IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1985 c. C-46, as amended 1991, c. 43

AND

THE BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF THE DISPOSITION HEARING OF

WADE ELLIOT DARWIN GIELZECKI

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
February 15, 2005

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr.H. Parfitt, psychiatrist
H. Landerkin, Q.C. (dissenting in part)

APPEARANCES:
ACCUSED/PATIENT: Wade Elliot Darwin GIELZECKI
ACCUSED/PATIENT COUNSEL: D. Nielsen
HOSPITAL/CLINIC: V. Bhauruth Dr. D. McKibbin Dr. E. Murphy
AFPS COUNSEL: D. Lovett
ATTORNEY GENERAL: L. Hillaby

1.0 INTRODUCTION

[1] On February 15, 2005, the BC Review Board (BCRB), held a mandatory hearing, pursuant to S.672.81(2)(a) of the Criminal Code, to review the disposition of Wade Elliot Darwin Gielzecki (the accused), made on November 24, 2004. Following a lengthy hearing the BCRB reserved its decision. After due deliberation it rendered a disposition of detention on April 7, 2005 including the following conditions:

1. THAT he be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services ("the Director");
2. THAT, at the Director's discretion, he may have escorted as well as unescorted or unsupervised access to the community depending on his mental condition, and having regard to the risk the accused then poses to himself or others;
3. THAT as required by the Director, he attend at any time and place for purposes of assessment, counselling, assisting him with regard to any treatment, promoting his reintegration into society, or monitoring his compliance with this order;
4. THAT, at the Director's discretion, he may have overnight stays in the community for a period not exceeding twenty-eight (28) days for the purpose of assisting in his reintegration into society;
5. THAT he not acquire, possess or use any firearm, explosive or offensive weapon;
6. THAT he keep the peace and be of good behaviour; and
7. THAT he present himself before the Review Board when required.

[2] That order is further reviewable on or before November 24, 2005.

[3] The BCRB's hearing panel members were unanimous in the decision to detain Mr. Gielzecki. There was less than complete consensus regarding the conditions which should form part of the disposition.

[4] Ultimately Dr. Parfitt's order represents the perspective of the majority as to the nature and terms of the disposition. Chairperson Walter concurred with Dr. Parfitt's result but would have retained a form of the impugned clause #4 contained in Mr. Gielzecki's November 24, 2004 disposition (Ex. 11), which gave rise to the current hearing. Panel member Landerkin, although also agreeing in the result, dissented in terms of the conditions, he would have imposed.

[5] In light of the variation of opinion among the panel members their separate and independent reasons for disposition are provided in their entirety.

[6] The panel is of course also aware that the November 24, 2004 disposition has been appealed to the British Columbia Court of Appeal (Dec. 29, 2004). While it is not for us to determine, given the outcome of the current hearing, that appeal may be rendered moot. The appeal, however, raises issues which are fundamental to the jurisdiction of this Tribunal and to the role of the Director, Adult Forensic Psychiatric Services (AFPS).

[7] Counsel for the Director helpfully outlined her submissions on the appeal in the course of this hearing. The importance of the issues renders a response by the Tribunal both justified and necessary. That response may be found at 5.1 below.

1.1 <u>The Accused's First Hearing and Disposition: November 24, 2004</u>

[8] On October 20, 2004, the Provincial Court gave the accused a verdict of NCRMD and committed him to the custody of the Forensic Psychiatric Hospital (FPH) pending disposition by the BCRB: Ex. 7. The Review Board conducted its first hearing and, as indicated, made a disposition of custody (s.672.54(c)), on November 24, 2004: S.672.47(1), C.C.; Ex. 11.

[9] Mr. Gielzecki's available criminal and psychiatric history, including the circumstances giving rise to the index offence which brought him to our jurisdiction, may be found in the disposition information entered as exhibits 1 through 10 at the November 24, 2004, hearing.

[10] After considering the evidence adduced on November 24, 2004, the hearing panel had no difficulty in concluding that the accused satisfied the Review Board's jurisdictorial threshold of "significant threat": S.672.54,C.C.; Winko v. BC(F.P.I), [1999] 2 S.C.R.655, paras. 57, 62. The accused was not entitled to be absolutely discharged. For purposes of the current proceeding and decision, the accused's history, as set out in the

Reasons for Disposition, remains relevant and, except as hereinafter expanded upon or referred to, is accepted: Ex.11.

[11] In selecting the “least restrictive and least onerous” (sic) disposition the Review Board determined, in light of the non-availability of any suitable, outpatient, residential alternatives, to impose a disposition of detention in custody at FPH for a period of 6 months, subject to appropriate conditions: S.672.54(c) C.C.; S672.63 C.C.; Ex.11.

[12] In fashioning appropriate conditions under which the accused would be detained, the Review Board considered, inter alia:

- that since his admission to FPH, October 7, 2003, until the hearing, the accused had remained housed on the secure A-3 ward of FPH;
- that since two elopement attempts in October 2003 and a physical altercation in December 2003, the accused had not been aggressive or posed a management problem;
- that although the accused continued to report psychotic symptoms, these had abated in their intensity and frequency; despite such symptoms he had had been coherent and logical for 9 months;
- that he was not considered an elevated escape risk;
- that the accused had not experienced staff-escorted or supervised access to the community

[13] The Review Board was concerned about the length of time that the accused had been maintained at a high level of security because of Dr. McKibbin’s evidence that for a number of months the treatment team had felt Mr. Gielzecki could reasonably have had escorted community access (Ex. 12, p.21, lines 5-10); and that the accused was indeed clinically ready for a measure of gradual community access: Ex. 12, p.29, line 19.

[14] In addition to its ongoing detention of the accused, the Review Board, mindful of its obligations under S.672.54 C.C., imposed, inter alia, the following condition as part of its disposition (the impugned condition):

> 4. THAT the accused shall have staff escorted or otherwise supervised access to the community at least and no less than once per week, provided that if such access is withheld for any period in excess of fourteen (14) days the Director shall immediately give notice to the Review Board, pursuant to s.672.56(2) of the Criminal Code: Ex.11

2.0 THE CURRENT HEARING: February 15, 2005

[15] It is the above (impugned) disposition condition, or more to the point, the Director's decision to contest it, that has given rise to an Appeal of the Review Board's disposition as well as to the current hearing under S.672.81(2)(a) C.C., pursuant to a notice (dated December 10, 2004), that the Director had significantly restricted the accused's liberty by not implementing the impugned condition: Ex. 13.

[16] The impugned condition clearly delegated a measure of discretion to the Director in terms of its implementation. Insofar as the Director has complied with the terms of that delegation by filing the notice at Exhibit 13, in accordance with S.672.56(2) of the Code, the reasons for the Director's decision to appeal (December 29, 2004) remained unclear until counsel's submissions made at the close of the current hearing.

2.1 Positions of the Parties

Director, AFPS' Position

[17] Counsel for the Director informed the hearing that, the Board's November 26,(sic) 2004 Disposition was under appeal.

[18] She further asserted that the Director had, in fact, fully complied with that Disposition in any event and requested that the Disposition be varied to delete clause 4

thereof (the impugned condition). She indicated that such a variation or deletion would render the appeal unnecessary. She asked the Board to impose "the usual provision which gives the Director the discretion to provide Mr. Gielzecki with staff-escorted or otherwise supervised access to the community depending on his mental condition having regard to the risk that he then poses to himself or others": Transcript of February 15, 2005 Proceedings, p.8 ("Transcript").

[19] Counsel went on to indicate that the Board on November 24, 2004, "would have benefited from additional evidence…. that addresses the reason why Mr. Gielzecki had not … had any escorted access to the community." She offered her belief that "the Review Board's inclusion of the prescriptive mandatory community access provision was driven … by its concern about the lack of such access and the level or degree of security (the accused) was subjected to during the period, the entire period that he was on remand at the hospital, as well as a concern that any future staff-escorted community access might well be denied by the hospital's Program and Privileges Committee for irrelevant or extraneous reasons" or "for reasons that are not related to clinical or for reasons that are not related to community risk" (sic). She felt that information about the role of the aforementioned committee would have made a difference to the Board's Disposition.

The Crown/Ministry of Attorney General's Position

[20] On behalf of the Attorney General, BC, Mr. Hillaby stated that he continued to advocate for a strict order of custody with no "delegated or imposed" terms, (presumably with respect to the accused's access to community).

The Accused's Position

[21] Mr. Gielzecki's counsel sought to maintain the provisions of the November 24, 2004, Disposition including its proposed May 15, 2005, review date.

2.2 Evidence At Hearing

2.2.1 Evidence of the Director AFPS

Dr. Murphy

[22] Dr. Murphy gave evidence that between October 2003 and the November 24, 2004, hearing, the accused was a “full remand from the Court”. His management and security were handled that way; that people on remand are considered to be on strict custody and that such individuals are not able to have either staff-escorted or unescorted community outings, except for unusual medical or dental needs, under Forensic Security Officer/staff supervision.

[23] She stated that after the accused’s NCRMD verdict (October 20, 2004) he was granted “Level 2” privileges, including “supervised grounds” and “Fir Hall” (under escort).

[24] Dr. Murphy described Mr. Gielzecki’s October 18, 2003, elopement attempt (his second). She described a rather bizarre and obviously serious escape attempt, during which police intervention was required, weapons were drawn and tear gas used to subdue the accused and then place him in seclusion: Transcript, p.13, lines 6-36. I note that Dr. McKibbin’s report to the Court dated November 6, 2003, indicates the accused was subdued by tazer: Ex.3. The incident was commented upon by the Review Board in its November 24, 2004, Reasons for Disposition: Ex.11, p.2

[25] Dr. Murphy then gave evidence about the “Program and Privileges Committee”. Originally called the Security Committee, it was described as “an extra layer of clinical decision-making on issues regarding patient privileges and security issues in the hospital” as well as a “communication forum” which receives and determines “applications” from clinical staff regarding levels of privileges: Transcript, p.14.

[26] Dr. Murphy went on to provide her sense of the implications of a “proscriptive” (sic) term, such as condition 4 of the accused’s disposition:

> The practicalities of having a patient have for example community escort in the case where the clinical team may not feel that the person is ready for community access would raise some safety concerns for staff because staff would have to do the escorting and so if the person was not safe obviously they would be at some risk. And if – if the person was considered an AWOL risk but we were required to take him out anyway that would be fairly unsettling for the staff: Transcript, p.18

[27] At this stage the panel chair invited counsel to offer clarification of Dr. Murphy's evidence relating to the mandate and authority of the Program and Privileges Committee, and in particular, Dr. Murphy's understanding of those issues in relation to the Review Board's statutory authority, derived from the Criminal Code of Canada. Counsel properly categorized the latter issue as a legal question, to be dealt with in submissions, but her additional comment is nevertheless revealing:

> Because I think that everybody is aware that the Director is the person to whom the Review Board delegates authority, and so it is the Director that is responsible over all for the disposition and the way in which the terms of the disposition are carried out. She carries the full responsibility and not the clinical team. But in terms of the other questions that you have raised, certainly I'd be happy to have Dr. Murphy review now: Transcript, p.20 (underlining added).

[28] The following exchange to provides insight into counsel's and the Director's understandings or belief regarding the interpretation and implementation of orders and conditions imposed by the Review Board:

> **Chairperson**:.. I'm having trouble understanding how it would relate to a specific order that purports to grant a patient rights and liberties which is what I understand the mandate of this tribunal to be under the Criminal Code. So in other words, if a committee was to meet after a disposition hearing and an order which imposes or grants certain liberties, is it the Director's view that the meeting of that committee can then over ride or simply ignore the directions of the – of the disposition order?
> **Ms. Lovett:** Not at all. In the ordinary case the disposition order gives a discretion to the Director, for example, to permit staff-escorted or supervised community outings.
> **Chairperson**: That's a usage that's grown up in this Province. It certainly isn't universal nor is that necessarily the contemplation of the Criminal Code. That's just kind of a -- a usage that's grown up here. That's not to say that the Review Board has to couch its grant of privileges or liberties in – in the form of a discretion, is it? Or am I getting into a legal argument here?
> **Ms. Lovett:** I think that's a legal argument.
> **Chairperson:** Okay.
> **A.** But if I could just say that the dispositions that are on the patient's chart that came from the Review Board are considered by the clinical team before they put anything to the – to the Program and Privilege Committee. There's no exclusion of that. That's just part of the decision-making before anything goes to the committee.
> **Chairperson:** Which leaves me, I guess, with the question that if the committee disagreed on clinical grounds then it could choose to ignore the – the rights granted in law.
> **A.** The orders are generally very broad. The Review Board disposition orders are generally very broad and so nothing that would be decided in the committee would

> over ride what happens in the disposition. It's a given that the disposition is honoured before anything happens: Transcript, P. 21. (underlining added)

[29] Dr. Murphy was subsequently questioned by Mr. Hillaby. In relation to the accused Mr. Hillaby specifically asked and Dr. Murphy responded:

> **Q.** Right. Now in the case of this patient, did you have a role in – personally in the Director decision not to implement term 4 exactly as was set out?
>
> **A.** Only in that the clinical team recommended that this was something the patient wasn't ready for, and then the restriction of liberties had to be submitted: Transcript, p.22; see also Transcript, p.36, line 44

[30] Dr. Murphy's evidence on this critical point appears to contradict the supervising psychiatrist Dr. McKibbin's evidence which was accepted and relied upon by the Review Board at Mr. Gielzecki's first hearing: that the accused could be considered clinically ready to access the community under escort, and that except for his remand status and warrant and certain "administrative influences" would, even before November 24, 2004, have been enjoying such escorted access: Ex.12, pages 19, 20, 21, lines 1-21; p. 29 lines 13-39. I would observe as well, insofar as the issue is central to the Director's thesis herein, that the Review Board was fully aware of Mr. Gielzecki's situation before his first hearing: Ex. 12, P. 6, lines 6-31; see Para. 33 below.

[31] On behalf of the accused, Ms. Nielsen questioned Dr. Murphy further about the process of the Program and Privileges Committee, in particular about the informational basis for its eventual decisions. Dr. Murphy took pains to assert the view, that the committee is a "clinical" process, and not a "legal committee": Transcript, pages 27, 28

Dr. McKibbin

[32] Dr. D. McKibbin is the accused's assigned treating psychiatrist on behalf of Adult Forensic Psychiatric Services (AFPS). He filed an updated clinical report for this hearing entered as Exhibit 15. In that report Dr. McKibbin advised that the current mandatory hearing was triggered because the community access ordered by clause 4 of the accused's November 24, 2004, disposition was "not clinically feasible": Ex.15.

[33] His new evidence is not entirely consistent with the evidence he gave on November 24, 2004, and upon which the Review Board based its disposition and conditions: that but for his legal status and so-called “administrative influences” the accused, from a clinical perspective, could have been considered ready for escorted community access well before November 24, 2004.: Ex.12, pages 19, 20, 21,29; See also Transcript, p.61.

[34] He went on to describe that the impugned clause 4, mandating weekly (escorted) community access was perceived as the Board “micro-managing” clinical issues: Transcript, pages 41, 42; see Pinet#1 at page 349, cited at para. 101 below.

[35] Clinically, Dr McKibbin reported that the accused’s symptoms had since November 24, 2004, continued to decrease in frequency and intensity, to the extent that the accused could now be extended escalating privileges and liberties. Those “escalating” steps were described. We were told that in early January (2005) the treatment team “applied” to the Program and Privileges Committee and Mr. Gielzecki was granted “staff-escorted community outings”. Since then Mr. Gielzecki had exercised three such outings: Transcript, pages 39, 40.

[36] Dr. McKibbin stated that the next step in the escalation of Mr. Gielzecki’s privileges/liberties would be to apply for “Level 4”, which would include unaccompanied leaves into the community for the purpose of attending programs.

[37] Despite Mr. Gielzecki’s clinical improvement over two intervening months, Dr. McKibbin described the accused as still “moderately ill”: Transcript, p.43. He said that in respect of the matter of community access “the risk that he posed at the time of the index offences (sic) is diminished…”. He also said that Mr. Gielzecki had, over the preceding six weeks, been “entirely appropriate in his behaviour” at the hospital: Transcript pages 43, 44.

[38] Regarding the decision to withhold community access and the role and authority of the Program and Policy Committee, Dr. McKibbin stated:

> "… given the process that is in hospital for escalating privileges, it was the consensus that it would be pointless to apply for the level of privileges necessary to put this condition into practice because nobody anticipated that it would have been granted….." (underlining added)

[39] This lead the chair to ask:

> **Chairperson:** So contrary to what we've been hearing the imprimatur of the Program and Policy Committee does in fact precede or supersede the implementation of a legal order?
> **A:** I guess I didn't really interpret it as that at the time. It was more, I guess, clinical advice from colleagues rather than an administrative decision: Transcript, p.56

V. Bhauruth, CMC

[40] The Director's final witness, case manager V. Bhauruth, confirmed that Mr. Gielzecki was not "granted" "Level 3" privileges, such as would contemplate compliance with the Board's November 24 order, until December 15, 2004 – some three weeks after the Board made its order: Transcript, p.68.

[41] He went on to describe the timing and sequence by which the accused was granted increasing privileges, culminating in escorted community access on January 27, 2005 – two months after the Review Board's order granting such liberty: Transcript, p.71.

[42] Perhaps the most revealing aspect of Mr. Bhauruth's evidence, however, was his evidence that, according to the FPH's "Levels of Privileges and Programs", Mr. Gielzecki was actually granted "Level 2" privileges as early as November 3, 2004, three weeks before his first hearing and the rendering of the impugned order.

[43] The Board is of course in a position to take judicial notice of the Director's (policy) scheme of Program and Privilege Levels (attached as Appendix "A"). Under that scheme "Level 2" is described as including the following associated privileges:

> LEVEL 2
>
> ESCORTED:
> - Psycho-social Programs (specify)
> - TLS Programs (specify)
> - Vocational Programs (specify)
> - **SSCO**
>   - **Assessment Outing**
>   - **Small Structured Community Outing**

- **Large Structured Community Outing**
- **Single Escorted Outing**

- Walking Club (inside security fences)
- Fir Hall (1 to 1 escort only)
- Supervised Grounds
- 1 to 1 walks with Staff (inside fence)

(emphasis added)

[44] According to Mr. Bhauruth's evidence then, under this scheme Mr. Gielzecki was already at a level of privileges which, but for his remand status, afforded him the type of community access required under the Review Board's impugned order. Such opportunities could have been extended immediately in compliance with the Board's November 24, 2004 order, but were withheld.

[45] Moreover, the Director then took the additional, and seemingly extraordinary step of a further application to its own Program and Privileges Committee on December 15, 2004, at which the accused was granted "Level 3" privileges, which include:

LEVEL 3

- Unescorted attendance at programs within Hospital
- Full ground Privileges
- Accompanied D/L's with a designated person, family or volunteer
- Fir Hall (unescorted)
- Walking Club (outside security fences)

[46] Once again, despite this rather enhanced level of privileges, the accused was not actually granted even staff supervised community access until after yet another application to the Programs and Privileges Committee on January 12, 2005.

2.2.2 Evidence of the Accused

[47] Mr. Gielzecki's evidence was unremarkable. He confirmed that as of the date of the current hearing, he had been provided with three staff-escorted outings to coffee shops.

[48] He confirmed that once he is provided with the opportunity, he has the financial means to live in the community; and that under such circumstances he would continue to comply with treatment.

[49] He went on to describe the longitudinal course of his illness, including full compliance over 6 – 7 years. He elaborated on his behaviour and thinking leading to the index offence following a period of non-compliance.

[50] He also confirmed his longer term plans to return to Ontario after a year of living in BC.

3.0 ARGUMENTS AND SUBMISSIONS OF THE PARTIES RELATING TO DISPOSITON

[51] No party was seeking any substantive changes in the accused's legal status or disposition. The only issue in dispute was the so called impugned condition at clause 4 of Mr. Gielzecki's disposition: Ex. 11.

3.1 The Director, AFPS

[52] The Director argued for Mr. Gielzecki's ongoing detention and the deletion of the impugned condition. In support of that position counsel submitted:

- That the wording of the impugned condition appears to contemplate the potential or possibility of non-compliance and the current mandatory hearing.
- That the Review Board's motivation to impose the impugned condition was unreasonable and based on Dr. McKibbin's "speculative" evidence that staff-escorted community access might not be granted in the future.
- That the Board's requirement (contained in the impugned condition), that the Director immediately notify the Board if the accused is not provided with supervised outings for a period in excess of 14 days, concludes that a lack

of access as described constitutes significant restriction on the accused liberty and amounts to an “error of law”.

- That the evidence supports a further disposition of detention without the impugned clause.

[53] Counsel for the Director also submitted, in a summary way, the arguments which may eventually be placed before the British Columbia Court of Appeal. These are outlined and addressed separately at 5.0 below.

3.2 The Ministry of Attorney General

[54] On behalf of the Ministry of Attorney General, Mr. Hillaby argued that on the basis of the clinical evidence provided at the hearing by Dr. McKibbin, a further order which includes a degree of delegation to permit integration to continue could be supported.

3.3 The Accused

[55] On the matter of disposition Ms. Nielsen argued:

- That the imposition of the impugned condition was reasonable on the evidence, including evidence that the Review Board was well aware of the implications of the accused’s remand status;
- That the accused’s current disposition, including the impugned condition, out to be maintained and further reviewed by May 15, 2005.

[56] She also briefly responded to the Director’s appeal arguments: see 5.0 below.

4.0 DISPOSITION IN THE CURRENT CASE

4.1 The Statutory Foundations for the Hearing

[57] Section 672.63 of the Code provides that a disposition comes into force on the day that it is made unless the Review Board specifies that it is to take effect on a later

date. The accused's current disposition provides that it is to take effect on November 24, 2004, the date of the accused's first hearing: Ex.11. That disposition also contains a non-prescriptive statement of the Review Board's intention to convene a further disposition review hearing by May 15, 2005. Such a further hearing is, within the wording of S.672.63, considered a hearing under S.672.81, which once again engages the criteria and considerations of S.672.54: S.672.63; S.672.81(1)(2); S.672.83.

[58] The current hearing arises because the Director, for reasons it has sought to articulate in the course of its evidence, did not comply with or implement the Board's disposition of November 24, 2004, specifically clause 4 thereof, (the "impugned condition"):

> 4. THAT the accused shall have staff escorted or otherwise supervised access to the community at least and no less than once per week, provided that if such access is withheld for any period in excess of fourteen (14) days the Director shall immediately give notice to the Review Board, pursuant to s.672.56(2) of the Criminal Code: Ex. 11

[59] Counsel submits that the wording of the impugned condition contemplates the possibility of non-compliance because it specifically references S.672.56(2) of the Code. That subsection requires the Director to provide notice to the Review Board when it has "significantly" increased restrictions on the liberty of the accused pursuant to powers delegated to the Director by the Review Board. Under S.672.81(2)(a), on receipt of such a notice, the Review Board is required to convene what in its parlance has come to be referred to as a "mandatory hearing", to review its disposition.

[60] To the extent that the impugned condition specifically referenced S.672.56(2), it contained an express delegation of discretion to restrict the accused's liberties. The Director restricted the accused's liberty by refusing to comply with the condition. The "Notification of Change of Liberties" (the notice) filed by the Director and dated December 10, 2004, (Ex.13), apparently under protest (Transcript, p.93), was both appropriate and, under the circumstances, expected. Counsel's arguments are circular. The Board's requirement on the Director to file the notice was entirely lawful: see 5.0 below.

[61] The current hearing is a properly constituted mandatory disposition review required by S.672.81(2)(a), *Criminal Code* and resulting from the Director significantly

restricting the liberty of the accused, as ordered by the Review Board: s.672.56 *Criminal Code*.

4.2 Disposition and Conditions

[62] Recognizing that this hearing was occurring very soon after Mr. Gielzecki's first hearing, and in order to avoid the need, so soon, to reintroduce and canvass all of the historic evidence provided at the November 24 hearing, it was suggested that the current hearing have as its primary focus the evidence relative to intervening events and decisions.

[63] Although in law, Mr. Gielzecki is once again entitled to have all of the dispositional alternatives available under S.672.54 duly considered, no party was seriously arguing for a change in legal status after the passage of only 2.5 months or, more to the point, arguing that Mr. Gielzecki no longer posed a significant threat so as to entitle him to an absolute discharge: see generally Winko, supra.

[64] The evidence of November 24, 2004 is clear that the Review Board was well aware of the accused's remand status and the legal constraints in existence prior to its order. The Board was nevertheless entitled, indeed obliged to consider as a historic factor, the length of time that Mr. Gielzecki had been detained under highly restrictive circumstances. Failure to do so would have been to shirk it's mandate. The Board's orders are however prospective not remedial in nature. The Board based it's November 24, 2004 disposition, including the impugned condition, on the explicit expert clinical evidence of Dr. McKibbin.: Para 33 supra.

[65] Not only was the Board's order reasonable and supported by expert evidence at the time, we have, in the current hearing, heard that the accused was in fact considered clinically ready for such liberties as early as November 3, 2004: paras. 42-45, supra.

[66] As to arguments relating to the adequacy or reasonableness of the Board's inquiry, parties are referred to:

> Chalmers (Jan 22/01; Ont. C.A.): "The duty to inquire or gather evidence on the Board only arises where there is an absence of evidence on which to

> arrive at a decision"; and Baker (Apr 10/01; Ont. C.A.): "the Review Board's duty to inquire is satisfied where it can reasonably make the determination required on the evidence provided": at para. 5

[67] The evidence introduced and considered at the accused's first hearing as well as the additional historic evidence presented at the current hearing satisfies the jurisdictional threshold determination of significant threat: Winko (supra). Our jurisdiction over Mr. Gielzecki remains justified.

[68] A fair consideration of the evidence supports a conclusion that the least onerous and least restrictive disposition remains one of detention under S.672.54(c) C.C.

[69] As to the prudently appropriate and least onerous conditions, I am in agreement with my colleague Dr. Parfitt that, inter alia, Mr. Gielzecki's disposition ought to retain those conditions which, in the Director's discretion, contemplate appropriate opportunities for unescorted community access, including overnight visit leaves, aimed at promoting the accused's reintegration into society. In this respect we specifically differ with panel member Landerkin, dissenting as to the conditions he would impose.

[70] I agree with my colleague Dr. Parfitt that it would be appropriate to reconsider the current order on or before the anniversary date of the current disposition, November 24, 2005, subject of course to an earlier hearing convened on the application or request of parties in accordance with the relevant provisions of the Code.

[71] I dissent from both of my colleagues with respect to the matter of the deletion of the impugned condition which has given rise to this hearing. I would retain a form of the impugned condition, albeit without (either explicit or implicit) delegation of authority to the Director, to withhold the benefit of regular escorted access to the community. I would accordingly order a revised or amended clause 4 to read as follows:

> 4. That the accused shall be provided with staff or otherwise supervised or escorted access to the community no less than once per week, and any delegation to the Director of authority or discretion to restrict such access to the community, as may be permitted under S.672.56(1) of the Criminal Code, is hereby specifically withheld.

5.0 SUBMISSIONS RELATING TO AN APPEAL OF THE BOARD'S NOVEMBER 24, 2004 ORDER

[72] Given the Director's decision to file the Notice of Restriction of Liberty, (albeit under protest: para. 52 above), the filing of its Notice of Appeal (December 29, 2004), is, at first glance, puzzling. Nonetheless we appreciate counsel's willingness to articulate her arguments on the appeal. She submits:

(i) That the Review Board, in making an "admittedly unusual and apparently unprecedented prescriptive condition" (Transcript, p.89), erroneously or unreasonably based its decision on Mr. Gielzecki's lack of privileges while he was in fact on remand status. This amounts to an "error of law in (sic) jurisdiction", and was done on the basis of insufficient medical evidence: Transcript, p.93.

(ii) That the Review Board "abdicated its inquisitorial responsibility" when it based its disposition on "a presumption that there exists within the hospital structure … some kind of decision-making process whose criteria remain unknown". She goes on to describe that body as "an internally established clinical body … established at the discretion of the Director" which ultimately is "a safeguard for ensuring that the level of privileges are appropriate…" She suggests that in taking these steps the Director is acting in accordance "with proper legal principles": Transcript, p.91.

(iii) That the Director as a person who has "statute based authority" should be presumed to be exercising that authority regularly rather than arbitrarily.

(iv) That based on the BCCA's decision in Mazzei, the Board cannot, in any event, bind the Director, i.e., require the Director to provide the accused with weekly community access. Counsel at this point raises the apparently essential issue in dispute in the present case: The Director's belief that the Review Board cannot impose any condition with respect to an accused's rights or liberties unless that condition is first couched in, and imparts to, the Director a corresponding (and overriding) clinical discretion to decide

whether or not the right or liberty can be safely exercised at any particular point in time; that to do otherwise is to ignore safety or other clinical considerations. Such an order, it is argued, is therefore outside of the Board's jurisdiction.

In sum she argues (without any reference to S672.56 C.C.), that every order or condition imposed by the Board must include or be taken to include the qualification that the Director must be satisfied that the right or liberty is appropriate "depending on his medical conditional (sic) and having regard to the risk the accused then poses to himself or others". She concludes that in imposing the impugned condition the "Board has overstepped its management and assessment role and transgressed into an area within the 'commission's' mandate". That position is re-affirmed in counsel's closing remarks at p.102 of the transcript and her further written submission dated February 22, 2005.

[73] On behalf of the accused Ms. Nielsen responded that: the Review Board's jurisdiction to make the impugned condition is supported by the Tulikorpi decision of the Supreme Court of Canada, including the making of an order which specifies the detainee's access to the community, the reasons therefore and the level of supervision if any: Tulikorpi, paras. 24,32, cited at para. 95 below.

[74] As indicated at paragraph 7 above, a brief response from the tribunal is in the circumstance justified.

5.1 The Tribunal's Response

5.1.1 A Brief History of the Current Scheme under Part XX.1 C.C.

[75] Before promulgation of the current "not criminally responsible" scheme for dealing with mentally disordered accused persons, such individuals were dealt with under the insanity defence process. They were termed insanity acquittees. Such persons were then,

at least initially, detained according to the pleasure of the lieutenant governor of the province: R.S.C.1970, c.34, s.542. They were in some jurisdictions, subject to periodic review by voluntarily established, non-authoritative review boards which made recommendations to the provincial lieutenant governor: R.S.C.1970, s.547.

[76] In 1991, the scheme was challenged under the Charter of Rights in the Supreme Court of Canada, in the watershed case of R. v Swain, [1991] 1 S.C.R.933.

[77] The Supreme Court determined that aspects of the trial process relating to the introduction of evidence of insanity violated the accused's right to control the conduct of his or her defence contrary to s.7 of the Charter.

[78] More importantly for current purposes, the Supreme Court further determined that the process of automatically detaining insanity acquittees without hearing violated the fundamental justice principles of s.7, as well as the protection against arbitrary detention or imprisonment in s.9 of the Charter. Parliament was given a period of 6 months to rectify the impugned processes.

[79] In the course of its decision, the Court provided important insights into the purposes of the previous legal scheme which remain relevant under the current regime.

[80] It indicated that the dominant characteristic(s) of the then existing scheme were neither punishment nor treatment, but rather the protection of society from dangerous persons whose conduct has breached the Criminal Code: "while treatment may be incidentally involved... it is not the dominant objective"….: Swain, supra, par.93. The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. That objective is to be achieved by treatment in a hospital rather than in a prison environment: Swain, par.108, quoting Rebic, (1986) 28 C.C.C. (3d)154, at p.171.

[81] The Court distinguishes between the "objectives of prevention and protection" and the means by which those objectives are achieved:

> "While treatment or cure of the individual may be incidentally achieved, this consideration is secondary and simply a means to achieving the ends of protection and prevention": Swain, par.107.

[82] Parenthetically, although it is agreed that treatment per se is generally a provincial power, Parliament can respond to conduct prescribed by the Criminal Code in a manner which is sensitive to rehabilitation concerns without losing legislative competence: Swain, paras. 96, 115. In other words, although the provisions do not contemplate a traditional punishment model, nevertheless, federal criminal legislation may legitimately speak to matters of prevention and protection and even rehabilitation or treatment: Swain, supra, par. 96.

[83] In summary, Swain holds that Parliament's overriding responsibility for individual rights allows it to respond to criminal conduct and to legislate with respect to the process for managing an accused's progress and rehabilitation within a context which balances public protection and individual rights. In that sense Swain supports the notion that no aspect of an accused's progress, including his treatment, is beyond the scrutiny of the criminal justice system now embodied by the Review Board.

[84] In the final analysis it is beyond debate that Charter interests and requirements are engaged not only during the trial but throughout the post-NCR committal treatment process.

5.1.2 The Current Framework: PART XX.1, C.C.

[85] Parliament's response to the shortcomings of the previous scheme was to mandate the establishment of expert, authoritative Tribunals in every province and territory, with exclusive jurisdiction over NCR persons, applying the process and procedures contained in PART XX.1 of the Code, (C.C.C., S.C., 1991, c43).

[86] In its modern iteration the scheme remains true to, and consistent with, the objectives outlined in Swain above. In 1993 the BCCA adopted Swain's statement of the scheme's underlying objective:

> "The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. The objective is to be achieved by treatment of the patient in a hospital, rather than in a prison environment": Davidson v. BC (AG) (1993) 87 C.C.C. 3D, 269, Per Goldie J.A.; See also Winko v. BC (FPI), [1999] 2 S.C. 625, per McLachlin SCJ, at par.39

[87] In the leading decision of Winko (supra) the SCC once again not only reiterated, but indeed refined, the goals of PART XX.1:

> "The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately": par.21

[88] Throughout the process the NCR accused is to be afforded the utmost liberty compatible with his or her situation … compatible with PART XX.1's goals of public protection and fairness to the NCR accused: Winko, supra, paras. 21, 43.

5.1.3 Decision-Making Under PART XX.1, C.C.

[89] Section 672.54 of PART XX.1 reads:

> 672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.54(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous least restrictive to the accused:
>
> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (b) by order, direct that the accused be discharged subject to conditions as the court or Review Board considers appropriate; or
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate. (1991, c.43,s4.)

[90] This all-important section establishes the framework for what Winko calls the assessment and treatment model for dealing with Mentally Disordered Offenders (M.D.O.), and for achieving the objectives of the legislative scheme: Winko, supra, par.44. It articulates the sole, relevant criteria and considerations which Parliament, in response to Swain, has determined must inform and govern every decision of the Review Board: Winko, supra, par.59.

[91] The nature of the process of inquiry required to apply, implement and satisfy S.672.54, is also described in painstaking detail in Winko (supra).

5.1.4 The Least Onerous & Least Restrictive Disposition &The Appropriate Conditions

[92] In addition to outlining the evidentiary or informational criteria imposed on the Review Board, Section 672.54, consistent with the objectives above, (Winko, paras. 42, 43), further admonishes the Tribunal to impose the disposition which is the "least onerous and least restrictive to the accused". This mandatory requirement stands unelaborated and unqualified by any reference to the clinical opinion or discretion of the "Director", the statutory party "in charge of the hospital where the accused is detained": S.672.1 C.C.

[93] The product of its hearing process is the Board's order; it, not the "Director", crafts the disposition which is least onerous and least restrictive to the accused: Peckham, (1994) 19 O.R. (3d) 766.

[94] In crafting its disposition, the Board shall, unless the accused is absolutely discharged, impose, within its remaining available alternatives, "such conditions as the Court or Review Board considers appropriate": S.672.54(b), (c). On the plain language of the section, the Board's authority is not qualified or restricted to imposing conditions which accord with clinical opinion, or which are considered "appropriate" in the discretion of, the Director.

[95] The recent Supreme Court of Canada decision in Tulikorpi, [2004] S.C.C.20, settles definitively a debate that has flourished in jurisdictions other than BC:

> "that Parliament intended the Review Board to consider at every step of s.672.54 'the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused', and there is no textual or contextual reason to isolate the governing requirement of s.672.54('the least onerous and least restrictive') from the preceding list and hold that it alone does not apply to the formulation of conditions that constitute part of the decision or disposition order":

Tulikorpi, par.45; See also Winko, supra, at paras.148(9) and 165, approving Johnson, supra, at par.50

[96] As to the types of conditions that the Review Board may order, Tulikorpi goes on to clarify that what the Board may impose has inevitable impacts on an accused's liberty interests. Therefore the determination of what is "appropriate" is ultimately within the unfettered discretion of the Review Board:

> "Apart from hospital selection, there are other conditions routinely considered by Review Boards that also affect the liberty interest having regard to "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused". The disposition order may specify that the detainee is (or is not) to have access to the grounds of the hospital, or to the community within a defined radius (including a weekend or overnight pass), and, if so, the level of accompanying supervision, if any. The Review Board may specify the purposes for which community access is authorized (such as medical or dental treatment, education, employment, recreation, or social activities). Equally, the conditions may place particular restrictions on a detainee's liberty. In a conditional discharge under s.672.54(b) for example, such restrictions may include a prohibition against consuming alcohol or drugs, using or possessing firearms, associating with particular persons or classes of persons, and reporting requirements.": Tulikorpi, supra, par.32 (Underlining added)

5.1.5 The Legal/Clincial Interface: Detailed Conditions vs. Delegated Discretion

[97] Although it is not conceded by the Director in the case before us, the foregoing discussion, and in particular, the unequivocal language of Tulikorpi (supra) would appear to resolve any doubt as to the Board's authority to impose conditions, especially those which bear "serious ramifications" or a "vital impact on the liberty interests of the detainee": Tulikorpi, supra, paras.24, 31

[98] The Director, however, argues that, despite Tulikorpi, conditions imposed in a disposition must be interpreted according to its clinical context, including even workload management considerations: Transcript, p.14, line 8.

[99] The exchange captioned at paragraph 28 above, as well as the overall tenor of the Director's evidence, reflects a belief that is central to the current hearing: That with no reference to, or consideration of the Board's discretion to delegate or withhold authority in relation to an accused's liberties, Counsel and the Director believe that every order or

condition imposed by the Review Board is in fact couched, in terms of its ultimate implementation, in the discretion of the Director, whether or not the Board chooses to delegate such discretion using its powers under S.672.56(1)C.C..

[100] The Director takes the position therefore, that despite the plain language of S.672.56, which authorizes the Review Board to delegate discretion, and the conditions for its exercise, to the Director, each and every order and condition will in practice be interpreted in a manner which implies that such a delegation has in fact been conferred. In other words, any liberties, which the Review Board, in the exercise of its statutory power, awards to an accused will, in every instance, be read down and implemented within a framework of, and subject to, clinical judgment. A number of appellate decisions cast doubt on this assertion.

[101] Obviously the governing legal regime must attempt to import into its implementation/application a degree of flexibility which comports with the waning and waxing nature of mental illness. As early as the first Pinet decision (Pinet v Ont.[1995] 100 CCC (3d) [“Pinet #1”]) (which was eventually overturned by the Supreme Court of Canada in the companion case to Tulikorpi (Pinet v. St.Thomas Psychiatric Hosptial, [2004] S.C.C.21, [“Pinet #2”]), courts have been called upon to consider the tension or potential conflict between traditional treatment providers and those now charged with protecting their liberties; one which inevitably arises in balancing Charter- protected rights against appropriate clinical judgement, within a judicial or quasi-judicial framework.

[102] The Ontario Court of Appeal tried to ameliorate the tension, indicating that, without fettering its discretion:

> “The board is not required by s.672.54 (b) and (c) to impose detailed custodial conditions. Indeed, it would likely be appropriate in most situations to leave details of detention up to the professional care-givers. However, the board would not be acting outside its jurisdiction in imposing detailed conditions, or in naming a specific institution in which the accused should be detained, as it did in this case”: Pinet #1, p.349 (underlining added).

[103] Pinet #1 was applied by the Review Board to specifically override the Director’s (then) Security Committee in the Harvey decision. Not only does Pinet #1 not preclude the Review Board from imposing specific conditions, it may indeed be the Board’s duty in

certain situations to override a “clinical” decision of the Director: Harvey, BCRB, April 1996. One circumstance where the Board may be compelled to encroach on the responsibilities generally left to caregivers is in the area of restrictions on the rights of an accused.

[104] The BCCA spoke eloquently to the issue in Johnson, (BCCA #020369, Oct 31/95), wherein the Director appealed an accused’s conditional discharge, without a condition delegating authority to the director to control or restrict the accused’s access to the community. I would observe that in that case the Director raised no argument to the effect that the Review Board cannot impose a decision or disposition absent a delegation of discretion to the Director:

> “The Review Board is charged with the responsibility of crafting conditions which are relevant to the special and differing needs of each accused person. The principal objective of these conditions is to achieve the maximum protection of the public safety with a minimum degree of interference with the accused’s liberty, and not simply to enhance the accused’s treatment…”:Johnson, par.50 (emphasis added); WINKO, paras. 165.

[105] Ultimately, section 672.56 C.C. permits, it does not require, the Board to delegate authority and discretion to the Director:

> 672.56(1) – A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b) or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.
>
> (2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall
>
> (a) make a record of the increased restrictions on the file of the accused; and
>
> (b) give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board.

[106] Clearly the decision to delegate the authority to increase or decrease restrictions on the “liberty of the accused” is within the sole discretion of the Review Board and part of its power to craft conditions it “considers appropriate” under. s.672.54 C.C.

[107] The purpose of this all-important delegation provision is precisely to provide to the Review Board with a tool or mechanism to manage or mitigate the rights versus

treatment dichotomy identified above, albeit without injury to, or derogation from, the former:

> 51. "…Parliament recognized that the formal Review Board procedure may not be adequate to respond to changing circumstances in all cases. Indeed, there will be situations where the volatile nature of an accused's mental disorder leads to a sudden increased risk to public safety, or where the Review Board's conditions prove unworkable due to circumstances in the community which either could not have been foreseen or have changed since the order was made. In other cases, the progress of treatment may be such that liberty restrictions can safely be reduced without engaging the full formality of the hearing process.
>
> 52. Thus, in many cases, it will be appropriate to give the Director a discretion to increase restrictions on the liberty of an accused person in the event it becomes apparent that such a change in status is required to protect the safety of the public. At the same time, and again in keeping with the scheme of Part XX.1 generally, the Director may be given a discretion to lower any restrictions placed upon the accused's liberty by the Review Board.
>
> 53. The discretion which may be delegated to the Director under s.672.56 is an important vehicle through which the Review Board can achieve its mandated purpose. It was not intended to, and must not, be used as a means by which the Director can circumvent a conditional discharge order and keep an accused detained in hospital as though a custody order had been made under s.672.54(c). Nor must it be used as a means by which the Review Board can delegate to the Director its paramount responsibility for ensuring that a proper balance is maintained between the liberty interests of an accused and the safety interests of the public." (The latter of course being recognized as the sole province of the Review Board): Johnson, supra at paras.51-54 (underlining added).

[108] The BCCA in Johnson (supra) went on to discuss the issue which is being asserted in Mr. Gielzecki's case: that whether or not the Board specifically couches its conditions in the delegation language of S.672.56 C.C., the Director nonetheless has a "residual" or implied discretion: Johnson, par.57. The Court responds resoundingly:

> "Whatever may have been the extent of the Director's discretion to alter the accused's liberty restrictions prior to the 1991 amendments, I am of the view that such discretion is now confined to that which must be explicitly delegated by the Review Board pursuant to s.672.56": Johnson, par.58 (underlining added)

[109] Finally, the matter has been definitively determined by the Supreme Court of Canada in Tulikorpi, (supra). In that case, the clinical flexibility argument in aid of proper treatment was, once more, raised: paras.57, 68. These concerns were not shared by the Crown's own expert witnesses nor by the Court when it asserted that, although the Board's delegation of S.672.56 authority should be considerate of public safety and treatment, the delegation can in fact be exercised/managed in a manner which need not compromise treatment goals: paras.68,69.

[110] Furthermore the discretion or authority which may be delegated to the Director is in itself not unfettered or unrestricted. It is to be exercised “within any limits and subject to any conditions” set out in the disposition (and such limits or conditions are deemed to be part of the disposition).

[111] Section 672.56 communicates the dominant priority accorded to an accused’s liberty interests by providing a further safeguard in subsection (2), when there is a significant increase in restrictions:

> “It is because the primary responsibility for maintaining that balance lies with the Review Board that the delegation to the Director of the discretion to vary the liberty restrictions of an accused is coupled with the proviso that, where the exercise of the discretion results in a significant increase in restrictions on the liberty of the accused for a period longer than seven days, notice shall be given to the Review Board which is then required, under s.672.81(2)(a), to hold a review hearing as soon as is practicable.”: Johnson, supra, par.54

[112] I acknowledged that, in BC at least, practice has evolved which generally, or for the most part, imports the language of discretionary authority into the Review Board’s disposition conditions (which conditions are themselves, the “disposition”); some routine examples are provided:

> THAT, at the Director’s discretion, he may have unescorted or unsupervised access to the community depending on his mental condition, having regard to the risk the accused then poses to himself or others;
>
> THAT, at the Directors discretion, he may have overnight stays in the community for a period not exceeding twenty-eight (28) days for the purpose of assisting in his reintegration into society;
>
> THAT, at the Director’s discretion, he may have overnight stays in the community for a period not exceeding sixty (60) days for the purpose of assisting in his reintegration into society;
>
> THAT the Director may monitor his compliance with this order by testing for the use of alcohol, hallucinogens or unprescribed drugs where there are reasonable grounds to suspect that condition 6 or 7 of this order has been violated and the accused shall submit to such testing upon the demand of the Director;

[113] Such practice or custom is at best non-obligatory usage. It in no way operates to restrict or fetter the statutory authorities which Parliament has decided are to be exercised by the Review Board. Aspects of these authorities can be specifically delegated in terms of

their implementation. Such delegation can never be implied: see Winko, supra at para. 123, per Gonthier, S.C.J.; Johnson, supra, para. 58.

[114] A contrary interpretation would, in effect, empower the Director, in the exercise of its clinical discretion, to potentially countermand each and every order of the Review Board, including not only the conditions of the disposition but, to the extent that the conditions are an inextricable part its fabric, the disposition itself. Thus a Director could refuse to discharge a detained accused given a disposition under S.672.54(b); to supervise an accused directed to attend and report at a specific frequency; to return/re-admit an accused to hospital on the occurrence of specific events or under certain conditions.

[115] Such implicit residual authority would not only undermine the liberty interests at stake and which underlie the entire scheme, (to which treatment has been deemed secondary or incidental: Swain; Johnson), but would entirely neutralize the Board's responsibilities, through its orders, to protect the public from dangerous behaviour.

5.1.6 The Nature and Role of the Program and Privileges Committee

[116] BC's Forensic Psychiatric Hospital is operated under the Forensic Psychiatry Act, as an agency of the government of BC (R.S.B.C. 1996 ch.156 s.6). It is part of the public service of the Province. Obviously the "Director", or such other person "in charge of the hospital where the accused is detained…" and who is therefore a statutory "party" to Review Board proceedings (S.672.1 C.C.), has the authority to manage, organize, administer, and deploy the array of clinical programs, as well as the human and fiscal resources under, and in pursuance of, the agency's mandate.

[117] On the other hand, the preceding analysis (above) concludes that it is the Review Board, as Parliament's statutorily delegated vehicle for managing mentally disordered accused, which is authorized to determine the conditions under which an accused will be detained or otherwise restricted or supervised. In the exercise of that authority, the Review

Board has the unfettered discretion to delegate to the Director aspects of its authorities relating to a mentally disordered accused's liberties under S.672.56, or to decline to do so: Paras. 106 - 113 above.

[118] In its evidence in the current case, the Director variously describes its Program and Privileges Committee in terms which encompass both a clinical as well as an administrative and even a resource management role. At several points the director's evidence emphasises that the Program and Privileges Committee is not a legal process: Paras. 25, 31, supra.

[119] The evidence, however, clearly indicates that, operationally, a patient's treatment team is expected to bring its recommendations regarding community access (for example), or privilege and program levels, to the committee for its approval.

[120] Dr. McKibbin acknowledged that despite anything ordered by the Tribunal following its risk assessment, as conducted in the context of a statutory, quasi-judicial hearing, a Review Board order is, under current AFPS practice, routinely subjected to, and overridden by, a non-legal, administrative or organizational entity, which is part of the hospital's management structure, and which has no recognition or status in law: Transcript, p.49.

[121] His evidence leads to the inescapable conclusion that, under current FPS practice, the "Program and Privileges Committee", however its purpose and process are described, is considered, by the Director, to take precedence/priority over a lawful order made by the Review Board pursuant to the *Criminal Code of Canada*.

[122] Mr. Bhauruth's evidence further supports that conclusion. It also gives rise to the concern that the Director's internally established and mandated committee process, by which articulated levels of privileges and liberties are extended, actually operates with significant latitude or even arbitrariness.

[123] In those cases where the Review Board has explicitly delegated discretionary authorities to the Director, under s.672.56, the Director is of course at liberty, in keeping with its clinical and resource management responsibilities, to further sub-delegate its discretion to an accused person's direct "treatment team" or indeed, even to an organizationally-created entity such as the Program and Privileges Committee. In law these individuals or entities are indivisible from the 'Director' as the statutory party to Review Board proceedings.

[124] It is, however, in those, admittedly rare, but certainly not unprecedented, situations where no discretion under S.672.56 is explicitly delegated by the Board, that the authoritative and overriding role of the Program and Privilege Committee becomes legally problematic.

[125] To interpose an authoritative layer of decision-making, clinical or otherwise, after an accused has been granted unconditional liberties by the Review Board under the Criminal Code, revives the twin spectres of arbitrariness and denial of due process, which were considered fatal flaws of the predecessor regime. Dr. Murphy's characterization that the Program and Privilege Committee is not a legal process notwithstanding, to the extent that the process affects the exercise or implementation of legally granted, Charter-valued, liberties, it most decidedly becomes a legal event. In such circumstances, the process has the potential to undermine and indeed, to indirectly return the entire scheme of Part XX.1 C.C. to the pre-Swain era.

[126] Simply put, subjecting the accused's liberties to another layer of authoritative decision-making or, indeed, to any process (other than appeal to the BCCA or further reconsideration by the Review Board), which has the effect of restricting an accused's duly granted, non-discretionary liberties, offends the Criminal Code, likely violates Section 7 and Section 9 of the Charter of Rights, and may well be plainly illegal. It is simply not a satisfactory alternative to the old system. It's operation/utilization certainly does not comport with proper legal principles in the circumstances.

[127] Neither clinical nor resource rationales can legitimize what is an essentially administrative procedure of the hospital; one which defacto operates in a manner that avoids fundamental justice principles: Orru v. Penetanguishene Mental Health Centre,[2004] O.J. No.5203, paras.22, 23; See also Swain; Winko.

[128] In defending the Program and Privileges Committee, the Director has also argued that it should be presumed to be exercising its authority regularly rather than arbitrarily. The presumption of regularity (omina praesumuntur rite et solemniter esse acta donec probetur in contrarium) provides that where acts are of an official nature, it is a presumption of law that they are correctly and solemnly done unless the opposite is proven: See Lethbridge (City) v. Daisley, 2000 ABCA 79 and Irivine v. Canada (Restrictive Trade Practices Commission) [1987] 1 S.C.R. 181.

[129] Assuming for the purposes of this decision, that the Director has validly delegated her authority to the Committee (although no evidence of that delegation, nor of any supervisory role maintained by the Director over the Committee, was adduced before the Board), in my view the presumption of regularity does not and cannot assist the Director in determining the legal issue at the heart of this matter. Neither the Director nor her delegate, can override an order of the Board where the Board has not explicitly delegated discretion to the Director: see paras 105, 106, 108 Supra.

5.1.7 The Mazzei Decision And Its Impact

[130] Finally the Director argues that the impugned order indirectly purports to order or bind the Director and thus contravenes Mazzei v. BC (AFPS), [2004] BCCA 237, par.91.

[131] With respect, I disagree that the impugned order/clause has a negative bearing on any aspect of the Director's mandate to provide for M.D.O's, within the requirements and expectations of the *Criminal Code*. That clause is, in fact, in the purest possible sense, directed at achieving the very essence of the Review Board's duty: to undertake the difficult exercise of prudently balancing potentially competing considerations and then to extend to the accused those liberties which are compatible with public safety: Winko,

par.71. A public agency mandated to provide services to NCR accused must be taken to have the capacity to implement such an order to make the system work: Orru, supra, paras. 22, 23; See also Beauchamp v. Pentanguishene Mental Health Centre, [1999] 138 C.C.C.(3d) 172(Ont. C.A.) at paras. 31-39, 41.

[132] I would also acknowledge that Mazzei(supra) which is currently under appeal to the Supreme Court of Canada (leave to appeal granted), has in any event already been "read down" by the Manitoba Court of Appeal in R. v. Wiebe, [2004] MBCA 109. That decision clearly restricts the application of Mazzei to matters of purely medical treatment, and in fact reinforces the Board's mandate and authority to further the liberty interests of the accused: Wiebe, supra, paras.32, 33.

5.2 CONCLUSIONS REGARDING THE DIRECTOR AFPS' SUBMISSIONS UNDERLYING THE APPEAL

1. The considerations and authorities contained in s.672.54 of the *Criminal Code*, including the crafting of "appropriate" conditions, are imposed upon within the sole discretion of the Review Board; they are not qualified or restricted by a secondary process or screen of clinical judgement.

2. The requirement in s.672.54 to impose the least onerous and least restrictive disposition (and conditions), is imposed upon the Review Board as the sole arbiter of an accused's liberty interests; the determination is solely that of the Review Board.

3. On the plain language of s.672.56 of the *Criminal Code*, the decision to delegate discretion regarding implementation of disposition conditions to the Director, or to decline to do so, is a matter within the sole determination of the Review Board. Such a delegation of discretion, including conditions relating to the exercise of same must be explicit; it can never be implied.

4. Absent an express/explicit delegation of discretion to the Director, the rights or liberties granted to an accused in a disposition of the Review Board cannot be restricted by an entity such as the Programs and Privileges Committee.

5. To the extent that the impugned condition in the current case relates entirely to an accused's liberty interests it is entirely within the jurisdiction of the Review Board. The Mazzei decision has no application.

Bernd Walter, Chairperson

6.0 REASONS FOR DISPOSITION OF DR. H. PARFITT

[133] The hearing held on February 15th, 2005 was triggered by the Director's notice dated December 10th, 2004 that it had not complied with condition #4 of the Review Board Disposition issued on November 24th, 2004. The condition reads as follows:

> "That the accused shall have staff escorted or otherwise supervised access to the community at least and no less than once per week, provided that if such access is withheld for any period in excess of fourteen(14) days the Director shall immediately give notice to the Review Board, pursuant to s.672.56(2) of the Criminal Code;"

[134] In the November 24th Reasons for Disposition the Board expressed itself as "alarmed and indignant at the inordinate length of time that the accused has been maintained at a high and in our view unjustified level of security and restriction of his liberties". As a result the Board saw fit to add what it referred to as "an unusually prescriptive direction" in the form of the condition cited above.

[135] The accused has a long history of psychiatric disorder with an established diagnosis of paranoid schizophrenia since 1991. He has only partially complied with treatment (for example he has refused to go beyond arbitrary dosage limits and has refused to consider alternative drugs) and has failed to achieve complete remission as evidenced by his ongoing auditory hallucinations, isolated lifestyle and lack of participation in the workforce. There was an episode in 1995 when he waved a knife at a US Immigration Officer. Charges were laid but later dropped or stayed (he was hospitalized at the Vancouver Hospital). He stopped his medication altogether in May 2003 and by August 2003 had set off across the country. He left a note to the effect that he had been persecuted and tortured by the government since 1991. He had also purchased a Compound Bow and arrows "commonly used by big game hunters when hunting large game like deer, elk and moose" (Tab 1). He later acknowledged that he had purchased this weapon for purposes of self defence.

[136] The index offence was extremely serious and certainly life threatening. It was inflicted on an individual who had stopped to offer assistance to the accused, who had rolled his car. It was completely unprovoked and arose from the accused's delusional frame of mind. Shortly after admission to FPH there were two episodes of violent confrontation with staff (October 10 and October 18, 2003) both driven by the accused's delusional beliefs. The accused settled gradually over the subsequent year in hospital but was only partially compliant with treatment and remained to some extent symptomatic with

persistent auditory hallucinations. He continued to believe that his actions at the time of the index offence were justified.

[137] As a result of his remand status the accused's privileges were very restricted until the NCRMD verdict came down on October 20th, 2004. His remand status during this period must have been known to the Board that met on November 24th, 2004. At the hearing on February 15th, 2005 it became apparent that the process of applying for increased privileges was already underway when the Board met on November 24th, 2004, just five weeks after the NCRMD verdict. This evidence was not presented at the November 24th hearing but perhaps should have been inquired into by the Board, given its concern over what it perceived to be unreasonable restriction of liberties.

[138] The treatment team, in consultation with colleagues, including the Chair of the Privileges and Program (P and P) committee, Dr. Mark Riley, chose not to follow the direction in Condition #4 to the letter but did follow up its earlier applications to the P and P committee (prior to the November 24th hearing) with a request for Level 3 privileges on December 15th and a specific request for Staff Supported Community Outings (SSCO) on January 12th. Both requests were approved by the P and P committee. The accused had had three escorted outings by February 15th (January 20th, January 27th and February 10th).

[139] Dr. McKibbin, in his evidence at the February 15th hearing, indicated that he felt that it was unwise to proceed directly to escorted outings without first testing the accused by extending his privileges within the hospital. There was concern that staff might be put at risk. Furthermore, he understood that the P and P committee would be unlikely to approve such a request because of these same concerns.

[140] As noted, the accused was enjoying community access almost at weekly intervals by February 15th. There are numerous constraints on the regularity of such access including staff availability and the number of individuals considered suitable for such access at any given time. Requiring that this particular accused receive weekly access may put his fellow accused at a disadvantage. Given the usual uneven course of psychiatric illness and the continued manifestation of illness symptoms in this individual, it is desirable that the clinical team be given leeway with respect to community access and other privileges. I see no evidence to support the assumption that the treatment team has

shown excessive reluctance to move this particular accused through the system to the extent that proscriptive directions are needed.

[141] Chair Walter has made the case that the Board has the authority to make conditions such as condition #4 of the November 24th, 2004 disposition. The question is whether such a condition was needed in the circumstances and whether it is still needed, given the evidence presented to the February 14th, 2005 hearing. I would answer both questions in the negative. It seems to me that when the Director believes that the implementation of a disposition condition puts the accused or other persons at unreasonable risk of harm then he/she has a duty to withhold such implementation and trigger a hearing, as occurred in this case.

[142] In light of the foregoing I would make a disposition of custody with the same conditions as those laid out in the November 24th disposition except that condition #4 should be omitted. I agree that it should be reviewable on the anniversary of the November 24th, 2004 order.

Dr. H. Parfitt

7.0 REASONS FOR DISPOSITION OF H. LANDERKIN, Q.C., (DISSENTING AS TO CONDITIONS HE WOULD IMPOSE)

[143] On the 20th of October, 2004, The Honourable Judge R.A. Gould of the British Columbia Provincial Court, found the accused, Wade Elliot Darwin Gielzecki, guilty of aggravated assault, an included but lesser offence to the original charge of attempted murder, but not criminally responsible by reason of mental disorder (NCRMD). He detained the Accused in custody, ordered that he be transported to the Forensic Psychiatric Hospital (FPH) in Port Coquitlam and that a mandatory hearing by the British Columbia Review Board be held within 45 days.

[144] The Review Board convened its first hearing there on the 24th of November, 2004, with Mr. Bernd Walter as Chair, and Dr. Gwen Laws, Psychiatrist, and Mr. Neville Avison as members. After hearing from the Director, Adult Psychiatric Services, and the treatment team, as well as Crown, the Accused, and counsel, the Board made an order detaining the accused in custody, with the accused to continue to reside at the Forensic Psychiatric Hospital.

[145] Their order also provided for ancillary terms, three of which were in issue here, and of which clause #4 spawned the second hearing of this Review Board on February 15th, 2005, namely:

> (3) That, at the Director's discretion, he (the Accused) may have unescorted or unsupervised access to the community depending on his mental condition, having regard to the risk the accused then poses to himself or others;
>
> (4) That the accused shall have staff escorted or otherwise supervised access to the community at least no less than once a week, provided that if such access is withheld for any period in excess of fourteen (14) days the Director shall immediately give notice to the Review Board, pursuant to s. 672.56(2) of the Criminal Code;
>
> (6) That, at the Director's discretion, he may have overnight stays in the community for a period not exceeding twenty-eight (28) days for the purpose of assisting in his reintegration into society.

[146] The Director has filed an appeal from this order, which appeal will take some six months minimum to be heard on an expedited basis, once the factums of the Appellant Director are filed and the Court grants an expedited appeal. No stay is extant.

[147] This second Review Board hearing is a mandatory one, convened pursuant to s. 672.81(2)(a) of the Criminal Code. Counsel appeared for the Director, the Crown, and the Accused and all agreed that this second hearing was in the nature of a de novo hearing with all potential dispositions available to the members: with Mr. Bernd Walter, Chair, Dr. Hugh Parfitt, psychiatrist, and Judge Hugh Landerkin QC, members. This Board heard from the Director, Dr. Emilene Murphy, Psychiatrist, Dr. Doug McKibbin, attending psychiatrist, FPH. Vince Bhauruth, RN, case manager, FPH, and W.E.D. Gielzecki, the Accused.

[148] All parties agreed through counsel that the Accused ought to be detained in custody for a further term. Three issues were before this Board. First, should the Board continue the mandatory access order, with the Board's jurisdiction to do so acknowledged by the Director? Second, what term of the order should exist, to the original return date of May 15th, six months from today's date or some other date as set by the Board? Third, should clauses #3 and #6 of the original order, providing for a discretion in the Director to permit unsupervised community access and overnight stays in the community of up to 28 days, presumably without supervision, be continued?

[149] The Board is divided, and these reasons reflect the judgment of Judge Hugh Landerkin QC, member.

[150] Inherent in the views of counsel is the necessary finding that the accused remains dangerous, and that therefore there remains a significant threat to the safety of the public, the test set out in the leading case of *Winko v. British Columbia (Forensic Psychiatric institute)* [1999] 2 S.C.R. 625. Further, the order made must be the least onerous and least restrictive to the NCRMD Accused taking into account:

- The need to protect the public from dangerous persons
- The mental condition of the NCRMD accused
- The re-integration of the NCRMD accused into society
- The other needs of the NCRMD accused

[151] Put another way, any order made must be the least onerous and least restrictive commensurate with the findings of fact in a given hearing.

[152] The record before this Board amply supports the finding that the Accused be detained in custody and as there are no facts in controversy, and the first Board's reasons set out the necessary findings, a synopsis of the salient facts here will suffice.

- The Accused has a long history of psychiatric disorder, with an established diagnosis of paranoid schizophrenia made by his attending psychiatrists during his hospitalization at the Clarke Institute of Psychiatry in Toronto in his two admissions there in 1991.

- The Accused partially complied with treatment, e.g., his refusals to go beyond arbitrary drug dosage limits; a refusal to consider alternative drug treatments, and has failed to achieve complete remission (he suffers from ongoing auditory hallucinations, with a socially isolated lifestyle and no participation in the workplace through employment.)

- The Accused waived a knife at a United States Immigration Officer in 1995. Although charges were apparently laid, the Accused was hospitalized at the Vancouver General Hospital; they were either dropped or stayed after his admission.

- The Accused stopped his medication entirely in May 2003. By August 2003 he set off by car on a cross-country odyssey, leaving behind a note that he had been persecuted and tortured by government since 1991. Before leaving his home province of Ontario, he had purchased a compound bow and arrows "commonly used by big game hunters when hunting large game like deer, elk and moose." (Tab 1) He later acknowledged that he purchased these for purposes of self-defense.

- The index offence was extremely egregious and life threatening to the innocent Good Samaritan Paul Erik Serup, who stopped his car to come to the aid of the Accused after the Accused had rolled his car over in the ditch near Chetwynd, BC. The Accused's shooting of Mr. Serup in the jaw with an arrow was completely unprovoked and arose from the Accused's delusional state of mind.

- The Accused became a patient at FPH after his arrest, initially on remand from the court for the purposes of a fitness psychiatric remand. Subsequently, he was held on a certificate issued by the doctors there under the Mental Health Act, until a finding by the Court of NCRMD.

- On October 10th and October 18th, 2003, while on admission at FPH, the Accused confronted staff with violence, including an attempt to escape which resulted in the police being called and the Accused being subdued by Tazer.

- While on remand status at FPH, the Accused settled somewhat in his year at FPH, but was only partially compliant with treatment, and remained symptomatic

with persistent auditory hallucinations. All this time he believed his actions in shooting Mr. Serup were justified. His history is detailed in the report of Vince G. Bhauruth, RN, Case Management Coordinator at FPH, dated November 4th, 2004 (Tab 8).

- This notwithstanding, Dr. McKibbin, in his report dated November 4th (Tab 9) notes the Accused "continues to experience residual psychotic symptoms of auditory hallucinations of voices, and occasional thought insertion, thought withdrawal and thought control, as well as some retrospective persecutory beliefs around the index offence."

- Further, Dr. McKibbin is of the opinion that given the Accused's "history of attempted elopements from the hospital and his non-adherence to community follow-up and medication, there is a fairly high probability of his not complying with his treatment plan in the future."

- Finally, Dr. McKibbin concludes that "a release into the community at this time (November 4, 2003), would nearly certainly lead to abrupt discontinuation of his anti-psychotic (sic medications) and an escalation in his auditory hallucinations and delusions. Once Mr. Gielzecki's psychotic symptoms are under better control, a gradual increase in his privileges and a step-wise reintegration into society would be possible."

[153] What is in issue is what flows from these facts. Indeed, with this hearing coming on so quickly since the first Review Board, little has changed. Dr. McKibbin notes some small improvement in the mental condition of the Accused, yet he remains ill and psychotic, along with a general belief in other reasons for his diagnosed condition of paranoid schizophrenia.

[154] Crown, both at the original hearing, and before us, took the position that the accused was not ready yet for any kind of access to the community. In his closing submission, he argued, in the alternative, for limited supervised access. Crown therefore wished the deletion of clauses 3, 4, and 6 in the original order of the first Review Board [Tab11].

[155] Counsel for the Director argued for the inclusion of a general access order in the discretion of the Director, and for the deletion of the mandatory access clause, namely clause 4.

[156] Counsel for the accused wished to have the existing order continued as the accused was now ready to engage in this least intrusive remedy as part of his re-integration plan. In essence, her position was that the Director, by not complying with the

first Board's order, and without further testing through executing some escorted access to the community by this Accused as ordered, had created a new venue for a new board to express a second view, thereby depriving the accused of an existing liberty right. In sum, the Director retains the remedy of her appeal rights, something the Crown acknowledges she maintains, and gets a second opportunity to argue her position.

[157] I find that I am not bound by the order of the first Review Board. Generally, comity demands that deference be given to this Board, for we have had some of the same evidence before us as they have had and there are no credibility findings in issue. Neither are we here to usurp the function of appellate review. This said, we have had the additional benefit of further evidence, especially on the issues of how FPH deals with NCRMD Accused, including this Accused, and the interplay between the treatment team and the decision-making bodies within the hospital. We must therefore express our own judgement, independently of what has gone before.

[158] I am also mindful of the British Columbia Court of Appeal decision in *Mazzei v. British Columbia (Adult Forensic Services*) 2004 BCCA 237, 2004 04 29, Leave to Appeal to the Supreme Court of Canada granted, January 20th, 2005 in SCC action No. 30415, as outlined by Counsel for the Director in her submission. She suggests by making the mandatory order set out in clause #4 of the first order, the first Review Board may have "over-stepped its management and assessment role and transgressed into an area within the commission's (FPH) mandate." In a letter to the Board, after the hearing, counsel for the Director acknowledged that indeed the Board did have jurisdiction to make such an order, and so I do not have to deal with this submission. In fairness, counsel did not concede that this was an appropriate order on the facts, arguing unreasonableness.

[159] I find that much of the difficulty here relates to the findings and inferences made by the first Board about its concerns over the lack of community access by this Accused. Both Crown and counsel for the Director suggest that this may emanate from a misunderstanding by the first Review Board over the Director's role whilst the accused was on remand status until the verdict of NCRMD. It is clear from the record that this Accused was on remand status from his arrest on September 24, 2003 to the finding by Judge Gould of NCRMD on October 20th, 2004, and thereafter in custody by order of the first Review Board. [See Tab 1, The Provincial Court Record of Proceedings; Tab 3, the first medical-legal letter to the Provincial Court on fitness by Dr. McKibbin, dated Nov. 6, 2003;

Tab 7, Deferral of Disposition; Tab 8, the report dated November 4, 2004 of Vince Bhauruth, RN, case manager; Tab 9, Dr. McKibbin's second medical-letter dated November 10, 2004 and Tab 12, the transcript of the first hearing: see page 6 and post in the questioning by Dr. Laws].

[160] Therefore, as a matter of law, the Director had little discretion and that the delay in getting on to trial is not within her responsibility. Fortuitously, the accused was held in FPH by virtue of a certificate issued under the Mental Health Act, and, although the accused would not permit medication in the dosage that Dr. McKibbin wished to prescribe, he was on an anti-psychotic drug, Risperidone, that did indeed assist in the treatment of the psychosis he suffered from. An additional benefit was the creation of a healthy working relationship between Dr. McKibbin, the treatment team, and the Accused.

[161] Should the accused be remanded into custody without this certificate, then he would be housed in a provincial correctional institution on remand status doing what the criminal bar calls "dead time." While the delay was unfortunate, it does not lie at the feet of the Director, nor can this Review Board give any credit for this "dead time."

[162] I find the position of the Crown on this hearing to be persuasive. He invites us to re-assess the factors in s. 672.54 (see *Winko* supra) and make a fair order to assist the Accused's re-integration into society and to protect the public.

[163] Given the egregious facts of the initial index offence; the psychotic state of the accused, then and now; his previous entrenched mental health history; his prior escape attempts and history at FPH, including one where the police, of necessity, tazered the Accused, and his retained beliefs about both his conduct and his medication needs, I find him to be dangerous towards the higher end of the scale, even now.

[164] I find little substantive change in any of his behaviours since the index offence. For these reasons I make the detention order. For this reason I only make a general discretionary order for supervised access in the community. I find the risk to society by this man has not abated sufficiently that I can be assured the public is protected in any other fashion. The public must have, in considering its need to be protected, the confidence in the justice system that its needs are understood and considered. All must proceed with caution here based on the evidence we have before us. I appreciate I disagree with colleagues for whom I respect. Honourable people may honourably differ. It would have

been of benefit to understand the reasoning on the facts and law of how the first Review Board concluded that a prescriptive supervised access order was required. My appreciation of the facts tells me that the treatment team is alert to the Accused's liberty interests. Given the danger to the public he presents and his history, including his brief tenure with FPH on a NCRMD verdict, the Accused must go through a planned program of step-wise grant of privileges, which should demonstrate he is no longer such a danger.

[165] Mr. Gielzecki continues to be ill. I agree with Crown that he has little insight into his behaviours and his needs, both medical and social. His re-integration into society must be carefully thought out, carefully planned, carefully tested. Much more needs to be done on the main roadblock to normalcy - the Accused's own belief system: about his disorder; the medications that are medically proven and necessary to make him function safely, and his reasons for the index offence. Somehow, he continues to justify his actions of shooting a Good Samaritan in the jaw with a compound bow and arrow.

[166] I conclude that a six-month order is appropriate in this case. The Director now has clearly acknowledged her understanding of the role she plays comes from the legal matrix through the Review Board. While we understand the clinician's point of view, the legal matrix binds both us, through our interpretation of Part XX.1 of the Criminal Code and that of the Superior Courts whose decisions bind us. We need the clinician's assistance, and when it is reliable, that is, founded on proven fact, we will give it appropriate weight. This said, it is for this Board to exercise the discretion afforded it and make the appropriate order.

[167] I order that the Accused be detained in custody, reside in the Forensic Psychiatric Hospital, be under the general direction and supervision of the Director, Adult Forensic Psychiatric Services, and be granted, at the Director's discretion, escorted supervised access to the community depending on his mental condition, having regard to the risk the accused then poses to himself or others. Further, I order that clauses #5, #7, #8, and #9 of the first order dated November 24, 2004 continue as part of this order.

[168] This order shall continue until from the 6th day of April 2005, up to the 5th day of October 2005. I have considered a return to the original review date of May 15, 2005. As the Director and the Accused have the ability in certain circumstances to advance a review date by a Review Board, and in light of the depth of psychiatric knowledge on the record to

date, we believe that this affords all parties the ability to move forward on the psychiatric issues as well as the necessary social issues, should the Accused become a suitable candidate for a different disposition earlier on. To date he has no social support systems, no family supports nearby, no work in place. While apparently financially self-sufficient, the need for having these potential stressors resolved is imperative as if not, this may trigger de-compensation and his return to psychosis. Time is needed for this Accused to accomplish this. He has made some progress on some of these issues. His gradual improvement must continue. Another stressful hearing is not in his interests in May. His needs must be brought into account.

[169] I grant the Accused the privilege of staff escorted access to the community at the discretion of the Director. I do not follow the prescriptive order of the first Review Board specifying such access. While there is support in the record for escorted access, given the short time frame the Board has had jurisdiction over the Accused, it cannot be said the Director now fails to understand the order previously made. Clause #4 originally operated as a prospective order. It was the duty of the Director to execute the order, absent a stay. She decided to do otherwise. Nothing factually new had arisen. Simply put, she substituted her decision-making for that of the original Review Board. Arguably, a literal interpretation of clause #4 might permit this. Nevertheless, I am of the view a literal interpretation is inappropriate. In *Mazzei* supra, Ryan, JA adopted the dominant test for statutory interpretation, citing E.A. Driedger, 2nd edition, *Construction of Statutes* at 87: "Today, there is only one principle or approach, namely the words of an Act are to be read in their ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." It is, in my view, a purposeful and contextual approach.

[170] The original Board of Review heard the parties, their evidence, and what counsel said in helpful submissions. An order was made. It is then for the Director to follow, not to substitute her sense of what is best. Such a process would render great mischief to this Board's process, rendering it essentially nugatory. If this literal view is to prevail, why hold a Board hearing at all? What is now clear, reading *Winko* and *Mazzei*, is that Parliament has moved from a rule-based process of dealing with those found not guilty of crime by reason of insanity, to a principled approach. NCRMD are not criminals, but a new class of persons. They are to be treated with dignity and respect, and not stereotypically. Their *Charter* values permeate the whole of this remedial part, as does the need of society to be

protected from dangerous persons. While it can be said that the principles enunciated in *Winko*, may, on occasion, be in conflict, nevertheless, principles only point in a direction, they do not mandate a conclusion. Appropriate discretion is required to answer the inevitable calculus of the relevant evidence that goes into decision-making with this approach in view. This, in the first instance, is the primary task of the Review Board.

[171] This said, once the Review Board has exercised its power to make a disposition, here prescribed supervised community access, it can invoke s. 672.56 and delegate power to the Director to increase or decrease the restrictions on the Accused's liberty. The reason for giving the Director this discretion is that if facts arise *subsequent* to the original order, and these new facts could not be reasonably contemplated at the time of the original order, the Director may then restrict the liberty of an Accused for such probable clause, and trigger a new hearing.

[172] I must ask what has happened since the original order of November 24, 2004. Dr. McKibbin continued to press on within the hospital for an increase of privileges for this Accused. These have been granted. In fact, this Accused exercised his privileges for supervised community access on three occasions and there appears to be a weekly program now coming into existence for this. This assists me in concluding that this should continue on a discretionary basis, mindful of the uneven course of mental disorders. In sum, this Accused is moving through the system. No factual finding can be made to infer that neither the treatment team nor the Director is reluctant to move this Accused forward. Be it remembered, that this case is, in this jurisdiction, a case of first impression, both from a Board perspective, and a Director's perspective.

[173] Crown argues that beyond supervised access, this Review Board grants no further access. This brings clause #3 and #6 of the original order into play. Arguably, these clauses find their way into orders where there exists a proven need for flexibility in the treatment of an Accused, all the while advancing his liberty interests towards community reintegration. The Board delegates to the Director the authority to make this kind of community based disposition from time to time, without the necessity of a further hearing. Generally, this makes good sense. But there is a necessary condition precedent for its use: that there exists a proven factual backdrop in the case at hand warranting such clauses. Absent any showing on the facts that the Director will be faced with the need of such a decision, or that the level of dangerousness of a given Accused is high, a Board

may very well make such an order. Again, it is the duty of a Review Board to make this decision on the evidence in the first instance. Only then can it delegate the power to make such decisions on a day to day basis to the Director.

[174] On my parsing of the record, I cannot find any probable cause for the need for these clauses. Further, I cannot, by inductive or deductive reasoning, infer that within the next six months, this Accused's condition will improve to such an extent, that the Director might be in a position to consider unescorted community leaves of any kind. Thus, there is no need for this Board to consider the employment of such clauses. Should such a need arise, then the Director and the Accused have the right to apply for a new hearing. Upon a showing of probable cause, I have no doubt a Review Board would be constituted to hear from him, together with other parties. Thus I decline to make any further access order at this time.

H. Landerkin, Q.C

/ck, May 11, 2005

LEVEL OF PRIVILEGES AND PROGRAMS

LEVEL 1

ESCORTED WITHIN A & B BUILDINGS ONLY:

- First Steps Program
- Occupational Therapy
- Act I/Act II
- Power Hour
- Native Brotherhood
- Dual Diagnosis/Substance Abuse Counselling in Ashworth Bldg.

LEVEL 2

ESCORTED:

- Psycho-social Programs (specify)
- TLS Programs (specify)
- Vocational Programs (specify)
- SSCO
  - > Assessment Outing
  - > Small Structured Community Outing
  - > Large Structured Community Outing
  - > Single Escorted Outing
- Walking Club (inside security fences)
- Fir Hall (1 to 1 escort only)
- Supervised Grounds
- 1 to 1 Walks with Staff (inside fence)

LEVEL 3

- Unescorted attendance at programs within Hospital
- Full Grounds Privileges
- Accompanied D/Ls with a designated person, family or volunteer
- Fir Hall (unescorted)
- Walking Club (outside security fences)

LEVEL 4

- Unescorted and Structured Community Program D/L's (specify)

LEVEL 5

- Unescorted D/Ls for leisure purposes

LEVEL 6

- Overnight leaves
- Visit leaves
- Extended leaves