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

CATHERINE MARY BISTRISKY

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
April 21, 2017

BEFORE:

ALTERNATE CHAIRPERSON:	F. Hansford, Q.C.
MEMBERS:	Dr. T. Tomita, psychiatrist (dissenting)
	A. Markwart

APPEARANCES:

ACCUSED/PATIENT:	Catherine Mary Bistrisky
DEFENCE COUNSEL:	D. Nielsen
DIRECTOR AFPS:	Dr. B. Singh, L. Fredrickson
ATTORNEY GENERAL:	G. Kabanuk

INTRODUCTION AND BACKGROUND

[1] ALTERNATE CHAIRPERSON: On April 21, 2017, the British Columbia Review Board convened a hearing pursuant to s.672.81 of the *Criminal Code* at the Forensic Psychiatric Hospital in Port Coquitlam in respect of Catherine Mary Bistrisky, a 44-year-old woman who was found not criminally responsible on account of mental disorder (NCRMD) on August 20, 2012 in respect of the index offence of robbery. The offence occurred on July 7, 2012 in New Westminster.

[2] Although we have considered all the evidence on record, for the purpose of these Reasons we only recite that evidence necessary to our decision.

[3] Ms. Bistrisky carries a diagnosis of Bipolar Disorder and Borderline Personality Disorder. The commission of the index offence is attributed by her current treating psychiatrist, Dr. B. Singh, to symptoms of both her Bipolar Disorder and her personality disorder.

[4] Ms. Bistrisky was born in Québec and subsequently moved to British Columbia. Her sister and mother live in the Lower Mainland of British Columbia. Her father predeceased her. She was diagnosed with learning disabilities at an early age and received special education throughout primary and secondary school. She was first admitted to psychiatric facility at age 16 and subsequently lived in psychiatric group homes for several years. She subsequently stayed in various shelters. She describes a dysfunctional family life, a conclusion not entirely supported by collateral sources.

[5] Throughout her life, Ms. Bistrisky has come into regular conflict with the law and into contact with psychiatry. She has 21 convictions for assault, 10 for arson and one prior conviction for robbery. Her convictions since 2001 all led to serious prison sentences. In 2001, she was convicted of arson with disregard for human life and uttering threats (2 years concurrent and 3 years' probation) and 2 counts of assaulting a police officer (3 months on each charge); in 2003 of arson with disregard for human life and assaulting a police officer (2 years on each charge, concurrent) and on a separate occasion, of assault (6 months consecutive); in 2006 of assault (1 day after taking into account 70 days in custody); in 2007 of robbery (3 years); and in 2010, of assault (6 months consecutive). Her record includes approximately 30 psychiatric admissions to hospital before the index offence, including 3 admissions to FPH.

[6] In response to her symptoms, Ms. Bistrisky has frequently engaged in cutting herself with sharp objects and to this day, arrangements are made at the Coast Cottages, where she is on visit leave, to remove knives and other sharp objects from her environment to reduce the temptation to harm herself. She has also threatened or attempted suicide on multiple occasions, and she attributes many of her arson convictions to her repeated attempts to kill herself. She also committed offences to force a return to the federal and provincial correctional systems, where she felt safe and comfortable, or to precipitate changes in her care or admission to a hospital when she felt it was necessary. On other occasions, she acknowledges having committed offences because she was angry or because she was subject to command auditory hallucinations from a voice called “Odon”, which she found hard to resist.

[7] The circumstances of the index offence reflect Ms. Bistrisky’s attention-seeking in the community. In March 2011, she was placed in a mental health transition home in Vancouver named “Peggy’s Place”. Although she was initially successful in establishing mental stability and obtaining part-time employment, she deteriorated rapidly after transition to independent accommodation in the community. She did not feel that she was receiving the support that she required, and so attended 2 hospitals seeking admission to a psychiatric ward. Admission was refused. In response, she decided to commit an offence that would see her either admitted to a hospital or convicted and given a sentence that she could serve in the federal correctional system. She decided that she would rather be incarcerated in New Westminster than Surrey. She attended at a fast food restaurant in New Westminster and produced a robbery note in which she stated specifically that she wished to be arrested. Staff did not feel threatened by her and did not resist when she removed the till from the cash register. She remained at the restaurant until arrested, calmly counting out the money in the till. After her arrest, she threatened to assault attending police officers by biting if they took her to jail.

[8] Since the commission of the index offence, there have been no overt symptoms of Bipolar Disorder. Ms. Bistrisky is now prescribed, and takes routinely, medications intended to have a prophylactic effect. Dr. Singh confirmed in her evidence at this hearing that despite the administration of such medications, a manic episode may occur at some point in the future. Since the index offence, Ms. Bistrisky has experienced command auditory hallucinations on several occasions, apparently attributable to her severe personality disorder. These auditory hallucinations represent a voice she recognizes as “Odon”. She

has resisted these commands successfully. Her last conviction for arson dates from 2003 and her last assault conviction, from 2010. There is no recorded instance of violence directed at a member of the public since that date other than that inherent in the index offence, during which she preferred a robbery note that specifically stated her desire to be arrested. She did not appear to have any weapons with her and none of the people at the scene appeared to have felt threatened or were traumatized to any degree.

[9] Ms. Bistrisky's progress in the Forensic system has been characterized by numerous setbacks and suicide attempts when resident both at FPH and at Peggy's Place after a conditional discharge, or on visit leave. It is material to note that unlike her attempts to suicide by self-immolation, none of her suicide attempts or actions since the commission of the index offence have involved any risk of harm to a member of the public. She has stated to her treating psychiatrists that she intends to harm herself rather than a member of the public if she feels overwhelmed and that she no longer wishes to be incarcerated in the correctional system.

[10] Dr. Singh, when testifying at her hearing in 2016, opined that Ms. Bistrisky posed more of a danger to herself than to any member of the public. Her attempts at suicide since the commission of the index offence were impulsive. They have included overdosing on Tylenol, cutting herself with pieces of broken ceramic mugs, swallowing remote control batteries, and swallowing a nail clipper. On one occasion, she wound clothes tightly around her neck and was subsequently found supine with her face submerged in the bathtub full of water. She disclosed that she had also considered ingesting Virox, a cleaning solution. In December 2014, she threatened to gouge one of her eyes out. She disclosed to nursing staff that she harmed herself so that she would not hurt other people, and because she had heard voices telling her to do so.

[11] Ms. Bistrisky has explained to her treatment team that she resorts to self- harming behaviours because they provided an escape from her problems, and particularly because it would motivate professionals to immediately step in and intervene. She has also stated that she had a fear of being thought healthy because she thought she might lose the support she was then receiving in the forensic system. Ms. Bistrisky also advised that engaged in such behaviours in response to attempts by staff to manage her in ways she disagreed with. For example, when staff suggested that she did not need to be tied up for her own safety, she began violently smashing the back of her head against a wall. On another occasion when in seclusion, she attempted to break her arm by banging it against the door and against the

toilet in the seclusion room. She later reported that self-injury provided her relief and a feeling of power.

[12] Ms. Bistrisky has been granted a conditional discharge after successful visit leaves to Peggy's Place, but this did not go well. In 2015 she was returned to FPH on at least five occasions after suicide attempts or expressions of suicidal ideation. She was given a custodial disposition. Since then, she has made sufficient progress to be placed on serial visit leaves at the Coast Cottages, a staff supported and supervised residence. She has been returned to FPH from that facility on four occasions during these visit leaves as a result of suicidal ideation. After brief stays at FPH, she was returned to Coast Cottages and was residing there at the date of this hearing. She has been well received by staff at that facility and has participated well in their mandatory programming. There have been no concerns respecting her compliance with treatment recommendations. She has continued with Dialectical Behavioural Therapy (DBT) which she has undertaken at FPH since 2014. There have been no concerns with medication compliance and it is expected that she will successfully complete a trial of self-medication at the Cottages in the near future.

[13] Ms. Bistrisky's recent suicide attempts have been attributed by her treating psychiatrists to impulsivity arising from her Borderline Personality Disorder rather than to psychosis. There have been no symptoms of her bipolar disorder since the commission of the index offence and it is regarded by Dr. Singh as being in remission.

[14] Ms. Bistrisky has developed good insight into her mental disorder and the need for treatment and support. Her greatest challenges have been identified by her treating psychiatrists as further developing her coping skills and tolerance to stressful situations, and achieving residential stability in the community with adequate support. In considering issues related to the threshold question of whether Ms. Bistrisky represents a significant threat as defined by s.672.5401 of the *Criminal Code*, the Board has consistently stated that caution must be exercised in reintegrating Ms. Bistrisky into the community because her improvement has occurred in the context of residence in highly structured environments. In the past, a greater degree of independence had resulted in a rapid disintegration. An absolute discharge was therefore considered precipitous, particularly in view of Ms. Bistrisky's expressed anxiety about the prospect of losing structured support and supervision if she were discharged and her ambivalence about a further placement at Peggy's Place.

[15] Ms. Bistrisky was particularly vulnerable to being overwhelmed by stress in the community. Her mood fluctuations were dependent upon external and perceived stressors which drove her behaviour and suicidal thinking. She needed to improve her coping skills through further DBT therapy before an absolute discharge could be considered.

[16] At previous hearings, Ms. Bistrisky testified that she found living in the community to be “scary”. She did not feel that she had been ready to be out in the community when conditionally discharged in 2015, and acknowledged the need for a slow and measured return.

EVIDENCE AT THE HEARING

[17] In preparation for this hearing, the Board received and reviewed a psychiatric report prepared by Dr. B. Singh dated July 4, 2017 (Exhibit 39) and a Social Work Report prepared by Ms. K. Albrighton dated April 11, 2017 (Exhibit 40). Dr. Singh and Ms. Bistrisky both testified orally.

[18] Ms. Albright reported that Ms. Bistrisky had been resident at the Coast Cottages on sequential 28 day visit leaves, where she was well received by staff, for the past 6 months. She was participating in the mandatory Recovery Star program. She is fully independent in all activities of daily living except for medication administration. Plans are underway to move her to a medication self-administration program and compliance was not expected to be an issue. She continued to feel triggered for self-harm behaviours by kitchen knives or other people’s medications kept in plain view. Her environment at the Cottages was altered to address this concern.

[19] Ms. Bistrisky continued to report thoughts of self-harm but had not acted upon them recently. She was responding positively to continued Dialectical Behaviour Therapy with a concurrent disorders clinician. She had also enlisted the assistance of Jewish Family Services and attends regular sessions with a registered clinical counsellor at that agency, with whom she had developed a good rapport. She will be continuing counselling at that agency regardless of the result of this hearing. She spends 4 days per week at a mental health clubhouse in Vancouver where she participates in many of their programs. She intends to continue attending at that facility as well. She is in regular contact with her family in the Lower Mainland. Although they cannot provide a residence for her, they remain supportive and engaged.

[20] Ms. Bistrisky tendered as Exhibit 41 a letter from The Kettle Society documenting her attendance at their drop-in facility for the last 2 years. At this site, she can participate in their daily lunch program and has access to Advocacy Services, Community Living Support and an on-site nurse. We also received as Exhibit 42 a letter from Ms. Taya Cassidy, a Mental Health Outreach Therapist employed by the Jewish Family Service Agency. She has seen Ms. Bistrisky for faith based counselling since May 2016. She reported that she has engaged willingly in a committed and meaningful manner. She describes Ms. Bistrisky as highly motivated and self-aware. She utilizes personal resources and community supports effectively to help support her mental stability.

[21] Ms. Bistrisky has lived in the correctional system or in hospital, or alternatively in supportive housing, for many years. If discharged, there is little likelihood that she would seek out independent market based housing. She is allegiant to her medication regimen and has developed a good rapport with her treatment team. There is no reason to expect that she will not seek out treatment through a mental health team in the community or that she will be unable to establish a proper therapeutic alliance with them.

[22] Coast Cottages has agreed, somewhat unusually, to continue to provide a residence for Ms. Bistrisky for up to six months after her absolute discharge even though she is no longer in the charge of the forensic system. Ms. Bistrisky is also on the waiting list for Peggy's Place. Ms. Bistrisky now feels that she is ready to handle the environment at Peggy's Place. Discharge planning for Ms. Bistrisky has been complicated by Vancouver Coastal Health Authority's policy that acknowledges that she satisfies their residency requirements, does not consider her eligible to access licensed mental health residential supports because of her involvement in the forensic psychiatric system. They will provide verbal recommendations only for unlicensed housing. If absolutely discharged, she will then become eligible for such services. She has also been referred to the B.C. Housing Agency's supported housing registry, and is waitlisted for the Pathways program managed by the Elizabeth Fry Society, which can provide a transitional bed only that is unlikely to be available before the summer of 2017.

[23] The most viable option, as it has been in the past, is Peggy's Place, with which Ms. Bistrisky is very familiar. This is a transition home designed for women with mental illness who are risk of homelessness. It has a strong substance abuse focus. Substance abuse is not an issue for Ms. Bistrisky. She has been placed on the waitlist for this facility, but a bed is not likely to become available for between 6 and 12 months. Greater priority would be

assigned if she would otherwise become homeless. Ms. Bistrisky has expressed a preference for Peggy's Place because it provides a private bedroom and individual meals. Sharps and knives are kept locked in the staffed area.

[24] Dr. Singh was of the opinion that Ms. Bistrisky had developed good insight into her mental disorder and understands the nature of her illness. She also has good insight into her need for treatment. She continues to have chronic thoughts of self-harm that have stabilized and that have not resulted in any recent suicide attempts. She has not voiced any violent ideation or intent to act violently towards any other person. She continues to assert that she would prefer to harm herself rather than another person and that she harms herself so that she will not harm other people. In her evidence, Ms. Bistrisky testified candidly that she still regards killing herself as means to avoid harming others and that it continues to be a final option of last resort for her. She stated that she recognizes that setting fires is a danger to other people and testified that she will never do this again.

[25] Dr. Singh advised that Ms. Bistrisky has continued to develop coping skills through DBT therapy, which she intends to continue in the community if absolutely discharged. Dr. Singh considers her coping skills to be good, but not yet optimal. While resident at Coast Cottages, she has readily disclosed suicidal ideation and this has been dealt with twice by a short stay at hospital and rapid return to the Cottages. Dr. Singh advised that this treatment is optimal for people suffering from a personality disorder who will not benefit from long stays in hospital. Dr. Singh also expressed confidence that Ms. Bistrisky would be accepted by the civil mental health system and assigned a psychiatrist and case manager if absolutely discharged, and confirmed that forensic services would continue to provide clinical support until the transition to civil mental health services is completed.

[26] Dr. Singh testified that there was no clinical reason for a custodial disposition. A significant change in Ms. Bistrisky's presentation is that her attitude towards her return to the community had changed. She now feels that she is ready to be discharged absolutely from the forensic psychiatric system. She appears to be more stable at Coast Cottages. She no longer wishes to remain in an institution. Dr. Singh could not preclude that she would act on her a propensity to threaten or attempt suicide when she feels that she is not receiving the services that she requires or if she became overwhelmed by stress. However, she has developed additional supports in the community to which she was committed and which were not present during her previous attempts to re-integrate.

[27] A further change in Ms. Bistrisky's presentation is her greater age. As people get older, symptoms of Borderline Personality Disorder tend to become less intrusive. This leads to reductions in impulsive behaviour. This process has been observed with respect to Ms. Bistrisky.

[28] Although Dr. Singh could not opine that Ms. Bistrisky's risk had been wholly attenuated, she was clear that the risk was "not as great as before". If she was again overwhelmed by stress and anxiety, she could revert to expressions of suicidal intent or again attempt suicide. She also conceded that it was possible that if discharged in the community, if overly stressed and feeling overwhelmed, and if her various supports were ineffective in assisting her, and if she felt the need to act out, then Ms. Bistrisky might resort to actions which might harm a member of the public. If these developments occurred, then there was at most a low to moderate risk that a member of the public would be harmed. She stressed that this is not in fact occurred for 5 years even when Ms. Bistrisky felt significantly stressed. In Dr. Singh's opinion, Ms. Bistrisky continues to present a much greater risk to herself than to members of the public

[29] Dr. Singh confirmed that Ms. Bistrisky's bipolar disorder is currently in full remission. Her borderline personality disorder symptoms are in "reasonable control". She concluded that the risk she presented to the public was "low" and not in her view as a risk assessor, significant.

[30] Ms. Bistrisky testified that she now thinks Peggy's Place is "okay". This facility is close to other support facilities and represents an intermediate step to securing an independent supported apartment. She would be eligible for Vancouver Coastal Health housing support once she was absolutely discharged and she intends to pursue that avenue. She continues to enjoy going to the Kettle Society Mental Health Clubhouse where she receives food, clothing support and recreational opportunities. She also will continue to see her counsellor at the Jewish Family Services Agency. She continues to get benefit from DBT coping techniques that help her to remain stable. She defined her significant triggers as crowds, which lead to anxiety, require her to take a PRN medication, and the presence of knives and medication in her immediate environment. She felt that if living on her own, she could manage having knives around. She pointed out that she had not cut herself for 10 months.

[31] Ms. Bistrisky agreed with her diagnoses of Bipolar Disorder and Borderline Personality Disorder. She understands she will have to take medications for the rest of her life. She will establish a relationship with the civil mental health team if absolutely discharged and if this is not possible, she will seek out her own psychiatrist. She asserted that she now had the skills to negotiate her illness and not to get angry or mad and act out accordingly. She has found DBT therapy to be very useful. She asserted that she had played the “sick poor me” game enough. She wanted her freedom back and to get a more normal life.

[32] Ms. Bistrisky asserted that she believes that her present situation is different than it was in the past. She stated “I am done with crime” and that she no longer wishes to live in an institutional setting. She was adamant that she would harm herself before hurting someone else. Her last resort would be threatening to kill or hurt herself. If she again began hearing voices, she would immediately seek out psychiatric help. She is older and feels that she has “mellowed”. She is no longer so impulsive, which he attributes in part to her medications. She considers her big issues with her personality disorder to be impulsivity and overdosing with medications.

[33] Ms. Bistrisky acknowledged that some of the offences or suicide attempts were driven by anger, and particularly at being refused hospital treatment. With respect to the index offence, she said that she felt “unsafe” after the hospital “let me go”. She decided to commit an offence specifically to get arrested because she would feel safe in prison. She said that if she again felt unsafe in the community, she would take PRN medications and if they did not work, she would immediately attend at Royal Columbian Hospital. She would ask for medications to “numb” her feelings. She would try to use her coping skills and repeated that she would not engage in dangerous behaviours as she had in the past.

ANALYSIS AND DECISION

[34] The Director initially made no recommendations respecting disposition but at the end of the hearing, Dr. Singh recommended that the Board consider granting an absolute discharge. She considered that there was only a low risk that Ms. Bistrisky might cause harm to a member of the public, but under cross-examination, acknowledged that if a certain sequence of events occurred that risk might be “low to moderate”.

[35] Crown Counsel submitted that Ms. Bistrisky remained a “significant threat” and must therefore remain within the Board’s jurisdiction. He suggested a further conditional discharge, reviewable within 12 months on the terms presently in force. Ms. Bistrisky

submitted that she was entitled to an absolute discharge, but that if the Board disagreed, her conditional discharge should be made reviewable within six months.

[36] We must first determine whether Ms. Bistrisky is a significant threat, as defined by s. 672.5401 of the *Criminal Code*. If she is not a significant threat, we must discharge her absolutely. In arriving at our decision in respect of this threshold question of jurisdiction, we are not bound by the positions adopted by the parties and must arrive at a decision based upon the record and the evidence presented at this hearing.

[37] The statutory framework for our determination is found in s. 672.54 and 672.5401 of the *Criminal Code*. We term "significant threat" is defined by s 672.5401 as a person who represents "a risk of serious physical or psychological harm to members of the public… resulting from conduct that is criminal in nature but not necessarily violent." The Board has consistently held that the words "a risk" must be interpreted as requiring a "significant risk" rather than any risk. (***Davis, Lacerte, Baranyais***)

[38] This approach has been adopted and applied by the courts. In ***Calles v. British Columbia (Adult Forensic Psychiatric Services), 2016 BCCA 318***, the B.C. Court of Appeal stated that:

> "*A significant threat to public safety is defined in s. 672.5401 of the Criminal Code to mean "a risk of serious physical or psychological harm 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 that is criminal in nature but not necessarily violent". The threat posed must be more than speculative and be supported by the evidence. It must 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 grave harm will not suffice", nor will a high risk of trivial harm: Winko, at para. 57. (para. 15)*

[39] In ***R. v Carrick, (2015) ONCA 866*** the Ontario Court of Appeal court stated:

> *"…the "significant threat" standard is an onerous one. An NCR accused is not to be detained on the basis of mere speculation. The Board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge (Par. 17)*

[40] In ***Calles v. British Columbia (supra)***, the BC Court of Appeal provided further guidance on this question, stating that the Board must not adopt an interpretation of the term "significant threat" that places a burden on an accused to negative any future possibility that he might pose a significant risk of causing serious harm of a criminal nature to a member of the public. While the phrase implies a consideration of possible events, the evidence must

take the Board beyond mere speculation. If applied over-broadly, the effect would be to foreclose ever granting any accused an absolute discharge. The Board must be careful not to impose on an accused a legally impermissible onus to disprove he is a threat.

[41] In short, the determination we must make in this case is a legal rather than a clinical decision. We cannot detain an accused, for example, for treatment simply because they present a risk to themselves or that it is in their best interest to remain in the forensic system if they do not also present a significant threat to the public. If we conclude that a person is a significant threat, however, such considerations may inform a decision whether a particular disposition is necessary and appropriate, applying the criteria set out in s. 672.54, but such considerations plainly have no place in determining the threshold question of jurisdiction itself.

[42] The risk analysis presented by Dr. Singh in her report (Exhibit 39) was loosely based on the HCR-20 format and quite sparse. It was formulated without reference to any of the circumstances underlying previous psychiatric admissions or the exact nature of previous offences. It is therefore hard to assess the factual underpinnings of Dr. Singh's opinion, and of the opinion of previous treating's psychiatrist and risk assessors. This was the subject of comment by at least one earlier panel that suggested that such information should be forthcoming, but it was never provided. Previous panels were content to proceed on the assumption that the circumstances of her previous convictions involve serious misconduct, having reference to the length of the sentences imposed by trial courts.

[43] We considered adjourning this case and directing the preparation of a more fulsome risk assessment and provision of additional information, but decided ultimately that the particulars of the offences and previous hospitalizations, given their remoteness from the accused's present circumstances, would be unlikely to alter our decision. Dr. Singh's risk assessment does not appear to differ significantly from that advanced at previous hearings except to the extent that there appeared to have been significant changes in Ms. Bistrisky's position which warranted consideration of an absolute discharge. It was therefore necessary to consider the risk analysis advanced at recent hearings to place Dr. Singh's assessment in context.

[44] Past risk assessments relied on the conclusion that Ms. Bistrisky's past history, although increasingly remote, involved multiple and serious criminal offences of assault, assault causing bodily harm, and arson. Some of these offences attracted serious prison

sentences and in the case of her arson attempts, involved obvious threats to the safety of members of the public. They noted that Ms. Bistrisky suffers from bipolar disorder, a serious mental illness, and from a severe Borderline Personality Disorder, which together or in concert with manic episodes featuring command auditory hallucinations led to chronic attempted suicides and self-harm, or criminal behaviours. Some of these attempts may not have been directed specifically at the public but others, such as the assault cases, plainly were. They share a common grounding in Ms. Bistrisky's reaction to stress, feelings of being overwhelmed in the community, her perceptions that she was not receiving proper care, is somehow being discriminated against, or has reason to fear living in the community. The commission of offences was also driven on occasion by anger or psychosis, and in particular, by auditory command hallucinations.

[45] It is also common ground among the risk assessors who have reviewed this case that development of enhanced coping skills through Dialectical Behavioural Therapy would assist Ms. Bistrisky in managing stress and significantly reduce the likelihood of acting out or of self-harm. They were not opposed to an eventual transfer to the community but considered an absolute discharge was premature. The Board has consistently concluded that placement in the community should occur in a measured and moderated manner.

[46] Dr. Singh's recommendation that we grant an absolute discharge was largely based on evidence that supported a conclusion that Ms. Bistrisky was sufficiently stable so as not to pose a significant threat to the members of the public, although she continued to be a threat to her own well-being. In that context, there was no clinical reason to detain her in custody. Dr. Singh considered there to be a low chance that a member of the public would suffer harm in the future as a result of Ms. Bistrisky's actions, but agreed to that in certain specific circumstances that risk might be "low to moderate". Dr. Singh cited recent changes in Ms. Bistrisky presentation noting that she is calmer and more stable, (in part due to the moderation of her borderline personality disorder symptoms as she ages), her relative success in residing at the Coast Cottages, the absence of any violence directed at members of the public for 7 years, her commitment to her medication and treatment regimes, and her proactive actions in seeking out additional support in the community. If anything, Ms. Bistrisky is overly dedicated to seeking out support and assistance. Ms. Bistrisky was well aware of her need for support and it is very unlikely that she would not continue these proactive efforts if absolutely discharged. When she has presented a danger to herself, she

has responded quickly to intervention at FPH and there is no reason to expect she would not respond to such interventions in the community.

[47] Ms. Bistrisky has presented a discharge plan which addresses her risk factors and to which she appears sincerely committed. In particular, she has continued to develop good coping skills through DBT and is able to apply them to assist her in maintaining her mental stability. She has also developed a good support network in the community. In short, Dr. Singh concluded that while she may represent a danger to herself, she does not represent a significant threat of causing serious harm to a member of the public.

[48] Crown Counsel argued that it was unusual to grant an absolute discharge to someone who is currently subject to a custodial disposition. This is of course not a bar to granting an absolute discharge if the evidence does not meet the onerous standard required for determination of the person is a "significant threat". In this case, Ms. Bistrisky has also been resident at Coast Cottages in what is effectively a practical equivalent to a conditional discharge for six months.

[49] We have not lost sight of the degree to which Ms. Bistrisky may present a danger to herself. As was made clear by the Supreme Court of Canada in the ***Winko*** case, the only justification for maintaining Review Board jurisdiction over a person is the danger she represents to the public. Once an accused who has been found NCRMD is no longer a significant threat to public safety, "the criminal justice system has no further application". We are not entitled to refuse an absolute discharge out of "an abundance of caution" as "that is not the legal test". (***R. v. Marzec, 2015 O.N.C.A. 658***)

[50] Similarly, we are not entitled to refuse an absolute discharge simply because an accused may remain symptomatic if the accused is not thereby rendered a significant threat. In ***Carrick (supra),*** the court dealt with an accused who presented a substantial risk, or perhaps a likelihood, that he would abuse alcohol drugs and commit further offences, and that he was unlikely to change. Nevertheless the mere recitation of those facts was insufficient to justify a conclusion that a person was a significant threat.

[51] The evidence in this case no longer justifies a conclusion that Ms. Bistrisky represents a significant threat to a member of the public. Dr. Singh's opinion is justified by the noted changes in Ms. Bistrisky's presentation over the last year, and in particular her development of significant and applied coping skills, and her proactive seeking out of necessary supports in the community. She has arranged for supported and supervised

housing and located, and employed, additional supportive community resources. In these respects, she has addressed the concerns of previous risk assessors who considered an absolute discharge premature. She has not been a danger to any member of the public for at least seven years, even when experiencing suicidal ideation. She is committed to continuing her proactive efforts to maintain her mental health. Her bipolar disorder is in remission. The symptoms of her personality disorder are reasonably well controlled and moderating as she ages. There has been no violent ideation directed at any member of the public since the commission of the index offence, which itself was as lacking in violence as a "robbery" could possibly be.

[52] The only identified person at any significant risk is Ms. Bistrisky herself rather than a member of the public. In law, she may not be considered a significant threat under s. 672.5401 on that basis, however desirable the intervention of the forensic system might be for her personally. As the Supreme Court of Canada stated in ***Winko***, if she is not a significant threat, then the criminal justice system has no role to play. Her management would be a matter for the civil mental health system.

[53] Dr. Singh concluded that Ms. Bistrisky's risk of violence might be "low to moderate" if a sequence of events occurred that found Ms. Bistrisky overwhelmed and lacking all support in the community. We consider that this possibility to be unduly speculative in her circumstances. In any event, a deterioration in the circumstances of an accused who suffers from a serious mental illness is always a possibility. To deny an absolute discharge on this basis when an effective and appropriate discharge plan has been presented would, in essence, require an accused to prove that she is not, and can never be, a significant risk. The Board would be acting out of an abundance of caution. The imposition of such a burden, and acting on that basis, is impermissible in law.

[54] We therefore concluded that the evidence does not satisfy the onerous requirement of demonstrating that Ms. Bistrisky is a significant risk of causing serious criminal harm to a member of the public. She must therefore be absolutely discharged.

Reasons written by F. Hansford, Q.C. in concurrence with A. Markwart

DR. TOMITA, DISSENTING:

[55] The available evidence indicates that Ms. Bistrisky continues to pose a significant risk to members of the public. Although Ms. Bistrisky is to be commended for her progress, my view of the available evidence is that she presents a continuing risk of harm to members of the public.

[56] The conclusion that Ms. Bistrisky has now achieved a durable recovery that includes no longer posing a risk of maladaptive violence connected to her Borderline Personality Disorder is not what the totality of the evidence indicates despite her better level of stability in recent months. More data is needed to make this conclusion.

[57] Ms. Bistrisky's psychiatric conditions, Bipolar Disorder and Borderline Personality Disorder, are chronic conditions with relapsing and remitting courses. Chronic self harm and suicidal thinking and attempts are a product her Borderline Personality Disorder that, at times, has been aggravated by relapse of her Bipolar Disorder. The evidence indicates that self harm and suicidal thinking and her past violent offending, including arsons and assaults, have been intertwined. Ms. Bistrisky's history indicates that her risk of self harm and violence to others is tightly coupled. No convincing evidence was presented to indicate that this intertwined risk had changed aside from the lengthening period without demonstrable violence during periods when Ms. Bistrisky has engaged in self-harm. In my view, the evidence suggests that it is the rapid intervention of the forensic treatment team that has prevented Ms. Bistrisky's escalation to reckless or violent behaviours towards others.

[58] While Ms. Bistrisky has not engaged in demonstrable violence to others since the index offence in 2012, the evidence indicates that this is likely attributable to the ready access of clinical support and hospitalization through the forensic treatment team, which has been a steady and predictable resource for her. Considering Ms. Bistrisky's history, it is in the context of an absence of support or her perception that clinical services are not meeting her needs that self-harm and suicidal thinking rises to the degree of severity that she engages in types of suicidal behaviour that place others at risk, such as arson, or she becomes reckless and proceeds to commit offences to gain access to prison or hospital, which she perceives as safe places when in distress.

[59] Ms. Bistrisky has not been in a scenario of lacking access to clinical and other support services since the index offence. A more fulsome risk analysis that considered Ms. Bistrisky's course following the end of prison terms or after long term hospital discharges

would be very helpful evidence to see if her present clinical profile mirrors the past or if it is materially different. The available evidence suggests that her present course does mirror the past. In the past, Ms. Bistrisky has been stable when clinical and other professional supports that she perceives she needs are readily available. When ready access to these supports have been removed and Ms. Bistrisky has been unable to access the level of support or clinical services she wants then self harm and criminal offending has emerged. This is not speculative as it is her historical pattern. It may, however, be an over simplistic understanding of her past pattern. Hence the need for sufficient data for a more granular risk analysis.

[60] The evidence presented that Ms. Bistrisky's advancing age, her stability over the past several months, and her changed attitude towards returning to Peggy's Place does not dislodge the fact that, like in the past, it is the constant and consistent clinical care provided by the forensic treatment team that is containing her risk and preventing it from escalating. The evidence indicates that Ms. Bistrisky's prior pattern of suicidal and reckless behaviours involving violence to others have been tightly intertwined. I note that Ms. Bistrisky continues to experience chronic self harm thoughts and has continued to engage in self harm. But for the rapid intervention of the clinical team it is foreseeable that she is likely to escalate towards reckless or violent behaviour of a criminal nature, if the help she perceives that she needs is not forthcoming. This is in keeping with the nature of her psychiatric condition of Borderline Personality Disorder.

[61] Based on these considerations, I would adjourn this case and direct the preparation of a more fulsome risk assessment that includes additional risk relevant information. The Board would then be on firm ground to make findings about Ms. Bistrisky's future level of violence risk. In the absence of this additional data, my read of the evidence is that Ms. Bistrisky continues to pose a significant risk to members of the public.

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