BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1985 c. C-46, as amended S.C. 2005 c. 22

REASONS FOR DISPOSITION
IN THE MATTER OF

MIHAELA CLAUDIA HAU
a.k.a.
MIHAELA CLAUDIA AMARIEI

HELD AT: **Forensic Psychiatric Hospital**
Port Coquitlam, BC
February 22, 2017

BEFORE:	**CHAIRPERSON:**	**B. Walter**
	MEMBERS:	**Dr. L. Grasswick, psychiatrist**
		K. Polowek

APPEARANCES:
ACCUSED/PATIENT: Mihaela Claudia Hau
ACCUSED/PATIENT COUNSEL: D. Abbey
DIRECTOR AFPS: Dr. G. Wiehahn, B. Lohmann
DIRECTOR'S COUNSEL:
ATTORNEY GENERAL: L. Hillaby

INTRODUCTION AND BACKGROUND

[1] On February 22, 2017, the BCRB convened an early hearing pursuant to s.672.63 of the *Criminal Code* ("*Code*"), to review the disposition of Mihaela Claudia Hau, the accused, who is 44 years of age.

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

[3] Ms. Hau's index offences spanned several months between December 2010 and October 2011; they consisted of:

1. December 19, 2010: Obstruction of a peace officer (s.129(a) *CC*);

2. May 15, 2011: Break and enter with intent (s.349(1) *CC*); obstructing a peace officer (s.129(a) *CC*);

3. October 1, 2011: Obstructing a peace officer (s.129(a) *CC*); fraud (s.364(1) *CC*)

[4] The index offences are well described in Reasons for Disposition dated December 2, 2011, following the accused's first hearing of the Review Board: Ex. 13b, para.3. On October 31, 2011, Ms. Hau was given a verdict of NCRMD on all counts.

[5] On each occasion Ms. Hau was evidently suffering from symptoms of schizophrenia, an illness she has, and continues to, consistently and steadfastly deny. On each occasion, as she has also frequently done, she provided fake names or identification to investigators. She has used numerous aliases. She continues to maintain that she is not the persons involved in the index offences. She has maintained this during hearings. It follows that she denies the offences. Ms. Hau has no other criminal convictions.

[6] Ms. Hau is well educated and comes from Romania. She lived in California for some years before arriving in Canada (Ontario), in 2006. Ms. Hau's illness pre-dates her arrival in Canada but she has never been compliant with prescribed treatment. According to Ex. 32, she had a high number of mental health related police contacts in London, Ontario. These generally included a disorganized or paranoid presentation but they did not

involve any serious violence to others. Her life has been transient and disorganized. There has never been any evidence of alcohol or drug issues.

[7] When Ms. Hau was committed to FPH she was initially resistant to assessment but her psychosis, organization and impulsivity improved on injectable medication. Her insight remained limited.

[8] By November 2012, Ms. Hau's mental state was considered improved by 70%. She accepted her identity and assumed at least some responsibility for her conduct. Her insight was termed "emerging". Her illness was clinically considered to be in remission. She was unequivocal that she would not consume medication if absolutely discharged.

[9] Though she continues to deny the offences or the need for medication, and despite her continuing "profound" lack of insight into her illness, Ms. Hau was transitioned to Coast Cottages in the winter of 2013.

[10] Ms. Hau failed to attend and report to her outpatient clinic as directed and was returned to FPH under an Enforcement Order of the Court dated December 30, 2014. She had gradually disengaged from her treatment team. Her mental condition was apparently deteriorating. On February 11, 2015, she was detained.

[11] Given Ms. Hau's unremitting denial of her illness and her difficulty in complying with direction and supervision, it was predicted that cohabiting with her "fiancé", whom she met at FPH, might provide the only feasible avenue to reintegration.

[12] Ms. Hau's most recent hearing was held on September 2, 2016. The evidence at that hearing was that she was generally settled; she was disruptive at programs because she denied her illness; she planned to reside with her fiancé and her response to treatment was considered poor. She was also diagnosed with a thyroid condition which could be expected to generate symptoms and to impact her mental state. Ms. Hau was not prepared to consider a trial of clozapine to try to achieve better control of her illness.

EVIDENCE AT HEARING

[13] Dr. Wiehahn's assessment (Ex. 43), confirms Ms. Hau's established diagnosis of schizophrenia, which, along with the index offences, she continues to vehemently deny. She demonstrates lingering residual symptoms of her illness, some cognitive deficits (concrete thinking), and remains resistant to supervision. Her insight or acceptance of her

symptoms remains unaltered. Dr. Wiehahn also endorsed narcissistic and antisocial traits but does not go so far as to assign a diagnosis of personality disorder.

[14] Ms. Hau's plans to cohabit with her fiancé came to an abrupt end after a week. She returned early from a visit leave to his residence indicating that she did not wish to continue the relationship. Her treatment team assisted Ms. Hau in adjusting transition plans and redirecting her to CTC (Coast Cottages) under visit leaves, where she remains.

[15] At CTC, Ms. Hau is required to attend two programs (though she does not appear to participate meaningfully), and to report to the Vancouver Forensic Outpatient Clinic every two weeks. FPS's role consists entirely of supervision and the administration of medication.

[16] Ms. Hau is less disorganized when medicated. She was able to find and secure independent housing on her own though this, through no fault of Ms. Hau's, dissolved into a costly debacle.

[17] Regarding the threshold issue of significant threat, and while the Review Board does not endorse any particular risk assessment tool, Dr. Wiehahn's assessment in this case appeared to consist of a melding or combining of the HCR and START instruments. He acknowledges that Ms. Hau does not appear to harbour violent attitudes and has no history of criminal violence or serious antisocial behavior. The concern is that she continues to deny her illness and need for treatment while presenting with at least some paranoid and grandiose beliefs. Her insight shows no signs of deepening. She will more than likely not remain compliant or treatment adherent. She has no meaningful social supports. Dr. Wiehahn predicts that, based on historic patterns, Ms. Hau would distance herself from treatment.

[18] Dr. Wiehahn is unable to unequivocally predict Ms. Hau's risk of serious criminal behavior beyond saying that it might be similar to her past conduct, although she has not recently behaved in that way. He agrees that Ms. Hau's violence is at a lower end of the scale. In his report he characterized Ms. Hau's contacts with law enforcement, including at the index offences as "mischievous and disruptive".

[19] Currently Dr. Wiehahn considers Ms. Hau to be clinically certifiable and he acknowledges that she has been apprehended by this means in the past. He testified that statistically, she could do well for up to a year.

[20] Ms. Hau wishes to reside in her own one bedroom apartment in Vancouver. She would find a family physician to manage her thyroid condition. She wishes to pursue education in the field of meteorology. She remains friends with her fiancé. She wishes to move on from her episode or experience with the forensic system which, she says, has taught her to be more understanding, flexible and balanced.

[21] Ms. Hau says that she has never been in jail. She clearly denies that she has ever been mentally unwell and she attributes her past problems to a lack of resources. She does not dispute having been disorganized in the past but says that her past police contacts have been benign. She does not recollect being at the church during the December 2010 index offence. Ms. Hau testified that if she was absolutely discharged she would accept and follow the recommendations of a physician. If she were not required to see a doctor she would stop consuming her medication.

ANALYSIS AND DISPOSITION

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

> **672.54** When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:
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> > **(a)** where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
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> > **(b)** by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
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> > **(c)** by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.
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> **672.5401** For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public — including any victim of or witness to the offence, or any person under the age of 18 years — resulting from conduct that is criminal in nature but not necessarily violent.

[23] The Board must first determine whether Ms. Hau poses a significant threat to public safety as defined in s.672.5401.

[24] The first index offence did not involve violence. We accept that, in offering to mind children on an unauthorized basis, Ms. Hau could have generated some consternation and indeed a degree of psychological fear in the parents. However, the incident was quickly disrupted.

[25] Similarly, gaining access to a stranger's apartment, donning her clothes and sleeping in her bed, would predictably be psychologically distressing for the occupant.

[26] The third incident, the "dine and dash", contained no element of physical or psychological harm. The Board has not seen NCRMD verdicts based on such offences since before the ***Winko*** decision in 1999, which clarified the "significant threat" threshold standard.

[27] There is no historic evidence, beyond anecdote, of any other conduct approaching serious physical or psychological harm. Ms. Hau's history of police contacts in Ontario, filed, involves relatively benign, even mundane, interactions. They do not differ from what would be encountered daily in any city.

[28] Ms. Hau's offending conduct has been characterized as representing the low end on a scale of physical and even psychological harm.

[29] We readily accept that, given Ms. Hau's denial of her illness and antipathy to supervision and treatment, the accused will likely not adhere to treatment and will likely find herself decompensated and disorganized in the future. Yet she is also seen as resourceful and intelligent.

[30] We certainly cannot confidently rule out the possibility that Ms. Hau will, in the future, be involved in scenarios which are similar to the index offences. Nor are we required to do so.

[31] The concept and new definition of significant threat was extensively parsed by the Board in 2014 in ***Baranyais*** and ***Lacerte***. More recently the Ontario Court of Appeal ("OCA") has endorsed our own conclusions on the issue. In ***RE CARRICK***, 2015 ONCA 866 ("***Carrick***"), the Court set out the history of the law and, on the issue of significant threat in particular, said:

For present purposes, the most important point was that emphasized by the court in *Winko*, at para. 33:

> The only justification there can be for the criminal law detaining a person who has not been found guilty (or is awaiting trial on an issue of guilt) is maintaining public safety. Once an NCR accused is no longer a significant threat to public safety, the criminal justice system has no further application.

The Board is tasked with determining whether an NCR accused poses a significant threat to public safety. An NCR accused is not presumed to be dangerous and bears no burden of proof in proceedings before the Board.

If the Board concludes that an NCR accused poses a significant threat, it is required to fashion a "necessary and appropriate" disposition pursuant to s. 672.54 – which this court has held means the least onerous and least restrictive disposition: *Ranieri (Re)*, 2015 ONCA 444 (CanLII), at para. 20. If, however, the Board concludes that an NCR accused does *not* pose a significant threat to public safety, it must order that he or she be discharged absolutely.

What constitutes a "significant threat to the safety of the public"? The term is defined in s. 672.5401 as "a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent." The likelihood of a risk materializing and the seriousness of the harm that might occur must be considered together. As the Supreme Court noted in *Winko* (in discussing s. 672.54), at para. 57:

> [T]he threat posed must be more than speculative in nature; it must be supported by evidence. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature. [Citations omitted.]

In short, the "significant threat" standard is an onerous one. An NCR accused is not to be detained on the basis of mere speculation. The Board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge. (*paras. 13-17*)

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

> A significant threat to public safety is defined in s. 672.5401 of the *Criminal Code* to mean "a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but

> not necessarily violent". The threat posed must be more than speculative and be supported by the evidence. It must be significant "both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of grave harm will not suffice", nor will a high risk of trivial harm: *Winko*, at para. 57. (*para. 15)*

[33] Thus the ***Winko*** test remains the threshold standard.

[34] In ***Carrick*** (above), the accused had a criminal history including break and enter, theft, possession of stolen property, and as many as three violent offences, including assault and robbery with violence. The index offence did not involve actual violence per se, but rather, as in Ms. Hau's case, a break and enter into a family home where he was discovered by a five year old. He was diagnosed with an antisocial personality disorder and drug-induced psychosis. The appellant breached conditions of his disposition and tested positive for substances on every return to hospital.

[35] At the Ontario Review Board ("ORB"), proceeding under appeal, the evidence of significant threat consisted of ongoing symptoms, lack of commitment to medication, limited insight, and ongoing substance abuse. Seventeen of twenty risk factors on the HCR 20v3 were endorsed. The expert evidence also endorsed the view that because of the appellant's antisocial personality disorder, there would always be a baseline threat. He was considered a risk to continue to use drugs and to commit more offences.

[36] In finding the ORB's decision unreasonable, the OCA found that:

> There is no doubt that the appellant has a lengthy history of mental illness and substance abuse and has committed numerous offences in order to obtain alcohol and drugs. There is a substantial risk, if not likelihood, that he will abuse alcohol and drugs and commit offences if he is released in the community. Yet the law is clear that the appellant cannot be detained on this account. He is entitled to be discharged unless the Board concludes that he poses a significant threat to the safety of the public as discussed in para. 16. *(para.39)*
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> The Hospital argued that the decision of the Board was reasonable because the commission of non-violent offences by the appellant would necessarily cause serious psychological harm to some vulnerable individuals. However, if this argument were accepted the risk that the appellant might commit virtually any offence would be sufficient reason for the Board to detain him indefinitely.
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> Prior proceedings involving the appellant reflect this concern. In *R. v. Carrick*, 2010 ONCA 523 (CanLII), although this court dismissed the appellant's appeal from a previous Board disposition it expressed concern about the

Board's application of the significant threat standard to the appellant, at paras. 1 and 3:

> There is merit to the submission that the Board focused on the risk that the appellant would breach any release order rather than on the risk to public safety that may have been occasioned were the appellant to breach a condition of the release order. The two risks are not the same and it is the latter inquiry that must be made under the relevant provisions of the *Criminal Code*. *(paras. 39-41)*

[37] Similarly in ***RE MARZEC***, 2015 ONCA, 658, a case involving an index offence which included a weapon, the Court commented:

> The Board concluded that because the appellant has not lived in the community for some time, he is "untested" and should live in the community under its jurisdiction before an absolute discharge is granted. This was intended to allow for an assessment of the degree to which the appellant's current stability is a function of the structured and supportive hospital environment in which he currently lives. *(para. 21)*

and later:

> Both Dr. Sheppard and Dr. Johnston found that there would likely be an increased risk of harm to the public if the appellant was in an unstructured and unsupported environment in which he might be subject to stress. But notwithstanding that the risk would be higher, neither articulated the conclusion that an absolute discharge would result in a significant threat to public safety. The TBRHSC's report, in fact, articulated the opposite: "[t]he significant threat threshold is no longer met. It cannot be said at this time that, if absolutely discharged, [the appellant] would likely commit a serious criminal offence causing physical or psychological harm to others."
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> The Board's concern seems to be that because the appellant has not yet lived outside of the hospital, he is "untested" in the community. Having him live outside of the hospital would indeed allow for the Board to assess the degree to which the appellant's hospitalization is responsible for his stability.
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> **Such an approach, however, would erroneously place the onus on the appellant to prove that he is not a risk before he is entitled to an absolute discharge.** *(emphasis added*) *(paras. 28-30)*

[38] The Court concluded that:

> The only reasonable conclusion – one that is supported by the totality of the evidence – is that the appellant does not pose a significant risk of harm. **The Board appears to have ordered a conditional discharge out of an abundance of caution. That is not the legal test**. As per *Winko,* if the appellant does not pose a significant risk to the public, the Board must order an absolute discharge. *(emphasis added*) *(para. 33)*

[39] We note that in the current case, nowhere did the evidence of the Director, which we are admonished to respect, characterize Ms. Hau as a significant threat.

[40] It is trite to observe that, as an expert Tribunal, the Board can accept or reject evidence as long as its decision is based on the evidence before it. In this case, having considered the totality of the evidence, we find that it would place an impossible burden on Ms. Hau to negate the possibility that she might, in the future, pose a significant threat. The definition in s.672.5401 cannot reasonably bear such an interpretation and to so hold is impermissible at law. Ms. Hau is not a significant threat: see also ***DH. v. British Columbia*** (Attorney General), [1994] BCJ 2001.

[41] Ms. Hau is discharged absolutely.

Reasons written by B. Walter, in concurrence with Dr. L. Grasswick and K. Polowek.