BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

IN THE MATTER OF THE FITNESS TO STAND TRIAL AND DISPOSITION HEARING OF

HUE MA

HELD AT: **BC Review Board Offices**
Vancouver, BC
October 17, 2018

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr. P. Constance, psychiatrist
J. Threlfall

APPEARANCES:
ACCUSED/PATIENT: Hue Ma
ACCUSED/PATIENT COUNSEL: D. Nielsen
DIRECTOR AFPS: Dr. L. Meldrum, C. Rodgers, Dr. S. Patton
DIRECTOR'S COUNSEL:
ATTORNEY GENERAL: K. Haughton

INTRODUCTION AND BACKGROUND

[1] On October 17, 2018, the BCRB convened an annual hearing in the matter of Hue Ma, the accused, who is now 54 years of age.

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

[3] This is the accused's 11th hearing since her April 9, 2008, verdict of unfit to stand trial on account of mental disorder on charges of attempted murder, aggravated assault and assault with a weapon.

[4] Since her verdict, Ms. Ma has consistently been found unfit to stand trial and she has throughout resided in the community subject to conditions. Given evidence of her consistent, even static presentation over time, the RB has necessarily periodically turned its mind to the provisions of s.672.851 of the Code which provides:

> 672.851(1) The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if (a) the Review Board has held a hearing under section 672.81 or 672.82 in respect of the accused; and (b) on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a), the Review Board is of the opinion that (i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and (ii) the accused does not pose a significant threat to the safety of the public.

[5] Under s.672.851 the RB may, in respect of an accused who has been unfit to stand trial, recommend that a court of jurisdiction hold an inquiry to determine if a stay of proceedings should be ordered if the Board is of the opinion that (i) the accused is not likely to ever become fit to stand trial, and (ii) the accused does not pose a significant threat to public safety.

[6] The record reflects that Ms. Ma has generally required and had the benefit of a translator during her appearances before the Board and during clinical interviews.

ACCUSED'S BACKGROUND

[7] Ms. Ma came to Canada from Vietnam in 1985. She achieved limited success educationally and left school at age 15. She never learned to read or write. She was seen by a physician after an aggressive incident and concerning symptoms in 2007, but was not referred to psychiatry or provided treatment.

[8] The index offence has been fully described in past Reasons for Disposition. Ms. Ma is alleged to have stabbed her then 12-year-old niece in the neck, without apparent provocation, inflicting serious, but not life-threatening injuries. The accused had no prior criminal involvement.

[9] On assessment in respect of the index offence, Ms. Ma endorsed voices telling her to kill herself and feeling that her family was in danger at the time of the index offence. She reported no animus toward the victim. Despite not being treated at FPH during the assessment period, she denied delusions or hallucinations and she did not present as disorganized or otherwise psychotic.

[10] In an independent assessment, Dr. Eaves opined that Ms. Ma suffered from a severe developmental disorder leaving her illiterate and with limited communication skills. She was considered severely learning disabled. By history, Dr. Eaves concluded that she suffered a psychotic break at the time of the index offence. He felt her to be unfit and unlikely to ever become fit to stand trial and said that she did not present a "threat to others": Ex. 5.

POST-VERDICT PROGRESS

[11] After the verdict of unfit to stand trial, Ms. Ma continued to reside in her brother's home with her parents. She was maintained on anti-psychotic and anti-convulsant medication. She remained free of active symptoms of psychosis. It was suspected that her earlier psychosis may have been caused by, or related to, a seizure. She was permitted supervised access to her niece, the victim. Despite efforts to educate Ms. Ma regarding the court process, her ability to focus, pay attention, and to learn remained limited or impaired.

[12] In November 2009, Ms. Ma's father passed away and her mother suffered an injury. Ms. Ma became depressed and was described as "staring" and almost catatonic. She was certified and admitted to FPH. She was assigned a diagnosis of developmental delay and psychosis NOS. She stabilized and was discharged within a month at her baseline level of mental stability.

[13] As early as her third RB hearing, Ms. Ma's counsel asked the Board to consider embarking on the inquiry process set out in s.672.851 of the *Code*.

[14] In an assessment dated December 22, 2010, Dr. Adilman did not consider Ms. Ma a risk to the community: Ex. 20. At Ms. Ma's hearing of January 6, 2011, a dissenting Board member would have initiated the process under s.672.851 CC.

[15] In April 2011, Ms. Ma's mother passed away. Ms. Ma experienced no negative impact on her mental state. She was not considered psychotic, depressed or suicidal despite her consistently flat affect. In October 2011, Ms. Ma was provided with the additional benefit of an outreach worker to take her into the community. She was scheduled for a neurological assessment to determine her level of functioning and in turn her eligibility for Community Living BC ("*CLBC"*), programs and services. She remained non-aggressive, violence-free, non-impulsive and happy despite her limited understanding of her circumstances. She was seen as highly compliant, responsive to treatment, and not a risk to the community: Ex. 22

[16] A November 2011 neurological assessment determined that:

- Ms. Ma functions in the "extremely low" range of cognition, with impairment in attention, memory, language and executive functioning;
- she has no functional reading or writing abilities;
- she has modest daily living skills; and
- she meets the diagnostic criteria for mild mental retardation with an IQ level of between 50 and 70: Ex. 24.

[17] In 2012, Ms. Ma was, on the basis of this assessment, deemed eligible for CLBC services. She demonstrated no signs of psychotic illness or aggression. Dr. Adilman deemed her “not a risk to the community”: Ex. 26.

[18] Since 2013, Ms. Ma has had the benefit of 30 hours of outreach per week. She has remained stable, symptom-free and neither threatening nor aggressive. The administration of her medication is overseen by family members with no problems reported.

[19] At Ms. Ma’s June 13, 2015, hearing the Board considered evidence of Ms. Ma’s extended stability, family and professional supports, compliance and responsiveness to treatment and her pro-social behaviour and determined to once again order an assessment necessary to satisfy the process and criteria underlying s.672.851 of the *Code*.

[20] In the year that followed Dr. Meldrum assumed treatment responsibility for Ms. Ma. During that year, Ms. Ma’s circumstances and presentation did not change appreciably. She continued to benefit from CLBC’s provision of an outreach worker for at least 5 days per week and sometimes more. Ms. Ma remained compliant. She even reminded her caregivers when her medications were due. She was also diagnosed with a variety of physical aliments including diabetes, hypertension, reflux disease, and asthma, along with her seizure disorder. She was considered mentally stable since at least 2011 or earlier.

[21] In contrast to past assessors, Dr. Meldrum, apparently on the basis (inter alia) of the family’s preferences, speculated about a more elevated level of risk should Ms. Ma experience a recurrence of her mental disorder. Dr. Meldrum considered Ms. Ma’s illness as “poorly characterized” and premised her assessment on the “possibility” that she might become non-compliant or experience psychological stressors causing her to deteriorate mentally and thereby increasing her risk of harm: Ex. 36.

[22] In its December 2, 2015, decision the Board commented on the accused’s likelihood to remain unfit to stand trial permanently, but was persuaded that forensic supervision, monitoring and co-ordination, was so crucial that without it Ms. Ma might be a significant threat. The Board declined to refer the matter for an inquiry under s.677.851 *CC*.

[23] Since 2015, Ms. Ma has shown no evidence of psychosis, or mood symptoms. She has consumed her medication compliantly as administered by her family. She utilizes outreach services and does not venture into the community without escort. She even

spends time and travels with her outreach workers' family (e.g., 2018 Alaska Cruise). She has had no hospital admissions. Her accommodation and supervision remain unchanged. Because of her extensive non-psychiatric medical issues, Ms. Ma was referred to a more responsive medical clinic to which, after some initial resistance, she has acclimatized. She is seen monthly by her Forensic Treatment Team which also remains in contact with her family. Dr. Meldrum voiced a concern that absent Forensic supervision, Ms. Ma might attend a casino, an environment which could aggravate her seizure disorder. Ms. Ma has not done so.

[24] Ms. Ma has remained unable to meaningfully discuss the index offence beyond understanding she did something wrong.

[25] At Ms. Ma's November 2017 hearing, she was once again found unfit to stand trial and conditionally discharged. In its reasons, the Board considered Ms. Ma's multifactorial psychiatric and physical diagnoses (par. 5); her stable asymptomatic presentation; her access to extensive outreach and her family support; her likely future compliance and treatment adherence, and her lack of aggression (of over 11 years' duration). The Board had no difficulty concluding that, on the basis of the voluminous historic evidence, Ms. Ma is likely to remain unfit to stand trail on a permanent basis. The Board said that if Ms. Ma were under a different (NCR) verdict, it could not come close to the jurisdictional threshold finding of significant threat, and she would be entitled to absolute discharge.

[26] For that reason, the Board was persuaded to once again pursue the assessment process which precedes or is the prelude to a referral to the Court under s.672.851. Ms. Ma was also approved for international travel in the company of her outreach worker and family.

EVIDENCE AT HEARING OF OCTOBER 17, 2018

[27] Ms. Ma continues to reside in her brother's home with weekly home care support. Her rudimentary English has improved. She consistently presents as pleasant and co-operative. Her support worker takes her into the community 5 days or 30 hours per week. She even has Ms. Ma participate in her own family's activities, including an eight-day Alaska cruise last June, which proceeded without issues. Ms. Ma accepted instruction not to

attend a casino and she did not do so on her Alaska cruise. She now likes the staff at her new medical clinic. Given her cognitive limitations, Ms. Ma will continue to require supervision and support.

[28] There have been no changes in Ms. Ma's mental state and no evidence of psychosis, depression or seizures. She has been stable for years with no episodes of deterioration. Her meds are dispensed to her by family members. Her physical ailments are reasonably stable with treatment and monitoring. She has again been seen monthly by her FPS treatment team. Ms. Ma has not required admission to hospital since shortly after her verdict. She remains mainly illiterate. Her risk is well-managed and "not significant" with current supports. It is unlikely that she will develop her own insight or internal controls.

[29] Ms. Ma's psychiatric medication could, in future, be prescribed by her general practitioner or by a specialized developmentally delayed mental health team. Ms. Ma recognizes that her medication helps her and says that she was "sick" at the time of the index offence.

[30] Dr. Meldrum again assessed Ms. Ma with respect to her fitness to stand trial in the presence of an interpreter, on several occasions. On the basis of her interview attempts, Dr. Meldrum reports that Ms. Ma's memory of the index events, her charges, her ability to communicate with counsel, her understanding of the potential consequences of a trial and her ability to retain information all remain significantly impaired. She is intensely remorseful and finds discussion of the index offence distressing.

[31] Dr. Meldrum continues to be of the opinion that Ms. Ma is unable to participate meaningfully in a trial and that she is likely to remain chronically (or permanently) unfit to stand trial.

[32] In response to the Board's assessment order of September 12, 2018**,** Dr. S. Patton submitted an independent risk assessment of Ms. Ma for the hearing. Her assessment includes a review of Ms. Ma's files as well as an in-person interview with the assistance of an interpreter. Dr. Patton agrees with Ms. Ma's assigned diagnosis of mild Mental Retardation, among others. She found the accused asymptomatic and compliant.

[33] In the realm of risk assessment, Dr. Patton cites the serious index offence eleven years ago; the absence of any antisocial behaviour or orientation or other violence;

Ms. Ma's limited sphere of relationships based on her cognitive limitations; the absence of any alcohol or substance issues; her array of medical disorders; her demonstrated willingness, with support, to adhere to all treatment and conditions; her intention to continue to do so and her extensive, stable support systems.

[34] Dr. Patton opines that any future violence is most likely to be associated with a relapse to symptoms. She says that Ms. Ma has been overtly stable and symptom-free for years. She testified that Ms. Ma is clear that she would not cease taking her medications as they make her a "good person". She notes that Ms. Ma has pain complaints and sleep difficulties that can be destabilizing. She opines that a future relapse would likely be gradual and able to be responded to. She also comments on the potential withdrawal of FPS, as a stressor, but inconclusively. She does not take into account, for example, that with Ms. Rodgers' imminent retirement, Ms. Ma has already been transitioned to a new Chinese-speaking case manager with no loss in continuity. Much of Dr. Patton's concern in terms of continuity of care and treatment could be characterized as speculative and she does not squarely address the issue of significant threat as that concept is defined in law.

[35] As does Dr. Meldrum, Dr. Patton agrees that Ms. Ma, due to her impairments, is likely unfit to stand trial on a permanent basis.

ANALYSIS AND DISPOSITION

[36] The primary issues before us are the accused's fitness to stand trial and the necessary and appropriate disposition. A third issue relates to the appropriateness of a referral to the Court under s.672.851 CC.

FITNESS TO STAND TRIAL

[37] Unfit to stand trial is defined in s.2 of the *Code* which provides:

> **unfit to stand trial** means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> **(a)** understand the nature or object of the proceedings,
>
> **(b)** understand the possible consequences of the proceedings, or
>
> **(c)** communicate with counsel;

[38] The Ontario Court of Appeal, in ***R. v. Taylor*** (1992), 11 O.R. (3d) 323, outlined the elements of what has become known as the “limited cognitive capacity” test:

> Under the "limited cognitive capacity" test propounded by the *amicus curiae*, the presence of delusions does not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. It is submitted that under this test, a court's assessment of an accused's ability to conduct a defence and to communicate with and instruct counsel is limited to an inquiry to whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been co-operating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests.

[39] In discussing the test the Court said:

> To determine whether the test should be modified as suggested by the respondent, one must remain cognizant of the rationale for the fitness rules in the first place. In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. (***Taylor****,* p. 16) (emphasis added*)*

[40] Once an accused has been found unfit to stand trial, unfitness is presumed unless that presumption is rebutted in subsequent proceedings, as provided in s. 672.32(2):

> The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities.

[41] Ms. Ma functions at a very stable level of cognition which has not changed appreciably since before her current verdict and which is not progressively deteriorating. Even then an independent assessor opined that she was unlikely to ever become fit to stand trial: Ex. 5.

[42] Since her verdict, efforts to educate Ms. Ma about the court process, including by a highly skilled case manager, have yielded little improvement. Ms. Ma becomes agitated and distressed when the concepts are broached, and she does not retain them beyond a very limited period of time, if at all. She is illiterate.

[43] Forensic experts have repeatedly and consistently considered Ms. Ma to be permanently unfit to stand trial. This includes the opinion of an independent assessor ordered and provided for the current hearing. Moreover, as the concept of unfit to stand trial is a legal not a psychiatric construct, the Board, as an expert tribunal, has throughout Ms. Ma's time under its jurisdiction, reached the same conclusion in the course of its legal analysis.

[44] We find conclusively that the consistent historic and current evidence is unequivocal that Ms. Ma is not, and will not, ever be in a position to understand her legal proceedings or be able to communicate meaningfully with counsel. Ms. Ma remains unfit to stand trial and is not likely to ever become fit to stand trial.

DISPOSITION

[45] When making a disposition the Board's decision making is governed by s.672.54 and s.672.5401 of the *Code* 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:
>
> > **(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 such 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.

…

> **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.

[46] As the threshold to exercising or maintaining its jurisdiction, the Board must first find that an accused poses a significant threat to public safety. The test was precisely articulated in ***Winko v. British Columbia (Forensic Psychiatric Institute)***, [1999] 2 S.C.R. 625:

> To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given "dangerousness" a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". To engage these provisions of the *Criminal Code*, **the threat posed must be more than speculative in nature; it must** be **supported by evidence**: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL) (C.A.), at para 21. The threat **must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A 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**: *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406 (B.C.C.A.), at p. 413. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty.: **Par.57** (Emphasis Added)

[47] As recently confirmed in ***Calles v. British Columbia (Adult Forensic Psychiatric Services)***, 2016 BCCA 318, the codification of the definition in s. 672.5401, has not changed its interpretation:

> 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)*

[48] In ***Calles (supra)***, the BC Court of Appeal provided further guidance, saying that the Board must not adopt an interpretation of the term "significant threat" that places a burden on an accused to negative any future possibility that he might pose a significant risk of causing serious harm of a criminal nature to a member of the public. While the phrase implies a consideration of possible events, the evidence must take the Board beyond mere speculation. If applied over-broadly, the effect would be to foreclose ever granting any accused an absolute discharge. The Board must be careful not to impose on an accused a legally impermissible onus to disprove he is a threat.

[49] The Court understood both the **gravity and the inherent** difficulty of a finding of significant threat.

[50] Again, since prior to her verdict, expert assessors have consistently and repeatedly opined that Ms. Ma is not a threat.

[51] Dr. Meldrum raises the potential discontinuity of care providers as a destabilizing possibility. Yet neither the death of Ms. Ma's mother, nor a change in treatment providers, including in her general medical treatment and in her forensic team (in 2015) have served to do so. Ms. Ma remains compliant, adherent, directable, prosocial and symptom-free. Her community access has been, continues to be escorted and supervised. There is no evidence to suggest it would not be in future.

[52] Dr. Meldrum's concerns, since taking on Ms. Ma's care in and treatment in 2015, have included such cautions as Ms. Ma's spoken desire to visit a casino (which she had not done), which might possibly have a negative impact on her seizure disorder. Her brother wants to maintain FPS' involvement because it helps him and "it is good for" him and "easier". That said, he is in a position to recognize and respond when help is needed. He says Ms. Ma does not complain about her medication.

[53] Dr. Meldrum voices concern that Ms. Ma can be somewhat strong headed and that her brother relies on the authority of the Review Board to manage and maintain her compliance. The evidence is that Ms. Ma responds to authority and is fearful of being returned to hospital. Ms. Ma is unable to grasp the subtleties of her legal situation and she is unable to understand the locus of such authority. If authority should pass from the Review Board to her doctor, civil mental health, her brother and her support worker will certainly be able to direct her. She will almost certainly accept direction from these authority figures to ensure her compliance without the legal backdrop of the Review Board.

[54] Any services upon which Ms. Ma relies are not dependent upon FPS's once-a-month involvement, which appears to be in the nature of mostly reiterating and reinforcing rules and expectations. Any additional resources can be marshalled and implemented well before an inquiry and stay of proceedings could proceed. In any event, FPS does not abandon its patients, even if transitioning is "challenging".

[55] Though well-intentioned, Dr. Meldrum's and Dr. Patton's assessments of the circumstances or scenaria under which Ms. Ma could, in future, pose a significant threat of foreseeable, serious physical or psychological criminal harm, are remote and highly speculative. They do not remotely comport with the legal definition of the construct imposed upon us by Parliament and the case law. Risk of relapse does not, in and of itself, conflate with significant threat to the public.

[56] We, therefore, find that Ms. Ma is not a significant threat. But for her verdict being that of "unfit to stand trial", she would be legally entitled to be absolutely discharged from this scheme.

REFERRAL UNDER S.672.851 CC

[57] As outlined in PHILLIPS, (BCRB, June 18, 2008) (attached as Schedule A):

> Prior to the proclamation of s672.851 even permanently unfit to stand trial accused remained under Review Board jurisdiction, potentially indefinitely. Jurisdiction over the accused was not founded on dangerousness as it is for **NCRMD** accused. Admittedly, stays could be, and were entered by the Crown on an ad hoc basis. In this case that agency has chosen not to act.

> In **R v. Demers, [2004], 185CCC (3d) 257(SCC)**, the **Supreme Court of Canada** concluded that to subject a permanently unfit accused, who is not a significant threat to public safety, to the jurisdiction of the criminal justice system indefinitely, violates **Charter** rights. **Demers** made it clear that a non-dangerous, permanently unfit accused should be treated the same as a non-dangerous NCR accused: See **R. v. Kearly (Ont. C.J., Dec 5, 2005)**. Section 672.851 was Parliament's corrective legislative response.
>
> In **Winko** (supra) the Supreme Court of Canada (SCC) said that absent "dangerousness amounting to a significant threat to public safety, there is no constitutional basis for the criminal law to restrict the liberty of (an NCR) accused": Paras. 5, 6 and 20.

[58] Having found that Ms. Ma is likely permanently unfit to stand trial and that she is not a significant threat to public safety, we hereby recommend that the Court hold an inquiry to determine whether this prosecution should be stayed pursuant to s.672.851 of the *Code*.

Reasons written by B. Walter in concurrence with Dr. P. Constance and J. Threlfall.

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

DWAYNE GEORGE PHILLIPS

HELD AT: BC Review Board Offices
Vancouver, BC
June 18, 2008

BEFORE:

CHAIRPERSON:	B. Walter
MEMBERS:	Dr. P. Constance, psychiatrist
	N. Avison

APPEARANCES:

ACCUSED/PATIENT: Dwayne George Phillips
ACCUSED/PATIENT COUNSEL: D. Nielsen
DIRECTOR AFPS: K. Field Dr. M. Riley
ATTORNEY GENERAL: G. Kabanuk

1.0 INTRODUCTION

[1] On June 18, 2008, the British Columbia Review Board (BCRB) convened an early hearing, just two months after its last review of the fitness to stand trial and disposition of Dwayne George Phillips, the accused.

[2] On February 28, 1997, Mr. Phillips was found unfit to stand trial on account of mental disorder on one count of sexual assault contrary to s.271 of the Criminal Code. He has been under the jurisdiction of the BCRB since that verdict and has, over thirteen previous hearings, consistently been adjudged unfit to stand trial (UST).

[3] Mr. Phillips has, during that same period of time, been continuously detained at the Forensic Psychiatric Hospital (FPH), until his discharge to a specialized placement on May 2, 2006, where he remains housed and cared for to date.

[4] At Mr. Phillips' most recent hearing on April 9, 2008, his counsel urged the BCRB to consider a recommendation to the Court to conduct an inquiry under s.672.851(1):

> **Recommendation by Review Board -** The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if
>
> (*a*) the Review Board has held a hearing under section 672.81 or 672.82 in respect of the accused; and
>
> (*b*) on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(*a*), the Review Board is of the opinion that
>
> (i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and
>
> (ii) the accused does not pose a significant threat to the safety of the public.
>
> (2) **Notice** - If the Review Board makes a recommendation to the court to hold an inquiry, the Review Board shall provide notice to the accused, the prosecutor and any party who, in the opinion of the Review Board, has a substantial interest in protecting the interests of the accused.
>
> (3) **Inquiry** - As soon as practicable after receiving the recommendation referred to in subsection (1), the court may hold an inquiry to determine whether a stay of proceedings should be ordered.
>
> (9) **Effects of Stay** - If a stay of proceedings is ordered by the court, any disposition made in respect of the accused ceases to have effect. If a stay of proceedings is not ordered, the finding of unfit to stand trial and any disposition made in respect of the accused remain in force, until the Review Board holds a disposition hearing and makes a disposition in respect of the accused under section 672.83. **[S.C. 2005, c.22, s.33]**

[5] Prior to the proclamation of s672.851 even permanently unfit to stand trial accused remained under Review Board jurisdiction, potentially indefinitely. Jurisdiction over the accused was not founded on dangerousness as it is for **NCRMD** accused. Admittedly, stays could be, and were entered by the Crown on an ad hoc basis. In this case that agency has chosen not to act.

[6] In **R v. Demers, [2004], 185CCC (3d) 257(SCC)**, the **Supreme Court of Canada** concluded that to subject a permanently unfit accused, who is not a significant threat to public safety, to the jurisdiction of the criminal justice system indefinitely, violates **Charter** rights. **Demers** made it clear that a non-dangerous, permanently unfit accused should be treated the same as a non-dangerous NCR accused: See **R. v. Kearly (Ont. C.J., Dec 5, 2005)**. Section 672.851 was Parliament's corrective legislative response.

[7] The evidence introduced at Mr. Phillips' April 9 hearing persuaded the BCRB that this accused amply satisfied the conditions or criteria upon which a s.672.851 recommendation, inquiry and eventual stay of proceedings are predicated:

> [59] In the Board's analysis the historic and recent expert evidence satisfies it at this stage, and on any standard of proof that the accused will likely remain unfit to stand trial for the rest of his life: **s.672.851(1)(b)(i)**.
>
> [60] Moreover, as expert assessors of evidence relating to the (additional) jurisdictional threshold of significant threat, we are persuaded that Mr. Phillips does not currently meet that standard. **s672.851(1)(b)(ii); Winko, [1999} 2 S.C.R., 625: Exhibit 74.**

[8] Nevertheless, the Tribunal undertook to obtain additional evidence relative to these defining issues by ordering a formal assessment report under s.672.121(a), (as apparently contemplated by s.672.851(1)(b)), as a further basis for its opinions that:

> (i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and
>
> (ii) the accused does not pose a significant threat to the safety of the public.:
> **s.672.851(1), supra**

[9] The current hearing and the Board's findings are in furtherance of its recommendation to the Court pursuant to s.672.851.

2.0 ACCUSED'S HISTORY AND PROGRESS UNDER BCRB JURISDICTION

[10] For the purposes of the current proceeding, this panel of the BCRB adopts the evidence and findings documented in the **Reasons for Disposition** of the previous hearing found at **Exhibit 74, paras. 3 - 41:**

[3] Mr. Phillips was institutionalized in Woodlands as a youth. He has also served time in correctional facilities. He resided in group care under Services to Persons with Mental Handicaps, the predecessor to the current Community Living BC program, since 1984. He was diagnosed with an explosive disorder and, as captioned above, moderate to severe mental retardation.

[4] On June 17th, 1996 the accused was charged with sexual assault contrary to Section 271 of the Criminal Code. The victim of the sexual assault was a caregiver employed at the accused's group home which housed mentally challenged adults. A Report to Crown Counsel at Exhibit 5 of the record describes the offence in brief as follows:

"There were four (4) residents and two (2) care workers there at the time. The power went out and the victim asked the other care worker to go with two (2) of the residents to get flash lights. When the other left, the suspect grabbed [the victim] from behind and forced her down. He had his pants and underwear down. He pulled [the victim's] pants down and attempted intercourse. She kicked him and managed to escape before intercourse occurred. [The victim] was not physically injured."

[5] We recite these circumstances because they are relevant to a determination of the accused's significant threat to public safety as that concept has been elaborated in the jurisprudence. The index offence has been characterized in the course of previous decisions and has, in the opinions of expert assessors, evolved over time: **see for example par 26, INFRA.**

[6] The accused was assessed by Dr. Chale who provided a report to assist the Court. In summary, that report indicated that the accused is afflicted with moderate to severe mental retardation since childhood and functions at an IQ of 50. It also indicated the accused had a long history of behavioural problems including fire-setting, assault, and inappropriate sexual conduct: **Exhibit 4.**

[7] Even in the earliest assessments on record the experts opined that the accused was/is unlikely to ever attain fitness to stand trial and is lacking in any meaningful concept of moral wrong. Dr. Chale's summary is helpful:

> "I spoke with one of the workers from the Spallucheem Group Home. I was provided with a number of psychiatric assessments from the past which document mental retardation (moderate to severe) dating back to childhood, as well as a long history of behavioural problems (ie. fire-setting, assault, sexual inappropriateness, etc.). He had been placed in the Woodlands Facility in 1959. He was in the Tranquille Facility from 1963 until 1984. He has been at the Spallucheem Group Home since 1984. The old records show that Mr. Phillips has been tried on numerous psychotropic medications…in the past with little improvement. There have been ongoing behavioural problems at the Spallucheem Group Home (ie. physical outbursts, stole and crashed a vehicle, verbal profanity, etc.). The staff have noted that Mr. Phillips tends to be highly opportunistic in terms of his behavioural outbursts. Over the past year he had been seeing the psychiatrist, Dr. Latimer, and a psychologist, Dr. Brazier on a regular basis": **Exhibit 4**.

[8] On the basis of that assessment Mr. Phillips appeared before the Court on February 28th, 1997. He was given a verdict of unfit to stand trial, whereupon he was remanded to the Forensic Psychiatric Hospital pending further disposition by the British Columbia Review Board (B.C.R.B.).

[9] Mr. Phillips first appeared before this tribunal on April 8th, 1997. At his first hearing the accused was found unfit to stand trial and he remained in custody at the Forensic Psychiatric Hospital. Even at that first appearance the accused demonstrated what has become his standard behavioural presentation: he became inattentive, agitated and unable to attend to the proceedings and was quickly excused pursuant to Section 672.5(10) of the **Criminal Code**. Mr. Phillips' appearances since that first hearing been remarkably consistent. He has generally been excused from remaining in the hearing room after a very short period of time due to his disruptive behaviour.

[10] An expert assessment prepared by his treating psychiatrist, Dr. Gharakhanian, for the accused's next annual appearance provided conclusory findings and recommendations which have also been consistently repeated in successive assessments year after year in anticipation of this accused's annual Review Board hearings. Dr. Gharakhanian's assessment at Exhibit 15 concludes and recommends as follows:

> "Mr. Phillips suffers from a mental disorder more specifically Moderate Mental Retardation with an IQ of 48. He is being treated for his behavioural problems but his mental disorder is not treatable. He is unable on account of his mental disorder to understand that there are charges against him let alone the possible consequences for him when he returns to Court. Dwayne's mental age corresponds with a maximum adult mental age of about 5.5 to 8 years, therefore it would be unrealistic to expect a performance beyond this age." [Emphasis added]

[11] We emphasize that conclusion to point out that from Mr. Phillips' earliest time under our jurisdiction the experts have been entirely consistent that the accused's disorder is not expected to improve. They repeatedly raise the possibility, indeed likelihood, that this accused will remain unfit to stand trial permanently. That conclusion was commented on in the Review Board's decision of April 1, 1998:

> "According to Dr. Chale's February report, he is unlikely to ever attain fitness to stand trial as he lacks concepts of moral right or wrong": **Exhibit 16 p. 3**.

[12] The Review Board also adopted Dr. Gharakhanian's evidence that Mr. Phillips' behaviour had become less intrusive and less inappropriate perhaps as a result of his medication regime. Once again at his hearing of April 1st, 1998 the accused was given a disposition of custody.

[13] As of those early days the Board also received evidence and commented on the possibility of residential alternatives beyond FPH. It noted that the accused's treatment team was exploring other forms of community living, including the possibility of certification and movement to another facility. The Board anticipated the possibility of an early hearing and the submission of a plan to help the accused attempt to live in the community under appropriate supervision.

[14] As of the accused's June 1999 Review Board hearing of where the accused was again detained, another theme, which has since been repeated on numerous occasions, first emerged. At page 4 of its Reasons for Disposition the Board first raised the prospect of a stay of prosecution for consideration by the representative of the Attorney General of British Columbia: **Exhibit 26.**

[15] Mr. Phillips remained, in the Board's opinion, consistently unfit to stand trial. He was continuously detained until his fifth hearing which occurred on May 31st, 2000. A so-called "needs assessment" produced and submitted by a service provider known as Kindale, in Armstrong, British Columbia, asserts that as of October 21st, 1998:

> "[The accused's] psychiatric disorders have been stabilized. He is less intrusive and not engaging in sexually inappropriate behaviour...Dwayne is ready for a community placement.": **Exhibit 19**.

[16] Page 5 of that report subsequently describes an array of essential components of a community-based residential resource necessary to monitor, supervise and maintain this accused safely in the community.

[17] With respect to the important risk factor of the accused's potential for sexually inappropriate behaviour, as illustrated by the index offence, the evidence at Exhibit 25 also indicates that as of August 1, 1997 the accused was initiated on antiandrogen medication which effectively ameliorated his [sexualized] behaviour. It, in combination with other medications, had also effectively reduced the frequency and intensity of his

aggressive outbursts. That exhibit also clearly states that the accused's FPH-based treatment team was in support of his discharge and placement in the community.

[18] Even at that relatively early stage, the Board began to be concerned about the accused's lack of progress toward discharge beyond FPH. In its reasons of May 31st, 2000, the Board awarded the accused a conditional discharge, though he remained unfit to stand trial. It went on to express concern about inaction in discharging the accused despite the existence of a potential placement, as represented by the previously identified service provider known as Kindale, and despite expert evidence of the accused's manageability in an appropriate residential resource beyond FPH: **Exhibit 33**.

[19] Although the Board imposed a disposition of discharge subject to conditions with a delayed effective date, the accused was in fact not discharged due to the Director's stated inability to implement the order. Therefore an early mandatory hearing ensued on February 8th, 2001.

[20] Exhibit 36 is Dr. Gharakhanian's January 29, 2001 expert assessment filed for that hearing. It represents a first step in the re-characterization of the accused's index offence:

> "The charges mentioned in the index offence are in my opinion the kind of behaviour that may be expected in patients with mental retardation."

He goes on to say that:

> "If properly supervised Dwayne will not be a significant risk to public safety more than any other moderately mentally retarded individual."

[21] Importantly for our current purposes, Dr. Gharakhanian also goes on to opine that:

> " There is no treatment that could improve Dwayne's mental condition, make him fit or make him act in a more socially appropriate manner."

[28] On the basis of that expert assessment, the Board at its August 1, 2002 hearing, again commented, in the course of its reasons, on the permanence of the accused's unfitness to stand trial and again urged the province's prosecutorial service to seriously consider staying the proceedings so that Mr. Phillips might be returned to the community under circumstances more optimal in terms of his quality of life. The accused was again unable to remain in the room or to participate in the hearing.

[29] The same situation again unfolded at the accused's next hearing in June of 2003 and the Board again recommended that the Crown consider the wisdom of maintaining this prosecution.

[30] Dr. Gharakhanian's expert assessment at Exhibit 55, introduced for the accused's May 27th, 2004 hearing, again states that:

> "Mr. Phillips suffers from Mental Retardation with an IQ of 48. This corresponds with a maximum mental age of about 5½ to 8 years. Therefore, it would be unrealistic to expect a performance beyond this age. As such, he remains Unfit to stand trial and there is no treatment that could improve his intellectual functioning to the extent of making him fit to stand trial. As suggested earlier, unless left unsupervised, Dwayne does not represent a significant risk or threat and his care could be equally dealt with by community agencies in an appropriately supervised setting."

[31] In the absence of alternatives, on May 27, 2004 the Board detained the accused.

[32] The months that followed brought some welcome developments. Evidence in exhibits 59 and 60 indicates that by November 2004, MCFD had resumed the process of developing a residential resource and discharge plan for Mr. Phillips, and that funding had been allocated to support such an initiative on his behalf. Unfortunately, no progress had developed by the accused's next hearing of May 11th, 2005 and Mr. Phillips was again detained.

[33] Evidence adduced for the accused's subsequent hearing scheduled for May 2006 indicated that the accused had, in May of 2005, suffered a hip injury which served to

curtail his mobility and that he was required to spend increasing amounts of time in a wheelchair. As of December of 2005 Mr. Phillips was being considered for hip surgery. His impaired mobility is, in our view, relevant in assessing his potential significant threat to public safety.

[34] Finally, as of March 2nd, 2006, we learned that the accused had been placed in a specialized Community Living BC care facility in Langley. Although he was somewhat hesitant and required support in adapting to this new environment, he settled relatively easily, according to Dr. Gharakhanian's assessment and was not presenting a management problem: **Exhibit 65**.

[35] In addition to Dr. Gharakhanian's previously quoted summaries, in this assessment he adds:

> "He does not understand that there are charges against him, let alone the possible consequences for him if he were to return to Court."

Again, Dr. Gharakhanian reiterated that:

> "There is no treatment that could improve his intellectual functioning to the extent of making him Fit to stand trial."

He goes on to say that:

> "Dwayne has settled in nicely in the community and he does not present a significant risk or threat. The intensity of care and supervision that he requires may be provided through community agencies, therefore, it is recommended the Review Board consider a conditional discharge with follow-up through the Surrey Forensic Out-Patient Clinic": **Exhibit 65**.

[36] On the strength of that opinion, at his next hearing on May 2nd of 2006, the Board awarded the accused a conditional discharge. The accused was unable to remain for his hearing. The Board commented at paragraph 7 of its reasons:

> "However, the good news is that a long awaited resource, that was to be made available by restored funding from Community Living BC, has actually come to fruition. This is a customized home in Langley called Brookswood House that was created exclusively for the care of the accused and one other forensic patient. It is a 24-hour highly supervised setting where the accused has no less than one-to-one supervision at all times. This care is increased to two-to-one supervision in circumstances when the accused requires such scrutiny, such as when he is around motor vehicles and in certain situations in the community": **Exhibit 67 paragraph 7.**

[37] There is no finding or no evidence commented on by the tribunal that this highly specialized and specifically established resource is in any way time limited in terms of accommodating the accused.

[38] As an outpatient Mr. Phillips' care and monitoring were assumed by Dr. Riley. In a report filed for the accused's next hearing on April 25th, 2007 and entered as Exhibit 68 in this matter, he indicates "...at 63, he now requires a wheelchair and staff assistance in most tasks." In that assessment Dr. Riley also described the accused as "totally dependent."

[39] The Review Board, in its reasons for disposition at Exhibit 71, paragraph 4, says:

> "Mr. Phillips is 63 years old. He is severely developmentally challenged. He is moderately mentally retarded with a full-scale IQ of 48. His maximum adaptive mental age is 5 1/2 to eight years. There is no prospect that these features will increase or improve. In addition, Mr. Phillips had historically required intense supervision due to his poor judgment and labile mood and behaviour. Reports of Mr. Phillips' conduct over his years at the Forensic Hospital are replete with accounts of his assaultive and threatening acts aimed at co-patients and staff; often provoked and occasionally containing sexual overtones. Further, he presently suffers from some hip problems which cause

him pain and some lessened mobility although we were told treatment for his pain is assisting him in his mobility."

[40] Parenthetically, we observe that the accused, who appeared in a wheelchair, was again excused from attending that hearing. He was once again conditionally discharged to his specialized residence.

[41] Commenting specifically on the issue of the stability of the accused's residential resource, the Review Board commented that:

"So far as we are able to learn from parties at the hearing there is no reason to believe the funding which permits him to reside at that facility with the level of care he enjoys is going to be stopped": **Exhibit 71 paragraph 17**.

2.1 EVIDENCE ADDUCED AT APRIL 9, 2008, HEARING

[11] At Mr. Phillips' last hearing, the BCRB received the following evidence **Exhibit 74, paras 42-54:**

[42] For the current hearing, in his updated assessment dated March 12th, 2008, Dr. Riley comments that the accused's placement is appropriate in all respects to meeting his needs. Amazingly, given his volatile, unstable behaviour in the FPH environment, the accused has been free of any aggression since May of 2006 despite having experienced considerable environmental change and despite an ongoing fragility of mood and behaviour: **Exhibit 72**.

[43] Dr. Riley has also undertaken a comprehensive review and possible adjustment of Mr. Phillips' extensive medication regime. He tells us that despite the elimination of the accused's antiseizure medications there has been no increase in seizure activity. He is slowly reducing the variety and possibly the dosages of the accused's medications.

[44] It remains impossible to interview the accused meaningfully on matters touching upon fitness to stand trial. There are no strategies or programs which could be expected to restore the accused to fitness. Mr. Phillips' current functioning, both as a result of his cognition and his inability to focus or concentrate, is far below the acceptable threshold where he could be taught and able to retain information with respect to the court process.

[45] It was Dr. Riley's opinion that the accused continues to lack fitness to stand trial and that his lack of such fitness will likely be permanent. Indeed Mr. Phillips is more likely to deteriorate further than to improve mentally. Dr. Riley is absolutely confident and convinced that the accused's impairment is of a permanent nature.

[46] As to the issue of disposition, Dr. Riley indicates the accused has been remarkably stable since his discharge. He is far less aggressive than he was in hospital. Under questioning, Dr. Riley was unable to provide any evidence that the accused's placement or supports were time limited.

[47] In terms of behaviour indicative of risk or significant threat to others, Dr. Riley added that as long as the accused is in an appropriately supported environment (as he currently is) his risk or potential risk to others is considerably reduced. His improved behaviour has been surprising and positive, although occasional outbursts which do not serve to escalate his risk to the level of "significant" should be expected in the future.

[48] Mr. Phillips, again, briefly attended the hearing in a wheelchair. Dr. Riley told us that the accused's mobility is such that he uses either a wheelchair or a walking frame in order to enjoy any movement at all. He is treated with morphine for pain management purposes.

[49] According to Dr. Riley, the accused is currently, as a result of his limitations, at low risk of physical assault and he has not demonstrated any aspect of his previous

> sexualized misconduct. There are allegations that the accused may have been the victim of sexual impropriety, or attempted impropriety, by a male residential staff member who has since been dismissed. Even that event did not serve to destabilize Mr. Phillips.
>
> [50] When specifically asked, Dr. Riley indicated that the accused's quality of care will likely be the same whether or not the accused is under Review Board jurisdiction or if his prosecution is stayed.
>
> [51] Should the accused's Review Board jurisdiction be terminated, Dr. Riley indicated that another physician could certainly monitor this accused and his medication regime. Dr. Riley also agreed to consider a referral to a specialized developmentally disabled treatment team. He also gave evidence that, given the accused's intellectual limitation, his behaviour is in no way affected or influenced by the presence of Review Board orders or conditions or by his legal status.
>
> [52] The Review Board heard evidence from a representative of Community Living Services BC. Although this accused is part of his caseload, quality analyst, Mr. Shannon was not intimately familiar with Mr. Phillips' individual background. In his view, CLBC's funding commitment to the accused is not time limited but ongoing, and is not liable to be withdrawn. When asked what would happen if funding ceased, he expressed confidence that the accused would remain under CLBC's mandate. He also said that that commitment was not dependent on the accused being under Review Board or Criminal Code jurisdiction.
>
> [53] Under questioning from Mr. Hillaby, Mr. Shannon did allow that ultimately eligibility decisions are not within his authority but he left us with no evidence that the CLBC services will terminate.
>
> [54] All parties and the Review Board were in agreement that the accused remains at this stage unfit to stand trial and that the appropriate disposition remains one of discharge subject to conditions.

3.0 EVIDENCE PROVIDED AT JUNE 18, 2008 HEARING

[12] For the current hearing, Dr. Riley, the accused's supervising forensic psychiatrist tendered an "assessment report' in satisfaction of the Board's s.672.121 (Apr 24/08) order, and also provided viva voce evidence: **Exhibit 77**.

[13] In summary, Dr. Riley's assessment report indicates that regarding fitness to stand trial:

- Mr. Phillips is 65 years old and has been unfit to stand trial since Feb 28, 1997. He has lived in supervised facilities since age 16.
- His diagnosis is of moderate intellectual disability, with an IQ of 48, which means he functions at the level of a 5 to 8 year old child. He does not have a typical psychiatric disorder.
- It has not been possible to deem Mr. Phillips legally fit to stand trial; he is not "trainable".
- **He can never be expected to be deemed fit to stand trial. This is consistent with previous psychiatric opinion(s).** (emphasis added)

[14] Regarding the legal issue of “significant threat to public safety”, Dr. Riley states that:

- Most standardized risk assessment instruments may be inapplicable or even inappropriate for individuals with Mr. Phillips’ mental disabilities.
- The most critical component in managing Mr. Phillips’ risk is the continuation or stability of his highly specialized community placement; in the absence of his current staffed, individualized placement he could reasonably be expected to pose a significant threat to others even despite his limited mobility.
- Mr. Phillips’ is compliant in consuming his impulse and aggression controlling medications.
- The environmental and behavioural interventions of the past 2 years have resulted in observed improvement in his behaviours.
- Largely given his concerns about maintaining Mr. Phillips’ current specialized placement, Dr. Riley recommended that he remain subject to the BCRB’s jurisdiction.

[15] Orally Dr. Riley reiterated that any risk the accused poses really depends upon the staffing and the environment in which he is managed and his response to any destabilizing influences or stimuli:

- Mr. Phillips is at baseline stability and recent medication reduction has not resulted in any increase in aggressive behaviours.
- Although Mr. Phillips’ mobility is limited he can move about without his wheelchair using furniture for support. He remains on morphine for chronic pain.
- The only expected change in the accused’s functioning and mobility is further decline.
- If his placement and treatment are maintained his risk will remain ‘low’ even without Forensic Psychiatric Services’ involvement.
- Mr. Phillips’ care could be referred on an expedited basis to a specialized Developmental Handicaps treatment team in Langley.
- His legal status or the restraints of his BCRB orders have no impact or effect on this accused.
- Although there was a single incident of striking out at staff soon after his placement, (2 years ago), he has not struck out recently. There have been no reported concerns for their physical safety from the residential staff.
- His current environment is not as provocative as his previous hospital environment.

[16] Given the central importance of maintaining the accused's highly supported environment in managing his residual risk, the BCRB, in satisfaction of its "inquisitorial" duties, (**Winko** par.54) (cited supra, par. 7), obtained further evidence from **Community Living BC (CLBC)**, which funds the accused's placement.

[17] Exhibit 76 is a letter from Ms. Paula Grant, Director, Quality Assurance, CLBC. She advises, inter alia, that:

- CLBC funds Mr. Phillips' residential, supervisory and support services.
- Mr Phillips' continuing eligibility for CLBC services has been confirmed and is not 'time limited or otherwise circumscribed or conditional'. The only qualifier is that Government retains the right to allocate resources to specific programs and individuals as part of the budget process.
- **There is no 'terminal date or time limit'** on CLBC's commitment to support Mr. Phillips. (emphasis added)
- If Mr. Phillips' current placement were to terminate or disrupt, he would continue to remain eligible for CLBC services and within CLBC mandate; CLBC would immediately endeavour to locate and approve alternative residential and community supports.
- Mr. Phillips' eligibility for ongoing CLBC services is not conditional or dependent upon his legal status or his being subject to the jurisdiction of the BC Review Board.

[18] The BCRB also arranged to hear, viva voce, evidence from representatives of the CLBC organization which indicated that the accused's setting is highly controlled and circumscribed. Protocols govern when the accused's behaviour warrants law enforcement intervention. Special precautions are in place to ensure the accused does not have access to motor vehicles.

4.0 FINDINGS

[19] In the Board's view, the evidence supports the following findings:

1. Given his lifelong afflictions and impairments, and on the basis of consistent expert opinion, Mr. Phillips **remains unfit to stand trial and is not likely to ever become fit to stand trial**.

2. Mr. Phillips has, after languishing for years in a secure psychiatric environment which was admittedly not optimal in terms of his quality of life or in managing his risk to others, achieved a positive reintegration into a highly specialized, structured and professionally staffed residential resource.
3. In his current supervised environment, **Mr. Phillips' residual behavioural risk to others is entirely manageable**.
4. There is **no evidence to suggest that Mr. Phillips' current placement or his** ongoing **eligibility for a similarly supported alternative environment are time limited** or **dependent on his legal status**.

[20] In **Winko** (supra) the Supreme Court of Canada (SCC) said that absent "dangerousness amounting to a significant threat to public safety, there is no constitutional basis for the criminal law to restrict the liberty of (an NCR) accused": Par. 50.

[21] **Demers**, (supra par 6), and s.672.851 C.C., in response, extended a similar protection to the permanently unfit to stand trial (UST) accused.

[22] The Court in **Winko (supra)** went on to precisely define the "significance" or level of threat required to keep the accused subject to the ongoing jurisdiction and restraint of the criminal law:

> To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given "dangerousness" a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". To engage these provisions of the *Criminal Code*, **the threat posed must be more than speculative in nature; it must** be **supported by evidence**: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL) (C.A.), at para 21. The threat **must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A 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**: *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406 (B.C.C.A.), at p. 413. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty.: **Par.57** (Emphasis Added)

[23] The Court understood both the **gravity and the inherent difficulty** of a finding of significant threat:

> Without purporting to define the term exhaustively, the phrase conjures a threat to public safety of sufficient importance to justify depriving a person of his or her liberty. As I stated earlier, there must be a foreseeable and substantial risk that the NCR accused would commit a serious criminal offence if discharged absolutely. **It is impossible to predict or catalogue in advance all the types of conduct that may threaten public safety to this extent.** It **must be left for the court or the Review Board** to determine whether the conduct in the case it is assessing meets this standard. In discharging this task, the court or Review Board will bear in mind the high value our society places on individual liberty, as reflected in the *Charter*. It will also bear in mind the need to protect society from significant threats. The final determination is made after hearing evidence and considering the need to protect individual liberty as much as possible as well as the need to protect society. This process, as I have outlined it above, does not violate the principles of fundamental justice: **Par. 69; see also paras. 87,88,89 (emphasis added).**

[24] In more precisely defining the concept, the Court also described the breadth of the Review Board's inquiries in arriving at a determination of "significant threat":

> It follows that the inquiries conducted by the court or Review Board are necessarily broad. They will closely examine a range of evidence, including but not limited to the circumstances of the original offence, the past and expected course of the NCR accused's treatment if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, **the support services existing for the NCR accused in the community** and, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. The broad range of evidence that the court or the Review Board may properly consider is aimed at ensuring that they are able to make the difficult yet critically important assessment of whether the NCR accused poses a significant threat to public safety. At all times, this process must take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system. Appellate courts reviewing the dispositions made by a court or Review Board should bear in mind the broad range of these inquiries, the familiarity with the situation of the specific NCR accused that the lower tribunals possess, and the difficulty of assessing whether a given individual poses a "significant threat" to public safety: **Par. 61; see also Lajoie, (1994) Q.C.A. #500-10-000200; Re Hind, (BCRB, Feb 4, 2003) (emphasis added).**

[25] The threshold concept of significant threat has been applied rigorously as the defining, pivotal finding, in every Review Board hearing, in every province and territory, since **Winko**.

[26] With the backdrop of the SCC's direction and its application to hundreds of cases since, this Tribunal finds that Dwayne Phillips does not, on the evidence now, pose a significant threat to public safety.

[27] Under the circumstances, we recommend that the Court hold an inquiry to determine whether this prosecution should be stayed in accordance with s.672.851 of the Criminal Code.

/JL
Edit KW July 2/08