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

E.W.
A Young Person

HELD AT: **John Howard Society**
Courtenay, BC
April 25, 2017

BEFORE:	**CHAIRPERSON:**	**B. Walter**
	MEMBERS:	**Dr. P. Constance, psychiatrist**
		P. Cayley

APPEARANCES:
ACCUSED/PATIENT: E.W.
ACCUSED/PATIENT COUNSEL: E. Chesterley
DIRECTOR YFPS: S. Jarvinen, Dr. M. Thorpe
DIRECTOR'S COUNSEL: K. LeReverend
ATTORNEY GENERAL: R. Richardson

***Publication of information identifying the young person is prohibited pursuant to s.110 of the Youth Criminal Justice Act.**

****Pursuant to s.672.5(4) of the Criminal Code, T.M., mother of the accused, was designated a party.**

INTRODUCTION AND BACKGROUND

[1] On April 25, 2017, the British Columbia Review Board convened an early hearing to review the disposition of EW, a young person within the meaning of the *Youth Criminal Justice Act of Canada.* EW will reach the age of majority, 19, on April 30, 2017. EW's first hearing since his November 2016 verdict of NCRMD occurred on December 14, 2016, just four months ago. On that date EW's mother Ms. M was designated a party to these proceedings pursuant to s. 672.5(4) of the *Code*. Given the recency of that proceeding, we do not intend to revisit the historic details of this case. EW's background, his index offence, his offence history, his somewhat chaotic family history, as well as his diagnoses have been dealt with in the Board's previous decision. This decision will deal in the main with events since the December 2016 hearing and will serve as an evidentiary update.

[2] In addition to reviewing EW's disposition of discharge subject to conditions, this early hearing was scheduled to coincide with his 19th birthday and to consider therefore the issue of his transition, on achieving majority, to the care and supervision of the Adult Forensic Psychiatric system of British Columbia ("AFPS").

[3] We are entitled to accept some, none or all of the evidence before us. While we have considered all of the evidence on record in this case, we only recite that which is necessary to our decision.

EVIDENCE

[4] We received evidence in writing, as well as orally, from EW's youth forensic case worker, Ms. Jarvinen. She has been meeting with the accused in his home community weekly. In addition to being monitored by a youth forensic psychiatrist, Dr. Thorpe, out of Victoria, EW receives monthly injections of his antipsychotic medication from his local family physician. He could continue to receive that service locally. Since the last hearing, EW has been attending a youth support group to assist him in remaining abstinent from substances. Happily, according to collateral sources, he has not relapsed to the use of marijuana in probably nine months now. Insightfully, EW is able to self-report an improvement in his mental health as a result of his abstinence. There have been no reports that he has used alcohol. He plans to drink to the point of intoxication once on his nineteenth birthday.

[5] This young man's history indicates that his home life has at times been chaotic and prone to conflict, in particular in the context of his relationship with his mother. Those circumstances have resulted in him once again relocating out of his mother's home, as of April 9, 2017. He now resides with a family with whom he has had a past relationship, and in whose home he is welcome. Fortunately, this is also a non-drug or alcohol using environment.

[6] EW is doing well at school. He has plans to further his education, apparently by attending post-secondary courses in welding, either in Campbell River or in Victoria. In light of his good progress at school, he may have employment opportunities available for the summer months with the local school district, as well as in other areas.

[7] EW has also recently joined the Mormon Church, which is also his mother's religious choice. Ms. Jarvinen indicates that EW's interest in the Mormon Church has been from the perspective of providing a social milieu to expose him to positive role models.

[8] Overall, Ms. Jarvinen is happy with EW's progress and compliance; in particular, that he is highly attuned to the negative potential of drug use on his mental state and on his cognition. He has resolved to abstain.

[9] In terms of future work and treatment, Ms. Jarvinen suggests that EW could use some assistance working on anger issues, as this has been an area of considerable discord at home.

[10] The Review Board also received written and oral evidence from EW's youth forensic psychiatrist, Dr. Thorpe. Her contact with EW has, except for some early visits, consisted of monthly telephone calls in order to monitor for the presence of any symptoms and to remain apprised of his overall progress in the community. She confirms that EW's injectable medications are administered monthly, by a local physician. As he has now reached the brink of adulthood, his ADHD medications have been stopped without any negative effect. There is no indication of any symptoms or impacts of his historic diagnosis of Tourette's syndrome.

[11] Dr. Thorpe is persuaded that EW suffers from paranoid schizophrenia, which, although it is currently in remission is quite sensitive to and would be triggered by a return to drugs or alcohol. It appears that the use of marijuana renders EW paranoid and impairs his cognition. It would therefore be a potent destabilizer and would cause EW to

relapse to positive symptoms of his psychotic disorder. Happily that has not happened. It appears that being symptomatic in the past has been an unpleasant experience for EW; one which he does not wish to relive.

[12] It is agreed that, given his background, this young man does well when his time and activities are structured, when he is relatively free of destabilizing stressors, and when he is abstinent. Those factors serve as an appropriate starting point for addressing his future progress and the role of the Review Board in his life.

[13] It is Dr. Thorpe's opinion that without structure, and/or a relapse to positive symptoms of his schizophrenia in the context of either noncompliance with medication or drug use, EW could become paranoid. Under such circumstances he could lash out at anyone in his environment. According to Dr. Thorpe it is therefore important, in the face of the numerous transitions that EW will be confronting, that he continues to be provided with assistance, and support and supervision to maintain his treatment and compliance, to assist him in dealing with stressors, to ensure the ongoing administration of his medication, and to assist him to achieve residential stability and the social supports and structures he requires to succeed. That said, he has only ever been violent in the context of psychosis.

[14] In terms of his need for structure and stability, the evidence suggests that EW's current residential circumstances, although they may subsist for a few months going forward, are not likely to be permanent. Further relocation will be necessary.

[15] When he graduates, EW wants to continue his education in the field of welding. He has not yet applied to programs. He may attend welding courses in either Campbell River or in Victoria. If he is not successful, he may take some time off, during which he would not be attending school and during which he would have little in the way of structure in terms of his time and activities. These circumstances could result in stress which is, in and of itself, destabilizing. They could also tempt him to relapse to marijuana use. Furthermore, if he is successful in gaining admission to educational courses, his participation will no doubt occasion some stress and dislocation. Therefore, Dr. Thorpe believes that it is important for EW to remain under a regime of support and supervision to maintain his mental stability and his sobriety.

[16] EW agrees that he benefits from structure. He is quite insightful and sincere in his wish to maintain his treatment and his abstinence from substances. He believes that

maintaining the jurisdiction of the Board under discharge subject to conditions, is and will continue to be helpful. He clearly wants to continue with his antipsychotic medication and to pursue his education. He has already made application for bursaries, as well as for summer employment because he will need funds for tuition and books over and above his PWD benefits.

[17] EW also feels that his Mormon Church may be prepared to provide some form of assistance. He agrees that in the past he has used large quantities of marijuana. He understands that this occasioned difficulties in a number of areas. He remembers that when he last relapsed a year ago, he quickly became paranoid. Regarding his residential stability, he says he is already looking at other accommodation.

[18] The second issue that the Review Board was concerned with has to do with EW's transition to the supervision of the Adult Forensic Psychiatric system. The evidence provided by a representative of that service was entirely unhelpful and noncommittal.

[19] Although it may not have been their position at the outset of the hearing, in closing all parties favoured or preferred, that EW's care and supervision, at least for the time being, remain with the Youth Forensic System.

ANALYSIS AND DISPOSITION

[20] The Board's decision making is governed by s.672.54, and s.672.5401 of the *Criminal Code* (as amended) which provide:

> **672.54** When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:
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> > **(a)** where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
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> > **(b)** by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
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> > **(c)** by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

> **672.5401** 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.

[21] The Board must first determine whether EW poses a significant threat to public safety as defined in s.672.5401. Although it is considered an expert tribunal in respect of the subject matter within its jurisdiction, the Board is not required or entitled to conduct its own assessment of an accused's significant threat to public safety. As must any adjudicative body, the Board can only evaluate the evidence presented to us at a hearing to determine whether it meets that threshold.

[22] Despite the implementation of s.672.5401, in 2014, the Courts have held that this codification has not changed the interpretation of significant threat, in substance. The jurisdictional threshold test remains that articulated in **Winko v. British Columbia (Forensic Psychiatric Institute)**, [1999] 2 S.C.R. 625:

> [T]he 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 miniscule risk of 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. (Par. 57)

[23] More recently in **Calles v. British Columbia (Adult Forensic Psychiatric Services)**, 2016 BCCA 318, the BC Court of Appeal confirmed 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)

[24] A finding of significant threat must be based on evidence rather than speculation. There must be a real risk of physical or psychological harm to individuals in

the community that is serious, in the sense of going beyond the merely trivial or annoying. The conduct of concern must be criminal in nature. There must be a foreseeable and substantial risk that the accused would, or is likely to commit a serious criminal offence if discharged absolutely. In making these determinations, we must have regard both to the interests of individual liberty as well as to the paramount consideration of public protection.

[25] The index offence, the assault of EW's sister, happened over two years ago. The two are in the process of reconciling. EW's breaches provide no assistance in determining significant threat. The remaining offences have been considered and are somewhat more serious.

[26] While EW could have pressed the issue and argued that he does not pose a significant threat, he recognizes that he has benefited from and that he continues, absent much in the way of parental influence, to require the support and assistance of an external agency to maintain his stability and to keep him on a positive trajectory to achieve his goals.

[27] Certainly, left entirely to his own devices at this stage in his progress, it would not strain the limits of prediction to find that, despite his desire to abstain, he is at high risk to relapse to substance use. He would then rapidly decompensate, become paranoid and disorganized to a degree that would cause him to misperceive the acts of others in his environment and potentially react violently.

[28] Further, in the unique circumstances of this case, we are prepared to accept that EW consents to a finding of significant threat so as to enable him to continue to receive the services he currently needs.

[29] If we find EW a significant threat we must then consider s.672.54 to arrive at the necessary and appropriate disposition:

> The "necessary and appropriate" standard came into force on July 11, 2014. Before then, the *Criminal Code* required that the disposition be the "least onerous and least restrictive to the accused". This court has endorsed the Board's view that the two standards are synonymous – in other words, the "necessary and appropriate" disposition is also the "least onerous and least restrictive" disposition: *Ranieri* (Re), 2015 ONCA 444 (CanLII), 336 O.A.C. 88, at paras. 20-21. The change in language was meant to clarify the standard and make it easier to understand, not to modify it. Thus, the jurisprudence developed under the least onerous and least restrictive

> standard continues to apply to dispositions under the necessary and appropriate standard: **McAnuff** (Re), 2016 ONCA 280. (par 22)

[30] However, the Review Board's disposition making in this case is rendered more complex because of EW's status under the *Youth Criminal Justice Act*, in particular s.141(6) which continues the previous obligation (s.13.2(6) of the *Young Offenders Act*), to consider the age and special needs of the young person and the submissions and representations of his parents, in addition to the criteria in s.672.54 of the *Criminal Code*, before making a disposition.

[31] EW has in many ways, and despite his vulnerabilities, been a co-operative and compliant patient.

[32] To progress he needs to achieve residential stability; clarity in respect of his educational and vocational aspirations or an alternative path, which provides needed structure, and to maintain his treatment and abstinence. Every aspect of this constellation of needs is currently unstable and in transition.

[33] EW's own views of his needs and fragility appear insightful. His parent is actually withdrawing from his life to some extent to facilitate EW's independence.

[34] There is no evidence to suggest, and nothing that has occurred since the December 2016 hearing to persuade us that a disposition of discharge on conditions is no longer necessary or appropriate.

TRANSITION TO AFPS

[35] Having heard and attended to the evidence provided, all parties, including the accused, submitted that EW should, for the time being remain under the service jurisdiction of Youth Forensic Psychiatric Services.

[36] Certainly nothing provided by the witness for AFPS challenged those submissions. His evidence was almost entirely focused on what AFPS could not or would not provide for EW.

[37] It is in the Board's experience highly unusual (but not unprecedented) to continue the supervision and service provision of YFPS beyond a young person's majority.

[38] Under s.672.54 of the *Code*, places of custody for the detention of accused persons are referred to as hospitals as defined in s.672.1 of the *Code*:

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

[39] This definition includes, in addition to institutional settings such as FPH or MATC, the various individual forensic outpatient clinics. The definition is incorporated by reference into the *YCJ Act.*

[40] The responsibility and authority to designate “hospitals” for the custody and treatment of both adult and young NCR accused is conferred upon the provincial Minister of Health.

[41] In BC, Ministerial Order 213 (March 31, 2003) designates various hospitals for both “young persons” and individuals over 18. The Board has held that despite these designations, and despite the statutory framework, nothing prevents the designation of the same “hospitals” as suitable for both young persons and adults.

[42] In a previous decision of the Board, the question of whether a young person’s transfer to a facility designated for adults was mandatory upon the young person attaining majority, was raised.

[43] It was argued that automatic or mandatory transfer to an adult hospital was inconsistent with the (then) *Young Offenders Act*, and a young accused’s lifelong status as a “young person” and the protections provided by that status.

[44] In **J.A.D.** [2000] BCRBD No.10 (QL), after a painstaking and detailed legal and contextual analysis the Board concluded:

> We would observe, moreover, that while young people may only be placed in hospitals designated under s. 13.2(11), nothing in the legislation requires those hospitals to be designated exclusively for that purpose. The Minister may, but is not required, by s. 13.2(11) to designate hospitals exclusively for the care and custody of children. The Minister may, if he so chooses, designate as a hospital for young persons even if it also contains adults, leaving decisions about appropriate segregation and placement within that hospital to professional and clinical judgment. The Minister may also, as we find below, designate hospitals principally for the care of young persons, while allowing a young person who becomes an "adult" to stay for a further period where circumstances warrant, prior to transfer to an adult facility. The discretion is very broad, and needs to be broad to accommodate different realities arising in different provinces. (par 72)

[45] The Board went on to provide its interpretation of the designating Ministerial Order:

> In our opinion, the following propositions reflect the construction which accords best with the plain language and objects of the both the Order and the parent legislation:
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> A. An NCR accused who commits the index offence anytime after their 18th birthday, and is committed to custody, is lawfully placed only in a "section 2" hospital.
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> B. An NCR accused who commits the index offence anytime before their 18th birthday, and is committed to custody, is lawfully placed only in a "section 1" hospital up until their 18th birthday.
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> C. An NCR accused who is lawfully placed in a "section 1" hospital but turns 18 may lawfully reside in a "section 2" hospital anytime after he turns 18.
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> D. The decision whether to transfer an NCRMD accused who turns 18 from one facility to another is not intended to be "automatic", if by this one means transfer without critical judgment. If the Minister intended transfer without critical judgment upon a person reaching 18, the words "anytime after they have reached the age of 18 years" would not have been included. Consistent with the overarching intent of the legislation, the decision to transfer will be an individualized one, informed by the needs and circumstances of the accused and those around him, the public interest and the resources and capacities of respective hospitals to continue or undertake custody.
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> E. The specific statement that a "section 2" hospital is a lawful place of custody "anytime after [a person referred to in subsection (1)] reaches the age of 18" necessarily implies that he may lawfully remain in a "section 1" hospital until he moves to a section 2 hospital, despite the fact that his legal status as a "young person" has been altered. As noted above, neither the Criminal Code nor the YOA demands utter exclusivity as between adults and young persons. As such, it was entirely open to the Minister to designate a facility such as the Maples as a hospital dedicated overwhelmingly to young persons but which is also framed in a fashion which recognizes the practical reality that there will exist a group of transitional cases involving such persons turning 18 who are hospitalized there and who have not yet had a decision made to transfer them to a section 2 hospital.
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> In view of the above analysis and on reflection, we add this comment. In the event that an accused, as in this case, objects to a proposed transfer after they turn 18 years of age, a hearing before this Board would be appropriate. In that context, we believe that while the Youth Director would be a necessary party to the proceeding, as "the person in charge of the hospital where the accused is detained" [Criminal Code, s. 672.1; YOA, s. 13.2(1)], it

> would be appropriate in most cases for the Adult Director also to appear, if for no other reason than to ensure that the Review Board and the parties may ask appropriate questions of the receiving hospital and in recognition of the fact that accused is not a "young person" for the purposes of hospitalization.

[46] Under the circumstances and based on the foregoing, it is open to the Board to order that EW's supervision and support will continue to be provided by YFPS, beyond his 19th birthday and we so order. If circumstances change significantly, the parties may approach the Board for an early hearing.

Reasons written by B. Walter, in concurrence with Dr. P. Constance and P. Cayley

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