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

BART DAVIS

HELD AT: **Forensic Psychiatric Hospital**
Port Coquitlam, BC
July 15, 2014

BEFORE:	**CHAIRPERSON:**	**F. Hansford, Q.C.**
	MEMBERS:	**Dr. P. Constance, psychiatrist**
		L. Chow

APPEARANCES:	**ACCUSED/PATIENT: Bart Davis**
	ACCUSED/PATIENT COUNSEL: T. Reyes
	DIRECTOR AFPS: Dr. M. Riley R. Dominguez
	DIRECTOR'S COUNSEL:
	ATTORNEY GENERAL: J. Fogel

INTRODUCTION

[1] ALTERNATE CHAIRPERSON: On July 15, 2014, the British Columbia Review Board (the Board) convened an initial disposition hearing in respect of Mr. Bart Davis, a 53-year-old man, pursuant to s. 672.47(1) of the *Criminal Cod*e. Mr. Davis is before us after being found not criminally responsible on account of mental disorder (NCRMD) on June 5, 2014 in respect of one count of breaking and entering a dwelling house and one count of having housebreaking instruments in his possession.

[2] The index offences both arose out of a single incident that occurred on January 30, 2013 in Chilliwack, British Columbia. Mr. Davis, while in a manic state, decided to drive his small SUV in the vicinity of the Chilliwack River Road. He came upon the home of the victims**,** JO and TO, who were at that time absent from their residence, leaving it occupied by their two children, accompanied by ER.

[3] For reasons he is unable to explain, Mr. Davis parked in the driveway of the residence. It was about 2 o'clock in the afternoon. He rang the doorbell and then started to walk around the house. He was carrying a crowbar. It is not clear where or when he acquired this tool. Upon hearing the noise of a tumble dryer operating inside the residence, he concluded that the occupants were attempting to dry illegal drugs and that the house was "a drug house". He decided to investigate. He used the crowbar to jimmy open the side door leading to the basement.

[4] The children went to the front door but no one was there. At that moment, TO returned to her residence and observed the children on the front deck of the house. She noticed a strange car in the driveway. She asked the children to see if they could determine who it belonged to. They went downstairs to investigate and observed the accused standing inside the basement. He asked if anyone was home. The children demanded that he leave the house. After staring at them for a minute and saying nothing further, he left the house. The children returned to the front of the house in an agitated state. They advised their mother that someone had broken into the house. Investigation by the RCMP after Mr. Davis' arrest showed that the door frame had been broken and that the door would no longer close.

[5] Mr. Davis returned to the front of the house where his vehicle was parked. He was immediately confronted by TO. He admitted having broken into the house. She called 9-1-1 and tried to block the driveway so that Mr. Davis could not leave. He drove

around her vehicle and onto the road. She followed him and maintained contact with the 9-1-1 dispatcher. He drove in a bizarre fashion, crossing neighbours' lawns and turning into driveways. TO observed Mr. Davis get out of his vehicle on one occasion and drink from a flask he was carrying. On another occasion he stopped beside a parked car, popped the hood, and rummaged around the engine compartment. He was obviously looking for something. He then drove off again. Shortly thereafter, the police managed to track him down and arrest him.

[6] During a subsequent interview with Dr. Riley, Mr. Davis described experiencing elevated mood, grandiose delusions and a sense of omnipotence during the index offences. He believed that the houses were unoccupied and consequently, he could drive through their yards and enter them without breaking the law. When detained by the police, Mr. Davis complained that people stole from him all the time and that the police would never do anything about it. He stated he was on stress leave from his employment and was relaxing by going for a drive. His rationale for breaking into the victims' house made no sense to the arresting officers.

[7] Mr. Davis recalled engaging in bizarre behavior during the week leading up to the index offences. He drove around feeling "happy" and "high as a kite". He denied any paranoid thoughts. His driving was aimless. He recalled driving across other people's yards and through car parks. He purposefully avoided going to his long-term employment. He drove off-road. He stopped to "liberate" sheep in a fenced field by opening the gate and trying to herd them out of the field. He tried to break a new trail from Canada across the border into the United States by driving through the bush. He now recognizes this was dangerous, since he could very well have driven off a cliff.

[8] During this manic episode, he seldom returned home. His partner knew he was ill, but could not locate him. She sought the aid of the RCMP. They attended when she found Mr. Davis at a gas station. The RCMP officer interviewed him and, unfortunately, accepted his assurances that he was fine. Mr. Davis then returned home for a short while, but then left the residence in his SUV. He was not located again until he committed the index offences.

[9] Mr. Davis appeared before a Justice of the Peace on January 31, 2013. He was released on his own recognizance, pending trial. He resumed his erratic behaviour and was again apprehended by the police. He was taken to the Chilliwack General Hospital

(CGH), where he was involuntarily committed under the *Mental Health Act.* Upon his discharge from the hospital 5 days later, he was managed in the community by a treatment team practicing out of the Chilliwack Mental Health Centre and by his bail supervisor.

[10] Mr. Davis' trial began on February 20, 2014. At the close of the case for the Crown, the trial judge made an assessment order pursuant to section 672.11(b) of the *Criminal Code*. In his report dated May 6, 2014, Dr. Riley stated that in his opinion, Mr. Davis had experienced a relapse of a recurring mental illness and had been unable to appreciate that what he was doing was wrong. On June 5, 2014, Mr. Davis was found NCRMD. Disposition was deferred to the Board.

[11] On June 11, 2014, an order was made by the Board for an assessment of Mr. Davis' mental condition and treatment and for a comprehensive forensic analysis of his risk or significant threat to public safety. This assessment was also performed by Dr. Riley.

[12] In preparation for this hearing, the Board was provided with Dr. Riley's assessment reports of May 6, 2014 and July 4, 2014. A report was also received from R. Dominguez, RPN, a community nurse/forensic liaison officer employed by the Forensic Psychiatric Services. Both reporters work out of the Surrey Regional Forensic Clinic. The Board also received copies of the relevant criminal informations and associated records, including the police report, the accused's criminal record, and TO's victim impact statement, dated January 30, 2014. Dr. Riley, Mr. Dominguez and Mr. Davis all testified orally.

BACKGROUND

[13] Mr. Davis was born in Burnaby and has always resided in the Lower Mainland. He reports a happy childhood with no history of abuse, trauma or developmental problems. He has three siblings, of whom two survive. His elder brother had a history of depression and, unhappily, committed suicide. His father abused alcohol but succeeded in quitting drinking at age 35. His mother died in late 2013 and his father, in the summer of 2012. Mr. Davis became depressed following his father's death and was prescribed antidepressant medication, which he discontinued late in 2012.

[14] Mr. Davis completed grade 10 and then left school to pursue a career as an auto mechanic. He has worked as a mechanic for the same employer for 36 years. He has been supervised by the same manager for 20 years. His employer and fellow employees have been supportive. This remains the case despite a recent change in ownership of his

employer. When the new owner took over, Mr. Davis arranged to meet with him and his manager. He fully disclosed his past psychiatric history to his new employer. He has been assured of his employer's continued support.

[15] Mr. Davis has enjoyed a relatively stable relationship with his partner of 14 years, although he testified that their relationship has been somewhat troubled since the index offence because of her occasional unexplained absences from the home for several days, without contacting him. She is otherwise very supportive and has intervened on several occasions to ensure that Mr. Davis obtained psychiatric assistance when required. He describes her as a very important support who knows him very well and who can quickly tell when he experiences symptoms of his illness.

[16] He enjoys his hobbies of rebuilding older model motors and motor vehicles and off-roading in his Suzuki SUV.

[17] Mr. Davis has been married on two prior occasions and has two adult daughters. He was formerly estranged from both of them. Several years ago, one of his daughters contacted him. They reconciled and now enjoy a good relationship. He will shortly become a grandfather, and is looking forward to the experience. He also sees his brother. On one occasion, his brother escorted him to hospital when his mental condition deteriorated.

[18] There is no suggestion that Mr. Davis has a personality disorder.

[19] Mr. Davis has a remote history of abusing alcohol. He started drinking at age 19. He quit in 2005 at age 45 after his first admission to hospital for psychiatric treatment. There was a single relapse for one year, ending in late October, 2010. Two of his six admissions to hospital (2005 and 2010) occurred when he was drinking heavily. Alcohol was a significant factor in the onset of his symptoms in both those cases. In his late teens, he smoked marijuana, but has not done so for many years.

[20] His criminal record consists of 2 convictions, one for impaired driving in 1981 and one for refusing to provide breath samples in 1988. Other than the index offences, his Client History Report from the Ministry of the Attorney General lists no other contacts or charges.

[21] Both Dr. Riley and Mr. Dominguez report that Mr. Davis appears to be motivated to remain sober. He recognizes the impact of alcohol consumption upon his mental state.

He has never attended any addiction treatment program or counseling respecting alcohol abuse. He emphasized his sobriety in his evidence and advised us that he and his partner do not go to bars for any purpose.

[22] Mr. Davis' first contact with psychiatry was an admission to Langley Memorial Hospital (LMH) in July 2005. He was again admitted to this hospital for psychiatric treatment in March 2007. In November and December 2010, he was admitted to Abbotsford Regional Hospital (ARH). He was admitted to the CGH on December 11, 2013 and February 3, 2014. The last admission was after the index offence. Mr. Davis has attended the Mental Health Centre in Chilliwack for counseling and follow-up since his discharge in February, 2013. He has been prescribed anti-depressant and mood stabilizing medications. His management in the community on bail has been without incident.

[23] Dr. Riley offers a current DSM-5 diagnosis of bipolar I disorder with psychotic features, and a prior history of alcohol use disorder, in sustained remission. He describes Mr. Davis as a high functioning individual with no residual disability as a result of his illness. He appears calm, polite and without evidence of mood symptoms, abnormal beliefs or abnormal perceptions during his contact with forensic services. Mr. Davis has been subject to recurring manic episodes since 2005. His recurring seasonal depression in the winter is a feature of his illness, as is his recurrent insomnia.

[24] The diagnosis of bipolar disorder was made for the first time by his community-based psychiatrist during his committal to CGH after the index offence. He generally returns to baseline so quickly that it was difficult for attending psychiatrists during his previous admissions to LMH, ARH and CGH to formulate a diagnosis. He was diagnosed tentatively as suffering from an unspecified psychotic disorder.

[25] Mr. Davis confirmed that he had not previously been diagnosed with bipolar disorder and to his recollection, did not take any medication after his earlier admissions to hospital. It does appear from his clinical records that he was prescribed Risperidone on one occasion, since he discontinued it after complaining of weight gain as a side effect.

[26] During the index offence, Mr. Davis was frankly psychotic. During his previous admissions to hospital, his presentation was characterized by paranoia, which did not lead to any aggressive acts or violent behavior. He responded to his feelings of fear by taking precautions respecting his personal property and by voicing his concerns to his partner.

Mr. Davis acknowledged during his interviews with Dr. Riley that he was “completely out of touch with reality” at the time of his earlier admissions.

[27] He cannot recall ever experiencing hallucinations, although he says he may have experienced them after he quit drinking, about the time of his first episode of manic behaviour. Medical records indicate that he exhibited persecutory delusional beliefs during most of his prior episodes, which developed in the context of increased activity but without notable mood disturbance. Mr. Davis testified to the contrary that he could not recall feeling paranoid during all but one of his previous manic episodes.

[28] His manic episodes have never resulted in actual physical aggression at any time, although his unpredictable behavior after the index offences resulted in his being secluded upon admission to CGH after the index offences. However, his most recent pre-index offence admission was associated with the perception that two former associates wished to harm him. He reported some homicidal thoughts towards these individuals as well as suicidal thoughts. This is the only documented history of suicidal or violent ideation.

[29] Mr. Davis’ medical history includes a diagnosis of type 2 diabetes and obstructive sleep apnea. He has had surgery to modify his palate. It was recommended that he use a continuous positive airway pressure (CPAP) machine at night to maintain adequate airflow. He advised Dr. Riley that he does not use the machine because the mask did not fit properly. Dr. Riley states that sleep deprivation has previously been identified as a contributory factor to Mr. Davis’ mental health issues and must be addressed if Mr. Davis is to maintain his optimal level of functioning and minimize his risk of relapse. Sleep apnea has a profoundly negative effect on a person’s ability to enjoy restorative sleep and deprives the brain of oxygen. Mr. Davis acknowledges that prior to index offences, he had not been sleeping much at all.

[30] Mr. Davis did not pursue outpatient treatment or medication after his previous discharges. Mr. Dominguez advised that contemporaneous hospital records are quite sparse, and Mr. Davis’ recollection that he was not given much direction upon his previous discharges is not inconsistent with the records reviewed. There was only one instance of a documented referral to a mental health clinic, originating from the ARH. Mr. Dominguez advised that it would not be uncommon for a referral from that hospital to a clinic in another catchment area, such as Chilliwack, to be misplaced. This does not excuse Mr. Davis for

his failure to follow up the referral directly when he did not hear from the Chilliwack Mental Health Centre. It is also possible that medication was not prescribed upon discharge because Mr. Davis quickly returns to baseline after being hospitalized, and his condition was not properly diagnosed.

[31] For the first time since 2005, Mr. Davis is being treated with medication and receiving counseling specifically directed at a firm diagnosis. He testified that he has researched his diagnosis and medications diligently so as to better understand his treatment options. He testified he was not depressed during the winter of 2013, for the first time since the onset of mental illness. He accepts his diagnosis and endorses his treatment plan.

POSITION OF THE PARTIES

[32] The Director took the position that from a clinical perspective, Mr. Davis did not represent a significant risk of causing serious harm. His management could be handled appropriately and safely by the Chilliwack Community Health Centre treatment team. Both Crown counsel and Mr. Davis suggested that he should be absolutely discharged.

[33] In his report of July 4, 2014, at paragraphs 15 and 16, Dr. Riley said he was unable to conclude that Mr. Davis met the jurisdictional threshold of being a significant threat. He concluded that Mr. Davis was well engaged with his community treatment team and was receiving treatment appropriate to his needs through the Chilliwack Mental Health Centre. Consequently, he did not require the services of the Forensic Psychiatric Service. If the Board concluded that Mr. Davis was a significant threat to public safety, then Dr. Riley said he would arrange to co-manage Mr. Davis with his community-based treatment team to ensure continuity of care and support.

ANALYSIS

A. Introduction

[34] The Board is required to arrive at an independent decision when determining whether Mr. Davis is a significant threat to the safety of the public, and thus must remain within our jurisdiction (s. 672.54). If he does not pose such a threat, he is entitled to an absolute discharge. If he does pose a significant threat to the safety of the public, we must then determine what disposition ought to be made. We are not bound by the recommendations of the parties. The term “significant threat” employed in s. 672.54(a)

was not defined in Part XX.1 of the Criminal Code as originally enacted. In *R. v Winko, [1999] 2 SCR 625* ("*Winko*") the Supreme Court of Canada held that an accused was not a "significant threat" unless he posed a significant risk of causing serious harm of a criminal nature.

[35] On July 12, 2014, the *Not Criminally Responsible Reform Act (Bill C-14. 2nd Session, 41st Parliament, 62 Elizabeth II, 2013*) (the NCRRA) came into force. It introduced as s. 672.5401 of the *Criminal Code* (Part XX.1), a statutory definition of "significant threat" for the purposes of section 672.54 (NCRRA, s. 9). Section 672.5401 provides as follows:

> "For the purposes of section 672.54, a significant threat to the safety of the public means 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."

[36] This statutory definition refers to "a risk" of an accused causing serious harm rather than to a *"*significant risk*"* of an accused doing so, as required in *Winko.* The NCRRA also amended 672.54 to require that the Board make the disposition which is "necessary and appropriate" rather than obliging the Board to make the least onerous and least restrictive disposition consistent with public safety and the needs of an accused. (s. 672.54, as amended).

[37] We now turn to a determination of risk, as required by s. 672.54 of the *Criminal Code.*

B. Determination of Risk

[38] We were not presented with a formal HCR–20 risk assessment. However, the reasons supporting the recommendation that Mr. Davis be absolutely discharged are reasonably clear from the reports we have received and from the oral testimony of Dr. Riley, Mr. Dominguez and Mr. Davis.

[39] The onset of Mr. Davis' illness occurred late in his life. Substance abuse is not a significant factor in his current presentation or in the onset of his recent symptoms. There is no diagnosis of any personality disorder. There is only one recorded instance of suicidal or homicidal ideation. There is no record whatsoever of any physical aggression directed at any person when Mr. Davis is well or during his manic episodes, despite his paranoia.

When confronted by the children during the index offence, he said little and walked away from the scene.

[40] When Mr. Davis left the victims' residence after committing the index offences, he made no attempt to damage TO's vehicle. At no time did he display any overt physical aggression or threatening behavior towards the victims other than the act of breaking into the house itself. His driving was aimless and potentially destructive of property, but was not directed at anyone.

[41] His criminal record is remote and related to impaired driving. His substance abuse disorder is in remission. He has been abstinent from alcohol for 8 of the last 9 years despite his lack of involvement in any alcohol counseling or support groups. He relapsed for about one year in 2010. He has not used marijuana for many years.

[42] He is remorseful. He is prepared to compensate the victims for the damage he caused to their house.

[43] Previous management of Mr. Davis' case has been complicated by the absence of a firm diagnosis, as well as his rapid recovery from psychotic symptoms when hospitalized. Dr. Riley felt that the hospital records available for his review corroborated Mr. Davis' information that he was not given adequate advice upon discharge or been the subject of arrangements for follow up and treatment. He was only given a firm diagnosis and treatment plan during and shortly after his latest hospitalization. He accepts the diagnosis he has been given. It corresponds to his recollection of his symptoms.

[44] Mr. Davis has responded well to treatment. He displays good insight into his illness. He states that he is allegiant to his new medication regime and intends to continue psychiatric follow-up indefinitely. He understands the need to continue on medications. Since his discharge from CGH, he has been compliant and cooperative with his treatment team in all respects. His current treatment team has no basis to believe that he will not continue to comply with expectations respecting medication. Indeed, in his testimony, he placed great weight on taking medication to promote ongoing mental stability.

[45] Since Mr. Davis' discharge from CGH, there have been no significant changes in his mental state. He denies perceptual disturbances and does not endorse any persecutory thoughts or untoward suspicions. He does not experience or exhibit any overt psychotic symptoms. He states that he will follow his doctor's recommendations, and accepts that he may require medication for the rest of his life. He understands that he may

decompensate and again become manic even if fully compliant with medical advice. In short, he enjoys excellent relations with his community based treatment team and has been managed by them in the community and while on bail, without incident, for 18 months.

[46] He is supported by his partner in a relationship of 14 years duration. He also enjoys the support of his employer of 36 years, his co-workers and his brother, all of whom are aware of his mental health issues. They have all played a role in the past in dealing with his periodic health concerns and have taken him to the hospital when he appeared to be suffering from symptoms of his illness. Mr. Davis has rebuilt his relationship with one of his daughters. He expects to become a grandfather in the near future. He is very happy about this prospect and does not find it stressful.

[47] Mr. Davis' accommodation is suitable. His house is situated on a one acre property in Yarrow, which is part of Chilliwack. He has lived there since 2006. He reports good relations with his neighbors. His hobbies of repairing and rebuilding cars and off-roading fully engage his leisure time. He has built a shop on the property for those purposes. He has no intention or desire to relocate in the foreseeable future.

[48] Mr. Davis adhered to all the conditions of his recognizance and attended at his bail supervisor's office on a daily basis before going to work. He is certainly amenable to, and compliant with supervision.

[49] There are nevertheless some concerns respecting Mr. Davis' risk profile.

[50] Although it has been recommended that he use his CPAP machine to enable him to better deal with sleep issues, he has been negligent in not pursuing available resources to adapt his masks to provide greater comfort. Recent test results confirm that his oxygen saturation levels are unacceptably low during the night. His partner has made recent comments about his snoring. He has not resumed using the CPAP machine even though he has purchased a new mask which was properly fitted to his face. He testified that he will have to start using it to enhance his sleep patterns, but appeared reluctant to do so despite this advice.

[51] Mr. Davis was unable to identify all of the symptoms identified by Dr. Riley that might indicate that his mental stability was deteriorating, other than increased obsessive behaviour and a general feeling of being somehow "off". He will require further education to increase his insight into this issue. He is confident that his caregivers, family, partner

and co-workers would recognize any changes even if he did not. However, he evaded his partner's efforts to help him in the days before the index offence. His relationship with his partner, upon whom he relies for support, is also not without issues and should they separate, he would lose his chief supporter and suffer considerable stress.

[52] Mr. Davis also relapsed to drinking alcohol as recently as 2010, which was certainly a factor in his consequent manic episode. He drank heavily for many years, and as a result, there is some risk that he will relapse to alcohol abuse. This would increase his risk of decompensation substantially.

[53] While it is true that Mr. Davis did not engage in any overt physical violence or aggressive behavior, breaking and entering into a dwelling house is a serious criminal offence that can have significant psychological impact. This is readily apparent in the victim impact statement which we have received and considered. Moreover, Mr. Davis' driving was erratic and dangerous. It is fortunate that he did not cause an accident.

[54] His behavior in the week before the accident was grandiose and bizarre. He felt omnipotent and "high as a kite". He did not return home for days on end, placing himself beyond the help of his partner and the RCMP, whom she had enlisted to help her find him. His behaviour could very well have caused defensive responses from people affected, including actual physical altercations which would put both Mr. Davis and the person responding at risk of physical or psychological harm.

[55] The index offences were the first recorded occasion during which Mr. Davis' mania resulted in behavior which escalated to the point it constituted a threat to public safety. It represents an exacerbation of his symptoms and his response to them. The onset of his mania is recurrent and periodic, and one cannot predict when he may experience a manic episode or guarantee that its recurrence will necessarily be suppressed by his medication regime.

[56] It may be argued that it is too early to properly assess his present commitment to community based treatment, however sincere.

[57] We have considered TO's victim impact statement. We appreciate the emotional response of the victim and her family to Mr. Davis' violation of their home and privacy. Unfortunately, it appears that the victims have the mistaken impression that Mr. Davis has a history of breaking into other people's residences. This was not the evidence before us.

[58] We were impressed by Mr. Davis' presentation and by his commitment to continuing mental stability and sobriety. He appeared genuine and well intentioned. He displays good insight. He is well aware of the potential risk he poses and that he cannot ignore the recommendations of his caregivers. Even if he did not comply with treatment recommendations, he lives in a supportive environment and is surrounded by individuals who now better understand the potential danger he may pose to himself and others should he decompensate. The likelihood is that they would, as they have in the past, arrange for psychiatric intervention in the event he deteriorates.

[59] In the circumstances, we accept Dr. Riley's opinion that Mr. Davis does not present a significant threat of causing serious physical or psychological harm. We agree that any risk he does pose does not rise to the level where it can fairly be characterized as "significant", given his progress and stability over the last 18 months.

[60] We are, however, unable to say that Mr. Davis poses no risk whatsoever of harming the public in the future, in view of the concerns we have identified. We agree with Dr. Riley's assessment that the accused continues to present a "low risk" of causing serious harm if he is absolutely discharged. There is a risk of decompensation and return to a manic state even if Mr. Davis remains fully compliant with his treatment plan. If he is absolutely discharged and later chooses not to adhere to his doctors' recommendations, or if he returns to drinking, that risk is higher, even if these events are unlikely to occur.

[61] It is foreseeable that if Mr. Davis again became manic, serious harm could result. Physical altercations with members of the public responding to bizarre behaviours and his erratic and dangerous driving could all result in serious physical or psychological harm to both Mr. Davis and members of the public, within the definition of serious harm now contained within s. 672.5401.

[62] Our determination that Mr. Davis represents a low risk of serious harm if absolutely discharged would have resulted in Mr. Davis being absolutely discharged before s.672.5401 came into force. We are therefore obliged to address the question of whether the recent amendments to Part XX.1 of the *Criminal Code* require us to refuse Mr. Davis an absolute discharge because the risk we have identified is "a risk" as identified in section 672.5401, although not significant.

[63] No party has delivered any notice challenging s. 672.5401 pursuant to the *Charter of Rights and Freedoms (*the *Charter),* and we have not considered what the

appropriate remedy would be had this argument been raised successfully. In any event, before such an analysis would be required, we must first determine how s. 672.5401 is to be interpreted.

C. Interpretation of Section 672.5401 & "Significant Risk"

[64] Is Mr. Davis disentitled to an absolute discharge by reason of the reference to "a risk" in s. 672.5401 when he represents only a low risk of causing serious harm? Are the words "a risk" synonymous with "any risk"? If not, what degree of risk is to be imported into the words "a risk"? S. 672.5401 does not incorporate language that quantifies any particular level of risk which would render a threat "significant" within this definition.

[65] If we had considered Mr. Davis to be a significant risk of causing serious harm, then whether he would be required to remain within our jurisdiction as constituting a lesser risk would not have to be decided. Equally, had we decided that he does not pose any risk of causing serious harm by any standard, we would then be obliged to grant an absolute discharge. Interpreting the words "a risk" would again not be a live issue.

[66] If we absolutely discharge Mr. Davis, we do not need to consider whether the requirement to make the "necessary and appropriate" disposition would lead to a different result than making the "least onerous and least restrictive" disposition.

[67] We are unaware of any authorities dealing with the issue raised by this case. The NCRRA only came into force three days before Mr. Davis' hearing. We shall therefore treat this case as one of first impression.

[68] In *Winko*, the Supreme Court of Canada affirmed the importance of correctly interpreting the undefined phrase "significant threat of harm", which is now subject to statutory definition. In that case, the accused contended that section 672.54 of Part XX.1 of the *Criminal Code,* dealing with mentally disordered individuals, violated the right of an accused to equal protection of the law and security of the person, was contrary to the principles of fundamental justice, and violated sections 7 and 15 of the *Charter.*

[69] The Supreme Court of Canada decided that as long as the term "significant threat" was interpreted to mean a significant risk of serious harm, section 672.54 and Part XX.1 as a whole did not violate the *Charter*. In making that decision, the court specifically addressed the questions of what constitutes a significant risk, and the relationship between

that concept and the constitutional validity of s. 672.54 and indeed, of the whole of Part XX.1 of the *Criminal Code*.

[70] The Court stated that a "significant risk" was equivalent to a "real" risk (para 51). After commenting on the difficult task facing a Review Board in determining whether an accused poses a significant threat, the Court stated (para 57):

> "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…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…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." (emphasis added)

[71] The court noted that the requirement set out in section 672.54 that the Board make the least onerous and least restrictive disposition that is consistent with the overriding goal of public safety and the needs of the accused supported a restrictive definition of "significant threat". We do not see the substitution of the words "necessary and appropriate" to describe the requisite disposition as requiring any change to this part of the Court's analysis of the words "significant threat".

[72] The Court summarized its conclusions respecting the concept of "significant threat " as follows: (paragraph 62):

> "… A "significant threat to the safety of the public" means a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature. …There is no presumption that the NCR accused poses a significant threat to the safety of the public. Restrictions on his or her liberty can only justified if, at the time of the

> hearing, the evidence before the court or Review Board shows that the NCR accused actually constitutes such a threat. …" (emphasis added)

[73] The Court then addressed the question of whether section 672.54 of the *Criminal Code*, so interpreted, violated the *Charter*. The court concluded that, correctly interpreted and read in their entirety, the provisions of Part XX.1 of the *Criminal Code* were not so vague and overly broad so as to violate section 7 of the *Charter*. The court also concluded that no improper onus was placed upon the accused to prove that he was not a significant risk. In particular, the court held the phrase "significant threat" provided sufficient precision for legal debate. The court stated (paragraph 69):

> "… 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. …"

[74] The court went on to provide guidance for Review Boards determining whether an accused is a "significant threat", stating that:

> "… 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*. …"

[75] The court stated further (at paragraph 71):

> "… 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…" (emphasis added)

[76] The court considered whether section 672.54 violated section 15 of the *Charter,* insofar as accused were treated unequally on the basis of stereotypical ideas about the mentally ill. The Court again emphasized the necessity, when interpreting Part XX.1 of the *Criminal Code*, to recognize the liberty interest of the subject (paragraph 93):

> "… The purposes of any restriction on his or her liberty are to protect society and to allow the NCR accused to seek treatment. …"

[77] The Supreme Court of Canada in *Winko* inextricably linked its understanding of the term "significant threat" to the constitutional validity of s. 672.54 of the *Criminal Code*, stating as follows (paragraph 96):

> "I acknowledge that if s. 672.54 were read as raising a presumption of dangerousness and as permitting courts and Review Boards to restrict the liberty of the NCR accused in the absence of a considered conclusion that he or she posed a significant threat to the safety of the public, as may regrettably sometimes have happened in the past, one could argue that it would serve to disadvantage NCR offenders in a discriminatory manner. Applied as suggested in these reasons, however, s. 672.54 serves to ensure that each NCR accused is treated appropriately…" (emphasis added)

[78] The interpretation of "significant threat" as involving both significant risk and serious harm was critical to the conclusion that s. 672.54 and Part XX.1 of the *Criminal Code* did not violate the *Charter*. Applying the statutory scheme only to individuals who pose a significant risk was essential to balancing the protection of the public and the liberty of the subject.

[79] Does s. 672.5401 require us to apply a lesser standard of risk than was adopted in *Winko* when determining whether Mr. Davis represents a significant threat and hence is not entitled to an absolute discharge? In interpreting this section, we bear in mind that we have been admonished by the Supreme Court of Canada to interpret Part XX.1 of the *Criminal Code* so as not to unduly trammel upon the liberty of the subject, having due regard to the necessity of protecting the public, and in accordance with *Charter* values. The interpretation of the term "significant threat" must also be considered in light of the statutory purposes of Part XX.1 of the *Criminal Code.*

[80] To hold that the words "a risk" was intended to include any risk, no matter how fanciful, trivial or insignificant, is not necessitated by the introduction of an indefinite article before the word "risk". It is difficult to reconcile such a result with the continuing use of the term "significant" in the statutory definition to define the threat required to found Review Board jurisdiction. The words "significant threat" do not naturally encompass insignificant, speculative or unreal risks. It is also difficult to see how substantial intrusions upon an accused's liberty are justified to contain a risk that is not real or significant.

[81] S. 672.5401 came into force over 15 years after *Winko*. If it had been intended to depart from the concept of "significant risk" as a component of the term "significant threat" and thereby further restrict the liberties of mentally disordered accuseds, one would have expected clearer and less ambiguous language. The concept of "significant threat" is not only central to the scheme enacted in Part XX.1 of the *Criminal Code*, but also to the

Supreme Court's conclusion in *Winko* that Part XX.1 is not overbroad and conforms to the *Charter*.

[82] The specific mention in s. 672.5401 of certain classes of members of the public as victims, as well as the reference to possible non-violent criminal offences which cause serious harm, do not change the existing law. The admonition in the newly revised s. 672.54 that public safety is the "paramount consideration" in making dispositions is also consistent with *Winko* before the NCRRA came into force. Arguably, these provisions of the NCRRA as a whole can be seen as merely restating the present law.

[83] We see nothing in the use of the words "a risk", in the structure of s. 572.5401 or in Part XX.1 as a whole that requires us to take a broad and expansive view of the definition of "significant threat" so as to sweep into our jurisdiction all NCRMD accused who present risks that are not significant. Were we to interpret the words "a risk" in section 672.5401 as synonymous with any risk at all, or indeed as requiring that the liberties of an accused person be restricted by reason of a risk that is not significant, then the effect would be to trammel upon the liberties of the subject in a manner that is not justified to protect the public or promote the re-integration of a mentally ill person into society. It would require offenders, such as Mr. Davis, who represent a low risk of causing harm, to remain subject to our jurisdiction indefinitely in an arbitrary manner, not justified by the risk actually posed.

[84] Adopting a more expansive definition of "significant threat" by virtue of the reference to the words "a risk" would, moreover, make it difficult to impossible to ever conclude that any accused who has committed a criminal offence causing harm, and who has been found NCRMD, does not present any possible risk of further serious harm and hence would be entitled to an absolute discharge. This result is plainly inconsistent with the statutory goal of promoting the reintegration of an accused into the community. It would unduly restrict Mr. Davis' liberty to require that he remain answerable to the Board indefinitely despite his circumstances and only because he presents a risk which is insignificant and speculative.

[85] All of these consequences of an expansive definition of the words "a risk" in s. 672.5401 would clearly violate the *Charter*. In *Winko*, the Supreme Court would have declared that s. 672.54 violated sections 7 and 15 of the *Charter,* but for the restricted definition it attributed to the threshold question of "significant threat". Indeed, the validity of

Part XX.1 of the *Criminal Code* as a whole would have been questionable. Where ambiguity exists, as it does with reference to the words “a risk”, coupled with the term “significant threat”, courts have always endorsed interpretations which resolve ambiguity in favor of the liberty of the subject. The Supreme Court made clear in *Winko* that the same rule applies *a fortiori* respecting the consideration of *Charter* rights and freedoms.

[86] In summary, there is nothing in s. 672.54 as amended or in section 672.5401 which necessitates an interpretation which clearly would have caused the court in *Winko* to hold that s. 672.54 violated the charter. The Court in *Winko* avoided that result by interpreting the term “significant threat” to extend only to cases involving significant risks. Equally, we should not interpret s. 672.5401 in a manner which would violate the *Charter* unless there is no other reasonable interpretation which would conform to the *Charter* and carry out the statutory purposes of Part XX.1, as amended.

[87] We have 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”.

D. DECISION

[88] We have already concluded that Mr. Davis is not a significant risk of causing serious harm and therefore he does not meet the threshold test for our jurisdiction. Accordingly, he must be absolutely discharged.

[89] In view of this determination, we need not consider what the “necessary and appropriate” disposition would otherwise have been, or whether these words would lead to a different result than the former requirement that we make the “least onerous and restrictive” disposition possible.

Reasons written by F. Hansford, Q.C., in concurrence with Dr. P. Constance & L. Chow

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