally vague in *R. v. Morales*, [1992] 3 S.C.R. 711. "Significant threat" has been applied by lower courts without difficulty: *Davidson*, *supra*; *R. v. Peckham* (1994), 19 O.R. (3d) 766 (C.A.). Without purporting to define the term exhaustively, the phrase conjures a threat to public safety of sufficient importance to justify depriving a person of his or her liberty. As I stated earlier, there must be a foreseeable and substantial risk that the NCR accused would commit a serious criminal offence if discharged absolutely. It is impossible to predict or catalogue in advance all the types of conduct that may threaten public safety to this extent. It must be left for the court or the Review Board to determine whether the conduct in the case it is assessing meets this standard. In discharging this task, the court or Review Board will bear in mind the high value our society places on individual liberty, as reflected in the *Charter*. It will also bear in mind the need to protect society from significant threats. The final determination is made after hearing evidence and considering the need to protect individual liberty as much as possible as well as the need to protect society. This process, as I have outlined it above, does not violate the principles of fundamental justice." (para. 68)

[44] The concept has of course been further refined and elaborated upon in successive decisions since, and following *Winko*.

[45] The *NCRRA* (Bill C-14, 2013), came into force on July 12, 2014. Among other amendments (discussed below), it introduces s. 672.5401. Unlike the previous scheme, which did not statutorily define this threshold for the Board's jurisdiction, the amendment provides:

> "For the purposes of section 672.54, a significant threat to the safety of the public means a <u>risk of serious physical or psychological harm</u> to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct <u>that is criminal in nature but not necessarily violent</u>." (underlining added)

[46] Section 672.5401's modification of the phrase "significant threat", by the unadorned word "risk" simpliciter, has raised questions and debate amongst commentators, legal and psychiatric professionals and decision makers, about whether a

lower threshold, or jurisdictional standard is intended, and if so, whether the scheme now violates s. 7 of the *Charter*. In other words, must a Review Board or court now decline to absolutely discharge and restrict an accused who poses a lower than "significant", or indeed any, risk of serious physical or psychological harm, due to conduct which is not necessarily violent?

[47] We expect that more light will be shed on the issue as appellate jurisprudence under the new provision develops. However, to this point the Board has reminded itself that at paragraph 57, the Court in *Winko* admonished that, both the level of the "risk" as well as the degree of harm thereby occasioned, must be "significant" and non-trivial.

[48] Moreover the Board aligns itself with the court's interpretation in *Winko*, that, absent a finding of "significant" threat, a court or Review Board must order an absolute discharge. This is supported by the principle that a statute should be read in a manner that supports compliance with the *Charter: Winko,* at paragraph 48.

[49] To date, the Board's approach to the issue to date is reflected in its recent decision in Re *Lacerte (aka Mazzei)*, BCRB July 15, 2014, where it said:

> "The legal question of whether the reference to the words "a risk" set out in the new statutory definition of "significant threat" contained in s. 672.5401 of the *Criminal Code,* in place of the Supreme Court's adoption of the words "a significant risk", requires us to refuse an absolute discharge to an accused who does not represent a significant risk of harm, was decided by this panel of the Board in *Bart Davis*, *BCRB July 15, 2014*. We concluded that an expansive interpretation of the term "significant threat" in s. 672.5401, which would violate the *Charter*, is not required by the language of that section and that, on the authority of *Winko*, the words "a risk" in s.672.5401 are properly interpreted as equivalent to "a significant risk"." (para. 46)

[50] Pending further judicial interpretation, the Board has therefore determined to continue adhere to an interpretation of "significant threat" which comports with s. 7 of the *Charter* as elaborated in *Winko*. Despite the change in language, we have concluded that s. 672.54 does not materially reframe or dilute the concept of significant threat: a non-trivial or non-speculative risk of serious harm arising from criminal conduct. A determination that an accused poses a significant threat remains both a constitutional cornerstone, as well as the threshold for the Board's jurisdiction over an accused. Absent that finding, no jurisdiction over the NCRMD accused exists. Further, to the extent that the concept of risk is necessarily future-oriented, we would simply add to this formulation the temporal

dimension that the risk must be reasonably foreseeable and not in the nature of conjecture.

Is Ms. Baranyais A Significant Threat?

[51] At Exhibit 43, Dr. Wang, Ms. Baranyais' former psychiatrist provided a comprehensive risk assessment applying to the HCR-20 instrument, under date August 22, 2011.

[52] Dr. Wang concluded that, as indicated by the index offence, the assault of her mother, and her aggression toward Dr. Chale, Ms. Baranyais has a documented history of violent behaviour from the relatively young age of twenty-three. He properly observes that these incidents occurred in the context of what would fairly be characterized as acute delusional beliefs.

[53] Dr. Wang considered Ms. Baranyais' established diagnosis of chronic paranoid schizophrenia, the symptoms of which were implicated in the index offence. He also noted a distant history of self-harm attempts. At the time, Dr. Wang considered Ms. Baranyais at baseline and stable, but still chronically ill. Dr. Wang also took into account in his analysis, Ms. Baranyais' difficult and likely abusive upbringing, including at the hands of her sister Jody.

[54] Dr. Wang placed less weight on Ms. Baranyais' unstable, serial relationships. He noted Ms. Baranyais had no history of steady or stable employment.

[55] Dr. Wang considered Ms. Baranyais to present with a documented but remote history of multi-substance abuse, which would have impacted her health and interpersonal relationships. Dr. Wang considered exposure to alcohol or drugs as potential destabilizers. At the time, she was abstinent including from alcohol and she remains so today.

[56] Finally, Dr. Wang documented Ms. Baranyais' history of non-compliance with supervision and prescribed medications. He considered her to lack insight into her illness and noted the complicating implications of compromised cognition due to her brain injury.

[57] According to Dr. Wang, Ms. Baranyais' serious lack of insight was ongoing. She did not believe she had an illness. Consequently, she saw no need for or benefit from her medication and was not motivated to continue treatment voluntarily. She did not accept that her symptoms would exacerbate and negatively affect her behaviour, absent regular

medication. Thus she lacked an understanding of her mental processes. Moreover, at least residual symptoms of her illness continued.

[58] As of August 2011, Ms. Baranyais continued to harbour the delusion that her child would be the Messiah. Though she recognized some of her earlier "imposter" beliefs as false, she was unable to connect these to her mental illness. Dr. Wang nevertheless considered her to have responded well to Clozapine.

[59] Dr. Wang characterized Ms. Baranyais' plans as lacking in feasibility. He said her planning and decision-making can be impulsive. He thought she would have difficulty handling housing and finances on her own. He noted her limited personal supports and said she appeared to lack judgment in terms of relationships.

[60] Dr. Wang considered Ms. Baranyais a high probability of non-compliance, characterizing her acceptance of rules and requirements as "superficial".

[61] In summarizing, Dr. Wang concluded:

> "In summary, Ms. Baranyais has a well established longstanding diagnosis of chronic paranoid schizophrenia. At the core of her risk for violence lies the state of her delusional misidentifications. Those delusional misidentifications have somewhat improved and are no longer at the forefront of Ms. Baranyais' mind. She continues to experience residual grandiose delusions such as the belief that she will give birth to the next Messaiah. The remaining delusional beliefs do not however point towards particularly increased risk for violence, at the current time and while treated on medications. It is my opinion that Ms. Baranyais if no longer under the external control of the Review Board will likely discontinue her medications as she does not believe that she is mentally ill. Should Ms. Baranyais discontinue her medication she needs to be considered at high risk that her delusional symptoms, including her past delusional misidentifications around family members will worsen. Should those delusional beliefs return in the setting of medication non-compliance Ms. Baranyais will then again become a significant threat to the public safety in the foreseeable future." (Exhibit 43, para. 14)

[62] In independently coming to an opinion of Ms. Baranyais' risk, based on the evidence, we consider the following as the most robust or potent predictive factors.

[63] Ms. Baranyais' historic risk factors remain unchanged. An assault on her mother, on Dr. Chale, and her threats, including homicidal threats, to these individuals as well as a former landlady, are established history involving violence. That history cannot be altered but currently Ms. Baranyais appears to have reconciled with her mother and she presents with no ongoing animus toward her or Dr. Chale.

[64] Ms. Baranyais' historic violence occurred in the context of acute symptoms of her schizophrenic illness. Currently, her mental state is considered stable with residual symptoms. Dr. Dilli says those symptoms are in the nature of beliefs about her mother's and her sister's identities. We saw no other such evidence, though Ms. Baranyais disclosed what must be considered an overt delusion about the identity of an FPH staff member, as well as the "Messiah" belief, which she either does not consider a delusion or denies. Her ongoing resentment of her sister Jody may indeed be justified and realistic.

[65] In any event, we find Ms. Baranyais has not achieved full remission of her symptoms despite apparent compliance in the consumption of her medications.

[66] Regarding the destabilizing effects of drugs or alcohol and their contribution to decompensation giving rise to an elevated index of risk, the evidence suggests this issue has abated in prominence. Ms. Baranyais has remained abstinent for several years. There is no evidence to suggest she harbours cravings or that she would quickly or significantly relapse to substance or alcohol abuse.

[67] Clozapine has been relatively successful in dampening her symptoms. However, Ms. Baranyais makes it clear that she does not believe she carries any symptoms. She fundamentally does not believe she is currently ill. She finds no benefit or effect from her medications. Despite her extremely low dose of Clozapine, she seeks further reduction or even a "drug holiday".

[68] Ms. Baranyais has an established history of non-compliance with treatment and direction. Ms. Baranyais does not believe that she is ill, or that she has symptoms, or believes that she derives no benefit from her medications and she wants to discontinue them. It stands to reason that she is not motivated to comply and would be unlikely to continue to consume them if left to her own choices. Moreover, she admits she wants to conceive, under which circumstance it would be medically necessary to discontinue Clozapine.

[69] Given her history as well as her dramatic lack of insight and acceptance of her illness, we find it entirely predictable, or even certain, that Ms. Baranyais would discontinue medications. This would most likely lead to an exacerbation to more prominent, overt and even acute psychotic symptoms and beliefs with a corresponding loss of behavioural control.

[70] At this time, Ms. Baranyais' longer term plans remain vague and aspirational. Moreover, there have been no instrumental steps undertaken to connect her to community services to ensure treatment adherence, continuity and support.

[71] Although Dr. Dilli endorses no significant concerns about Ms. Baranyais' "minor" cognitive issues, she continues to present in a vague, concrete, childlike and ambivalent manner. She may not be as high functioning as she appears. Certainly on observation, and consistent with the evidence, her executive functioning appears somewhat compromised.

[72] Despite her positive progress and a substantial period of baseline stability, we conclude that Ms. Baranyais continues to meet the jurisdictional threshold of 'significant threat" as defined in s. 672.5401. As this finding disentitles her to absolute discharge, our next task is to craft a disposition under s. 672.54 (b) or (c).

Disposition Making Under the NCRRA

[73] The *NCRRA* amends s. 672.54, the preamble of which now states:

> "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". (underlining added)

[74] The amended provision emphasizes that the safety to the public is now the "paramount consideration". The Board has concluded that this addition is but a restatement or codification of the previous jurisprudence and Board practice, developed under Part XX.1 since promulgation in 1992: Re *Davis, BCRB* July 15, 2014, paragraph 82.

[75] The amended provision further eliminates the requirement that the Board impose the "least onerous and least restrictive disposition". Rather, the Board must now choose the disposition that is "necessary and appropriate in the circumstances". Clauses (a), (b) and (c) remain unchanged.

[76] In the course of its analysis of Part XX.1, in the context of the constitutional challenges in *Winko*, the Court also commented extensively on the statutory requirement to impose the least onerous and least restrictive disposition. After defining and articulating

the threshold nature of significant threat, as a fundamental requirement of the scheme's constitutionality, the Court continued its analysis:

> "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." (para. 42)

[77] The Court emphasized the importance of the phrase to its survival under s. 7 of the *Charter*:

> "… It is for the court or Review Board, acting in an inquisitorial capacity, to investigate the situation prevailing at the time of the hearing and determine whether the accused poses a significant threat to the safety of the public. If the record does not permit it to conclude that the person constitutes such a threat, the court or Review Board is obliged to make an order for unconditional discharge. If the court or Review Board finds that the person does pose such a threat, it must proceed to make an order discharging the NCR accused on conditions or detaining him or her in a hospital. In all cases, the court or Review Board must make the disposition that is the least restrictive of the NCR accused's liberty possible. This process does not violate the principles of fundamental justice." (para. 69)

[78] Responding to the argument that the scheme violated s. 7 due to overbreadth, the Court said:

> "… The dual objectives of Part XX.1, and s. 672.54 in particular, are to protect the public from the NCR accused who poses a significant threat to public safety while safeguarding the NCR accused's liberty to the maximum extent possible. To accomplish these goals, Parliament has stipulated (on the interpretation of s. 672.54 set out above) that unless it is established that the NCR accused is a significant threat to public safety, he must be discharged absolutely. In cases where such a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition of the accused must be selected. In my view, this scheme is not overbroad. It ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety. It follows that I cannot agree with the contrary decision of the Manitoba Court of Appeal in *R. v. Hoeppner*, [1999] M.J. No. 113 (QL)." (para. 70)

[79] Thus, the Court considered the least onerous and least restrictive criterion critical to the scheme's constitutionality.

[80] The task confronting a court or Review Board is to discern Parliament's intentions in replacing "least onerous and least restrictive" with the words "necessary and appropriate", and more to the point, their impact on its decision making.

[81] First, we observe that the word "appropriate" has always been part of s. 672.54, in reference to the conditions to be appended to a disposition of conditional discharge under clause (b), or to an order of detention in custody, under clause (c). In *Winko*, the Court used that language, saying:

> "Any disposition regarding an NCR accused must be made in accordance with s. 672.54. The court or Review Board may order that the NCR accused be discharged absolutely, that he or she be discharged on conditions, or that he or she be detained in a hospital and subject to the conditions the court or Review Board considers appropriate. Although the court or Review Board has a wide latitude in determining the appropriate conditions to be imposed, it can only order that psychiatric or other treatment be carried out if the NCR accused consents to that condition, and the court or Review Board considers it to be reasonable and necessary; s. 672.55(1)." (para. 27) (underlining added)

[82] In outlining its understanding of the process and duties of a court or Review Board, the Court provided an extensive summary, which includes at paragraph 62:

> "8. If the court or Review Board concludes that the NCR accused is a significant threat to the safety of the public, it has two alternatives. It may order that the NCR accused be discharged subject to the conditions the court or Review Board considers necessary, or it may direct that the NCR accused be detained in custody in a hospital, again subject to appropriate conditions."

[83] Furthermore, in *Winko* at paragraphs 30, and 41 and at 43, the Court appeared to very specifically tie the notion of "appropriateness" to the accused's opportunities to obtain treatment and at paragraphs 94 and 95 it reiterated that restrictions (conditions) are imposed for rehabilitative purposes; that the focus is not penal but on appropriate treatment according to the individual's situation.

[84] In *Penetanguishene Mental Health Centre v. Ontario (Attorney General),* [2004] 1 S.C.R. 498 ("*Tulikorpi*"), the Court confirmed that the "least onerous and least restrictive" requirement applied not only to the choice of the three dispositions or orders available under s. 672.54, but equally to the choice of the "appropriate conditions" to be appended thereto:

"Similarly, in the English text, s. 672.1 provides that "'disposition' means an order made by a court or Review Board under section 672.54 . . ." (emphasis added). The order, of course, includes the conditions.

The "conditions" are not something that is bolted onto the disposition after it is made." (paras. 42, 43)

[85] In interpreting the specific word the Court said:

"In my view, with respect, the word "appropriate" in the context of s. 672.54 is not at all "unfettered". The word takes its meaning from the context. Conditions must be appropriate, yes, but appropriate having regard to the four enumerated factors (public safety, mental condition of the accused, other needs of the accused, and the reintegration of the accused into society) to fashion a disposition that is "the least onerous and least restrictive to the accused". This is clear from *Winko*, *supra*, where, in dealing with the *Charter* challenge under s. 7, McLachlin J. observed, at para. 71, that the scheme "ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety"." (para. 51) (underlining added)

and

"In light of these pronouncements, and the *Charter* challenge to which they were addressed, it seems to me impossible to accept the contention that the word "appropriate" in s. 672.54(*b*) and (*c*) can be read as conferring a discretion unfettered except by the management expertise and medical judgment of the Review Board to fashion such conditions as it thinks fit. In my view, Parliament intended "appropriate" to be understood and applied in the framework of making the "least onerous and least restrictive" order consistent with public safety, the mental condition and other needs of the NCR accused, and the objective of his or her eventual reintegration into society." (para. 56)

[86] The words "necessary and appropriate" also appear in *Manitoba (Attorney General v. Wiebe*, 2006 MBCA 87:

"With respect to medical treatment, it is the role of a Review Board to ensure that opportunities for medical treatment are provided to an NCR accused where necessary and appropriate, but it cannot require hospital authorities to administer particular courses of medical treatment. That would be an inappropriate interference with provincial legislative authority, with hospitals' treatment plans and practices and with a hospital's discretion concerning the provision of medical services. See *Mazzei*, at paras. 31-33, and *Wiebe*, referred to in *Mazzei* at para. 36.

As part of its mandate in supervising medical treatment, Review Boards may 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, especially where no progress has been made or is likely to be made. See *Mazzei*, at paras. 39-44." (paras. 95, 96) (underlining added)

[87] In further attempting to assess Parliament's intention in amending s. 672.54, the Board has previously had resort to Hansard and the proceedings of the Senate Standing Committee on Legal and Constitutional Affairs, where, on February 27, 2014, the Minister of Justice and Attorney General of Canada, the Honourable Peter Mackay testified:

> "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."

[88] It appears clear to us that any interpretation of the new legislation that does not balance the rights of the accused with the safety of the public will not survive *Charter* challenge. Thus it is self-evident that the Board should interpret the new provisions in the *NCRRA* in a manner that complies with the *Charter*. This approach leaves little room for a more restrictive treatment of an NCRMD accused.

[89] Based on the foregoing discussion, we conclude the change from least onerous and least restrictive to "necessary and appropriate" changes little. Any disposition or condition, whether "least onerous" or "necessary and appropriate", must be made having regard to the enumerated factors in s. 672.54. To satisfy s. 7 of the *Charter*, the accused's liberty interests must be trammelled no more than is necessary to protect public safety. Given the Supreme Court of Canada's treatment of Section XX.1, and the need to read this legislation in a manner that comports with the *Charter*, the "necessary and appropriate" disposition or condition must be that which is also the "least onerous and least restrictive". The new legislation does not fundamentally alter the essence of the former provisions.

[90] We therefore endorse and adopt the approach of the Board panel in *Lacerte* (*supra*) which said:

> "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.
>
> 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.
>
> 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." (paras. 48-50)

[91] In *Lacerte*, the Board therefore concluded:

> "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." (para. 53)

What is the Necessary and Appropriate Disposition for Ms. Baranyais?

[92] As Ms. Baranyais continues to meet our jurisdictional threshold, we must impose the "necessary and appropriate" disposition.

[93] Ms. Baranyais has now been spared the more restrictive option of detention and has been able to remain continuously in the community since September 2010, a period of four years. In the community, she has for several years demonstrated the capacity to administer her prescribed regime of medication compliantly and without problems. She maintains her baseline of mental stability despite some residual apparently false beliefs.

[94] Ms. Baranyais transitioned without difficulty to her own apartment, where she remains after a year and a half and where she says she will stay at least another year. Her self-direction and maintenance of her own health are considered appropriate. She is cooperative and pleasant in her relations with her treatment team. She appears more or less reconciled with her mother while maintaining appropriate boundaries. There have been no reported complaints of untoward or concerning behaviour from any source in the community.

[95] Having determined to continue our jurisdiction over Ms. Baranyais for a further period of time, we have been provided with no evidence that a more restrictive disposition or conditions would be more appropriate in terms of meeting her rehabilitative needs.

Furthermore, given her positive, pro-social progress, we conclude no more restrictive disposition is necessary, from the perspective of protection of the public.

[96] Therefore, we impose the same disposition and conditions as are currently in place.

[97] In order to assist Ms. Baranyais to further advance her goal of absolute discharge, and in recognition of the fact that with the passage of time and her positive progress, the justification for our ongoing jurisdiction over her is becoming somewhat tenuous, we recommend that some instrumental steps be undertaken.

[98] First, Ms. Baranyais should be exposed to further psycho education regarding the nature of her illness, its symptoms and the role of her medications, with the goal of deepening her insight.

[99] Second, we recommend Ms. Field undertake some practical, concrete steps to assist Ms. Baranyais in formulating realistic plans regarding her future living situation and environment, including what she would realistically need to do to relocate to and to identify treatment services in the Queen Charlottes, which seems to be where she wants to be.

[100] Third, Ms. Baranyais needs to be helped to understand the implications of possible parenthood, including hereditary genetic issues for her child and the consequences of stopping her medications during pregnancy.

[101] Fourth, we ask Ms Field, as she has offered to do, to assist Ms. Baranyais to establish a relationship, and to forge an allegiance with a community-based mental health team to assist her and to supervise her treatment post absolute discharge.

[102] If Ms. Baranyais, with her team’s assistance, is able to demonstrate further progress and self-governance in these key areas, she may, at her next hearing be in a position to persuade the Board that she is indeed ready for the absolute discharge she seeks.

Reason written by B. Walter, in concurrence with Dr. R. Stevenson & A. Markwart