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

REASONS FOR DECISION ON JURISDICTION AND DISPOSITION OF

JOEY MARTIN

HELD AT: **BC Review Board Office**
Vancouver, BC
June 2, 1999

BEFORE:	**CHAIRPERSON:**	**B. Walter**
	MEMBERS:	**Dr. G. Laws, psychiatrist**
		B. Brett

APPEARANCES:
ACCUSED/PATIENT: Joey Martin
ACCUSED/PATIENT COUNSEL: D. Nielsen
HOSPITAL/CLINIC: Counsel: M. Acheson
ATTORNEY GENERAL: P. Riddell

1.0 BACKGROUND - INTRODUCTION

On April 28, 1999, a panel of the BC Review Board consisting of Bernd Walter, Dr. Gwen Laws and Barbara Brett held a hearing to review the disposition of Joey Martin.

After reviewing the documentary disposition information filed, as well as hearing and considering oral evidence, the Board made a disposition of discharge on conditions similar to those imposed on May 5, 1998. The panel's order and reasons may be found at Exhibit 18 to these proceedings.

After the hearing and disposition it was determined that the appointment to the Review Board of Dr. G. Laws, the psychiatric member of the hearing panel, had expired as of April 24, 1999. On May 4, 1999 the Registrar of the BC Review Board informed counsel for Mr. Martin that the appointment of Dr. Laws had expired. By letter dated May 4, 1999, counsel indicated that Mr. Martin would consent to the Board holding a hearing on May 4, 1999 in the absence of the parties, in order to affirm the disposition made on April 28, 1999: [Exhibit 19].

Due to scheduling exigencies it was not possible to reconvene before May 5, 1999, the anniversary date of Mr. Martin's previous disposition.

Dr. G. Laws was reappointed to the Review Board on May 6, 1999: [Exhibit 21]. A new hearing was convened for June 2, 1999. Counsel for Mr. Martin notified the Board of her position that, having failed to convene and commence a hearing with the 12 month time frame prescribed by s.672.81(1) of the Criminal Code of Canada (C.C.C.), the Board had lost jurisdiction over Mr. Martin.

Counsel also advised that in order to facilitate this (re) hearing, Mr. Martin consents to attending the hearing and to having the evidence and the submissions with respect to disposition made on April 28, 1999, admitted as evidence at the hearing of June 2, 1999, obviously without conceding on the issue of jurisdiction: [Exhibit 20]. On the basis of Mr. Martin's consent it was agreed among the parties and the Board that the hearing of June 2, 1999 would be restricted to jurisdictional arguments only.

By letters dated May 31, 1999 and June 1, 1999, respectively, Lyle Hillaby, agent for the Attorney General of British Columbia and Mike Quinn, Director of Forensic Psychiatric Institute, consented to adopting the evidence and submissions of the April 28, 1999 hearing: [Exhibit 20].

The central issue to be determined in this hearing concerned the jurisdiction of this Board with respect to the 12 month limit prescribed in s.672.81 C.C.C. Stated another way: does the failure to convene a hearing within 12 months of the previous disposition result in loss of the Board's jurisdiction over the accused?

2.0 STATUTORY PROVISIONS AND AUTHORITIES CONSIDERED

The Criminal Code

1. s.485(1) C.C.C. - Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution, a new information shall not be laid and a new indictment shall not be preferred before any court in respect of the same transaction without
   (a) the personal consent in writing of the Attorney General or Deputy Attorney General, in any prosecution conducted by the Attorney General or in which the Attorney General intervenes; or
   (b) the written order of a judge of that court, in any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene.

2. s.672.81(1)C.C.C. - A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph s.672.54(a).

3. s.672.38 (1) C.C.C. - A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

4. s.672.41(1) C.C.C. - Subject to subsection (2), the quorum of a Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practice psychiatry, and any other member.

5. s.672.47 (1) C.C.C. - Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.

6. s.672.63 C.C.C. - A disposition shall come into force on the day that it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the date of expiration that the disposition specifies or until the Review Board holds a hearing pursuant to section 672.47 or 672.81.

7. s.672.53 C.C.C. - Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice. 1991, c.43, s.4.

8. s.785 C.C.C. - In this Part,
   "clerk of the appeal court" includes a local clerk of the appeal court;
   "informant" means a person who lays an information;

"information" includes
(a) a count in an information, and
(b) a complaint in respect of which a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order;

"order" means any order, including an order for the payment of money;

"proceedings" means
(a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction, and
(b) proceedings where a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order;

"prosecutor" means the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them;

"sentence" includes
(a) a declaration made under subsection 199(3),
(b) an order made under subsection 100(2) or 259(1) or (2), section 261, subsection 730(1), section 737, 738, 739 or 742.3 or subsection 747.1, and
(c) a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.43(3) or 742.6(9), and
(d) an order made under subsection 16(1) of the *Controlled Drugs and Substances Act*;

"summary conviction court" means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who
(a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
(b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
(c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices;

"trial" includes the hearing of a complaint.

Authorities Considered:

9. P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London : Sweet and Maxwell, 1969)

10. R. v McIntosh, [1995] 1 S.C.R. 686

11. In Re Chen, BC Review Board, April 3, 1996

12. In Re Crosson, BC Review Board, April 3, 1996

13. Elmer E. Driedger, Construction of Statutes, 2nd ed. (Toronto : Butterworths, 1983)

14. British Columbia (Forensic Psychiatric Institute) v. Johnson, [1995] B.C.J. No. 2247 (C.A.)

15. R. v. Swain, [1991] 1 S.C.R. 933

16. Jones v. British Columbia (Attorney General), [1997] B.C.J. No. 2773 (C.A.)

17. R. v. Robinson (1951), 100 C.C.C. 1 (S.C.C.)

18. R. v. Goulis (1981), 60 C.C.C. (2d) 347 (Ont.C.A.)

19. Blackman v. British Columbia (Review Board) (1995), 95 C.C.C. (3d) 412 (B.C.C.A.)

20. Winko v. British Columbia (Forensic Psychiatric Institute) (1999), S.C.C. File No. 258 - 56

21. Vukelich v. Vancouver Pre-Trial Centre, Director (1993), 87 C.C.C. (3d) 32 (B.C.C.A.)

22. Cleary v. Canada (Corrections Services) (1990), 56 C.C.C. (3d) 157 (S.C.C)

23. Re: Hutchinson, [1998] B.C.J. No. 2303

The Interpretation Act

24. s.11 Interpretation Act - The expression "shall" is to be construed as imperative and the expression "may" as permissive.

25. s.12 Interpretation Act - Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

26. s.15 Interpretation Act - Definitions or rules of interpretation in an enactment apply to all of the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

3.0 ARGUMENTS OF THE PARTIES

3.1 ARGUMENTS ON BEHALF OF THE ACCUSED SUMMARIZED

- That the BC Review Board, as a creature of statute, has no authority to exceed or otherwise avoid the specific requirement of s.672.81(1)C.C.C.

- That the words of s.672.81(1) are specific and imperative and ensure against indeterminacy.

- That there are no curative provisions in Part XX.1 of the C.C.C.

- That the Board is not a court or provincial judge or justice, therefore s.485(1) is not curative as it does not include a tribunal or quasi-judicial body; neither is s.672.5 curative.

- That the issue in question is in any event not a mere procedural irregularity: s.672.5.

- That it is beyond the authority of an administrative tribunal to read into its constituting statute the intention of Parliament.

- That the BC Review Board is not a summary conviction court under s.785 C.C.C.; nor are BC Review Board hearings "proceedings" under that section.

- That in the absence of ambiguity the clear words of the statute must be given effect; no task of interpretation arises: R v. McIntosh (*supra),* citing Maxwell on the Interpretation of Statutes (*supra*).

- That if ambiguity exists in a penal statute such as the Code the interpretation most favourable to the accused is to be adopted: McIntosh (*supra),* at 702 and 705.

- That Part XX.1 C.C.C. may not be penal in intent but it can affect liberty even indefinitely.

- That the Board can neither expand nor limit its statutorily conferred jurisdiction: Jones (*supra*).

- That the word "shall" in s.672.81 is imperative

- That parole cases do not apply by analogy to Part XX.1 proceedings.

- That once lost, jurisdiction under Part XX.1 cannot be revived.

3.2 ARGUMENTS ON BEHALF OF THE AGBC SUMMARIZED

- That failure to hold a hearing even beyond the period specified in s.672.81(1) would amount to a refusal by the BC Review Board to exercise its jurisdiction: Jones.

- That if the Review Board fails or refuses to hold a hearing an accused has remedies to judicially compel a hearing: Jones (*supra),* at Par. 30, and Par. 18; Hutchinson (*supra),* Par. 19.

- That an administrative failure to hold a hearing does not result in a loss of jurisdiction: Hutchinson (*supra)*, Par. 18.

- That Part XX.1 must be, and has been, interpreted consistent with its underlying purpose, object or legislative intent.

- That absent an expiration date, a disposition of the BC Review Board remains in effect until another hearing is held: s.672.63; and s.672.81.

3.3 ARGUMENTS ON BEHALF OF THE DIRECTOR AFPS SUMMARIZED

- That the expiration of an appointing OIC is not fatal to the Board's authority to make a disposition and does not nullify a disposition.

- That only the granting of an absolute discharge terminates the Board's jurisdiction.

- That the imperative requirement to conduct a hearing does not address the issue of the consequences of a failure to do so, (Robert MacCauley and James Sprague, Practice and Procedure Before Administrative Tribunals (Toronto: Carswell, 1995), at p. 22-11); (Pierre-Andre Cote, The Interpretation of Legislation in Canada, 2nd ed. Montreal : Les Editions Yvon Blous Inc., 1991).

- That failure to comply with a mandatory provision does not result in a nullity unless the law so states or unless real prejudice is caused.

- That determining the consequences of non compliance requires determining legislative intent: Cleary (*supra)*.

- That s.672.53 provides curative relief in respect of procedural irregularities.

- That failure to hold a hearing within a specified timeframe is a procedural irregularity or error: Doucet: p6.

- That the accused has suffered no substantial prejudice.

4.0 DISCUSSION & DETERMINATION OF ISSUES

4.1 THE HEARING OF APRIL 28, 1999

In keeping with its practice and in compliance with statutory direction, (s.672.81(1) C.C.C.), the BC Review Board convened and conducted an "annual" or "12 month" hearing to review its previous disposition with respect to Mr. Martin dated May 5, 1998, [Exhibit 13].

Section 672.41(1) provides that such a hearing must be conducted by a quorum of 3 qualified members to the Board duly appointed by Order in Council: s.672.39: s.672.38

C.C.C. Insofar as the appointment of Dr. G. Laws, the panel's psychiatric member had expired as of April 24, 1999, the hearing was not conducted by a duly constituted quorum of the Board.

The C.C.C. contains no provisions analogous to S. 130(2) of the Labour Relations Code, R.S.B.C. 1996, c.244, which authorizes members of the BC Labour Relations Board to carry out and complete duties and exercise powers in relation to proceedings in which he/she participated prior to expiry of his/her appointment, (see also Workers Compensation Act, RSBC 1996 c.493, s.83(5)).

The requirement of a quorum of the Board to hold a hearing is fundamental.

The April 28 hearing also violated the requirements of s.672.44 and s.672.39 C.C.C. in that it did not include a psychiatrist. We cannot seriously contend, notwithstanding, Dr. Laws' reappointment to the Board by May 6, 1999, that the defects in the hearing of April 28, 1999 can interpreted as mere procedural irregularities. The April 28, 1999 hearing was a legal non-event; a nullity which cannot be cured by s.672.53 C.C.C. Therefore no hearing was in fact held within 12 months as required by s.672.81(1) C.C.C.

4.2 INTERPRETATION OF S.672.81(1) C.C.C.

The Board agrees that the wording of s.672.81(1) is clear and apparently imperative. It requires the Board to convene a hearing within 12 months of the preceding disposition. Nevertheless, the precision of the language does not necessarily render its interpretation or application beyond debate. Nor do curative provisions appear to offer answers.

In similarly precise, clear and unambiguous language s.672.63 at least opens the door to the argument that a disposition "shall remain in force until the date of expiration that the disposition specifies or until the Review Board holds a hearing pursuant to s.672.47 or s.672.81."

Section 672.81 C.C.C. in its entirety appears to describe all those circumstances which trigger the requirement to hold a hearing. Section 672.63 C.C.C. deals with the remaining in force of a disposition arguably even where no hearing is held within 12 months. Section 672.81 C.C.C. does not include a provision that if the 12 month hearing contemplated is not convened then the disposition ceases to be in effect. As a matter of practice the Board does not specify expiry dates in its dispositions.

We do not presume to say that the sections are irreconcilable in terms of their joint or complementary interpretations. They do however at a minimum allow room for debate.

The constituting legislation, despite its otherwise clear direction, does not stipulate or describe the consequences of non compliance with s.672.81(1). There is clearly no provision which states positively that a failure to convene a hearing within 12 months under s.672.81(1), results in a loss of jurisdiction over the accused. There is no statement anywhere in the legislation which illuminates the issue at the heart of the

parties' submissions. On the other hand the matter is legitimately the subject of differing views and arguments. It is precisely these obvious and defensible, though opposing points of view which, in the absence of specific statutory direction allow, indeed require, the Board to consider and interpret statutory intent.

Whether or not the curative provisions of s.485(1) C.C.C. apply (see Doucet) it is within the competence of the tribunal to consider Parliaments' intent and to take a purposive approach to interpretation. The task of interpretation has arisen: R. v MacIntosh (*supra*).

Therefore, notwithstanding the Board is a creature of statute, and notwithstanding the language of s. 11 of the Interpretation Act, the Board is entitled to resort to s.12 of the Interpretation Act and seek guidance in the underlying objects or intent of the statutory scheme. These objects have been hi-lited in Swain, (*supra*) Davidson, (*supra*) and again in Jones: *supra* at Par. 15, 18, 19. They have been echoed by the Board in Doucet, (BC Review Board, December 15, 1997); and in Henry: (BC Review Board, June 1998. Most recently these statements have been reviewed with approval and recast by the Supreme Court of Canada in Winko v. BC [*supra*]: "The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately," (per McLachlin, J. at Par. 21). McLachlin, J. goes on to state at Par. 41 and 94 of Winko (*supra*) that the legislation is not penal in purpose or effect, rather its purpose is rehabilitative and to prevent antisocial acts.

4.3 IMPLICATIONS OF A PURPOSIVE APPROACH

In Doucet (December 15, 1997) the BC Review Board held that using a purposive approach to interpreting the constituting legislation, a failure to conduct a hearing within the forty five days provided by s.672.47 did not result in a loss of jurisdiction over the accused. In arriving at this conclusion, it relied on R. v Talbot (1996), (Unreported, Ont. P.C.) where an analogous situation under s.672.33(1) did not result in a loss of jurisdiction. In that case Paris, PCJ referred in turn to a number of bail cases and said:

> "The common conclusion in these cases is that although the detention is unlawful the jurisdiction over the offence is not affected. In other words the failure to bring the prisoner to court as mandated is a collateral matter that affects the legality of the detention but not the jurisdiction over the offence." (p-4)

In Hutchinson (BC Review Board, January 26, 1998), the Board held that, notwithstanding their language and effect, statutory provisions should be interpreted in light of legislative intent. The Board referred to the statements of intent quoted above as well as the statement by Cumming, J.A. in Jones [*supra*], quoted below. In that case the Board also held that parole cases are analogous and relevant to the Review Board.

In the course of her argument counsel for the accused, in seeking to distinguish the Board's decision in Doucet (*supra*), stated that the Board had wrongly found that "the

matter of jurisdiction is a procedural irregularity" which does not affect jurisdiction. Therein, in our view, lies the misconception at the heart of the issue being argued. Whether the failure to comply with specified time frames is ultimately procedural or substantive, which counsel defines as giving or defining a right, neither label either gives rise to, nor does it necessarily affect jurisdiction. Determining of whether an error is substantive or merely procedural does not of itself answer the question or lead to the conclusion that the error goes to jurisdiction: see Cleary, *supra*.

In Hutchinson (*supra*) the Board stated quoting its own earlier decision in Vos (BC Review Board, May 1997):

> "While it would appear to be beyond question that the Review Board only has such powers as are given to it by statute, the Panel hearing the case did not agree with Ms. Sattar's view that when a disposition order ceases to be in force as a result of the passage of its expiry date, the Review Board loses jurisdiction over the accused, i.e. loses the power to make any further orders with respect to the accused. In the opinion of the Panel, there is a clear distinction between the "jurisdiction", or power to make a disposition with respect to an individual accused, and the "force" or life of the disposition itself. There is nothing is sections 672.81(1) and 672.63, or, as far as the Panel can determine, in any other sections of Part XX.1, that requires the interpretation suggested by Ms. Sattar. Indeed, the legislative history of the Mental Disorder Amendments would indicate the contrary."

As to Ms. Pollak's assertion that the time limits are substantive in the sense that they confer or define a right the Board said:

> "Although the Review does not lose jurisdiction with respect to the accused if it fails to hold a review hearing within the prescribed time, this does not mean that the accused is left without a remedy in such situations. He/she may apply to the Board for a review hearing under section 672.81(1), or may apply to a superior court either to challenge the continued application of the expired disposition or to seek a preogrative writ to enforce his/her right to have a hearing before the Review Board. This approach protects not only the legitimate liberty interests of the accused but also meets the need to protect the public from dangerous persons."

Though the right conferred by s.672.81(1) may be one of substance, non compliance provides substantive remedies. We do not need to resort to "curative" provisions.

These concepts have been echoed by Cummings, J.A. In Jones (cite):

> The Review Board gets its jurisdiction from the *Code*, not as the appellant asserts, from its own disposition. In other words, the Review Board cannot create, by its own order, a different jurisdiction that that set out in the *Code*. **The Review Board has a mandate, pursuant to Part XX.1 of the *Code*, to exercise an ongoing jurisdiction over mentally disordered persons who are subject to a disposition order.** (Emphasis added).

Even more recently in Hutchinson (*supra*) McEachern, C.J. stated:

> "[18] I agree with the Reasons of Mr. Justice Hall and I would add that it would only be in the most unusual circumstances that an administrative failure to hold a hearing of the kind required in this case would result in a loss of jurisdiction, particularly in a case such as this one where public safety is involved.
>
> [19] While the statutory direction for periodic hearings are mandatory for the protection of the person in custody and for the integrity of the scheme established by Parliament, the person in custody can insist, or the court may order, that these hearings be conducted if, for any reason, they are delayed without very good reason. Jurisdiction over the person in almost all these circumstances, however, would rarely be lost by reason of a failure to hold hearings strictly as required."

The Board finds that its jurisdiction over Mr. Martin has not been lost. There is no question with respect to "reviving" it. Nor are we required to engage in an analysis as to whether the accused has suffered substantial prejudice pursuant to s.672.53 C.C.C. In any event the Board is prepared to take into account in making its disposition the time which has elapsed since the impugned proceedings of April 28, 1999. This would eliminate any notion of prejudice.

5.0 DISPOSITION

Having reconsidered, with the accused's consent, the evidence and submissions of April 28, 1999 the Board orders a discharge on terms and conditions and for the reasons articulated at Exhibit 18 which will form Appendix 1 to these reasons.

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BW/sec