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

AND

THE BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF

ROBERT ALLAN MITCHELL

REASONS FOR DISPOSITION

HELD AT: Forensic Psychiatric Institute
Port Coquitlam, BC
February 7, 2001

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr. H. Parfitt, psychiatrist
K. Lehal

APPEARANCES:
ACCUSED/PATIENT: Robert Allan Mitchell
ACCUSED/PATIENT COUNSEL: M. Smith
HOSPITAL/CLINIC: M. Shieh D. Carew M. Acheson
ATTORNEY GENERAL: T. Ochitwa
COUNSEL - MAG LEGAL SERVICES BRANCH: J. Loenen
MINISTRY FOR CHILDREN & FAMILIES: P. Grant

1.0 INTRODUCTION AND BACKGROUND

On February 1, 2001 the BC Review Board (BCRB) convened a "mandatory" hearing, pursuant to S.672.81(2)(a) C.C., to review its disposition in the matter of Robert A. Mitchell (accused) made on October 16, 2000. That disposition ordered, inter alia, that as of November 16, 2000, Mr. Mitchell be discharged from the Forensic Psychiatric Institute (FPI) to reside at the "South Surrey Residence": Ex. 119.

On November 16, 2000 the BCRB received notification pursuant to S.672.56 C.C. that "hospital unable to discharge patient to South Surrey Residence as ordered in patient's most recent Review Board disposition": Ex. 20.

Mr. Mitchell remains detained at FPI at the time of this hearing. His ongoing detention is in contravention of the discharge afforded him under his current disposition, occasioning this hearing.

Mr. Mitchell's social, criminal, psychiatric and clinical history have all been described in detail over the course of his (at least 15) previous hearings before the Review Board. This panel adopts the findings and conclusions contained in the Review Board's previous reasons for disposition; in particular Exhibits 44, 98, and 119. Some of this documented history is brought forward for the reader's benefit in these reasons.

The following passages are taken from Reasons for Disposition at Ex. 44:

> Mr. Mitchell's psycho-social and clinical history is outlined in excellent detail in Exhibit 44, the Reasons for Disposition of a hearing held on September 21, 1995:

Mr. Mitchell has had mental disorder since childhood. He has suffered seizures since a very early age, and in his third or fourth year was diagnosed as suffering from temporal lobe epilepsy. He still takes drugs to lessen the risk of grand mal seizures. He also suffers from an intellectual deficiency, having a borderline range of intellectual functioning, falling within the 4th percentile. In school he reached perhaps a Grade III or IV level. At age 15 he was admitted to psychiatric ward at Cranbrook because his mother had difficulty controlling him – he would fly into rages and destroy things. It is alleged that he also displayed inappropriate sexual behaviour with a four year-old girl and animals. (See Psychological Assessment by Kelly Reid, MA Psych, working under the supervision of Dr. Hans Veiel, October 22, 1992).

The above Psychological Assessment also indicates that to that date Mr. Mitchell had had three admissions to the Forensic Psychiatric Institute ("FPI"), all for assault. In the index offence, Mr. Mitchell was found to have thrown a knife at someone in a continuous care home of which he was a resident. He was found not guilty by reason of insanity and ordered into strict custody to await the pleasure of the Lieutenant Governor. On January 28, 1993, when brought under the new mental disorder provisions, he was given a discharge subject to conditions (Exhibit 20)."

Initially following his admission to FPI Mr. Mitchell demonstrated some progress under medication, programs and counseling, including the benefit of a "one-to-one" worker to support his reintegration. In April 1994 he was transferred to reside in cottage accommodations on the Riverview hospital grounds.

Prior to his February 16, 1995 review hearing Dr. Riar indicated that:

"Mr. Mitchell's condition was very stable. He caused no major management difficulties. He was very cooperative, polite, reactive and tolerable. His speech was good, his thinking concrete and his mood and affect appropriate (albeit a little silly sometimes). He displayed no hallucinations, delusions or suicidal or homicidal ideations. His attention and concentration were fair. His ability to judge certain social situations was poor and his insight to his situation was limited. He still remained passive aggressive and failed to accept responsibilities for his actions, tending instead to blame others. His diagnosis was
Axis I – Organic Personality Disorder due to Epilepsy + sexually inappropriate behaviour
Axis II - Borderline Mental Retardation
Axis III – Epilepsy: [Ex. 27]

Dr. Riar reported that Mr. Mitchell was taking public transport unaccompanied to attend Vancouver Community College to learn about human sexuality, and this experience was also helping his socializing skills. Dr. Riar added that despite this general improvement, Mr. Mitchell still had a tendency to decompensate quickly and to regress, and he need structure, supervision and guidance in his life: [Ex. 44]."

"In mid 1995 Mr. Mitchell was the object of allegations of sexual impropriety resulting in the loss of his privileges including community access. Further allegations that he had submitted a false expense claim and non-compliance with house rules at the cottages resulted in a transfer to the more restrictive environment of R2-N. Mr. Mitchell tended to blame others for these things.

A further summary of events and progress is found at [Ex. 44], p.p 2-3:

In a Progress Report dated July 27, 1995, Dr. Simon Hearn, Psychologist, wrote that it was hard to be optimistic concerning Mr. Mitchell's future ability to control prosocial behaviour in sexual and other areas for the long-term. Dr. Hearn added that he may have reached a ceiling on how much he can improve (exhibit 36). In preparation for the July 31 hearing of the Review Board, Dr. Riar wrote to Dr. D. Eaves, July 28, 1995 (exhibit 37) that since the last Review Board hearing he had not noticed any improvement in Mr. Mitchell's behaviour. "In fact", he said, "his behaviour had deteriorated at times." However, in assessing risk, Dr. Riar said that Mr. Mitchell was able to control his behaviour and act appropriately whenever properly supervised and instructed. On July 31, the Review Board extended the conditional discharge, granting a right of unescorted access to the community subject to the authority of the Director, Adult Forensic Psychiatric Services ("the Director") to set rules of supervision for such access.

In the middle of August three further events occurred that led once again to withdrawal of privileges. On August 13, Mr. Mitchell was sitting with his girl friend in a public area of the hospital, in front of a window, with his penis out. He was seen by a staff member who confronted him about it. At first, he denied the allegation categorically, calling the staff member an "f…..g liar", along with some racial slurs. However, his girl friend is alleged to have acknowledged that the allegation was true, and that Mr. Mitchell had indeed asked her to fellate him. Later, Mr. Mitchell is reported to have admitted to a staff member that it happened, but he refused to discuss it in a formal setting. The second incident occurred on August 14, when he persistently rang a buzzer on a hallway door, and when told that this was inappropriate conduct he became argumentative, refusing to talk it out, adding that he had "the right to remain silent". On August 16, he was reminded that use of his own cup to get ice from the ice-machine was prohibited on sanitary grounds, and he became argumentative and agitated (exhibit 41).

In response to his apparent disregard for the rules, the treatment team decided to place him on a strict behaviour modification program. All his privileges were withdrawn, and he was told that they would restored if his behaviour remained appropriate: (see letter of September 18, 1995, from Dr. K. Riar to Dr. D. Eaves, exhibit 42).

As of December 15, 1995 Mr. Mitchell's privileges were withheld after it was alleged that he was soliciting sexual partners for a mentally handicapped woman (his "girlfriend").

In anticipation of his June 26, 1996 hearing a significant body of new disposition information was generated.

Dr. Simon Hearn, psychologist provided an update to his earlier (1995) assessment:
He has always generated unusual amounts of attention at FPI, for instance, has a one-to-one worker when no other patient has, and weekly sessions with a psychologist where few others have.

Since 1995 the patient has transgressed behaviourally a number of times in serious ways. These incidents have entailed crossing sexual boundaries with women without consent, crossing sexual boundaries with consent but in public places, or conning staff. The team, through individual members and as a group, has explored how best to understand and ameliorate Mr. Mitchell's behaviour.

What has become apparent ins that his worldview and behaviour are unvaryingly egocentric, and that asking him to understand and use abstract principles, such as taking into account the other person's point of view, will not work, because such notions are beyond his intellectual capacity and out of his character. Mr. Mitchell is an unfortunate mixture of entrenched antisocial attitudes and intellectual limitation. He lacks abstract reasoning ability, and taking another person's point of view requires that ability.

Mr. Mitchell's behaviour did improve notably over his initial few years at FPI, and that raised expectations. Some team members now suspect he has reaching a ceiling of capacity.

While the patient can parrot statements of understanding principles such as those learned from human relationships courses he took at Douglas College, such attitudes are not internalized. For him, all situations are still about naïve self-interest, and actions are defined in terms of punishment and reward.

Mr. Mitchell's capacity for relationships and bonding with others is entirely limited. He was attached to Mike Best, his on-to-one worker, because Mike was a supportive and relatively undemanding companion. However, the concepts of trust, commitment, loyalty, or wanting the best for others, are not in Mr. Mitchell's repertoire. Not only do his intellectual limitations stop him from experiencing empathy, but his abusive, painful past seems to have taught him not to expect anything from anyone else and to look out for number one in every case. If he gives, there is an attached expectation of something in return. Among FPI patients, he is know as one of those who live by the "con code:" life in the Institute is a struggle between staff and patients; rules are to be worked around where possible; never tell, always deny; every one for himself. Mr. Mitchell has no close friends in the patient population: [Ex. 50].

With what appears to have become an insightful and prescient statement, Dr. Hearn states:
"Essentially, the Institute's 'dialogue' with Mitchell is about control and Power": [Ex. 50, p.4].

Dr. Hearn's report also indicates that Mr. Mitchell had consented to treatment with Androcur to lower his libido: [Ex. 50 p.6]. Mr. Mitchell withdrew his consent to such anti-androgen treatment May 31, 1996.

In the overview spanning 7 months Ms. Richardson, the accused's CMC stated:

Over the last year the treatment team has attempted to accelerate his activity in the community including ten months of community college courses for the mentally handicapped. He has continued with a one-to-one worker for well over 2.5 years to assist him to understand expectations of community living and appropriate social behaviour. He has one-to-one counseling and group counseling since the summer of 1995 and is on a fairly strict behaviour modification program. Although there have been periods where Robbie's behaviour has been acceptable for periods at a time. The behaviour can just as quickly deteriorate into argumentative, defiant, egocentric behaviour. He has been involved in sexually inappropriate behaviour which may have included the fact that he charge co-patients for the services of his girlfriend: [Ex. 51].

On October 1, 1996 Dr. Wanis assumed responsibility as Mr. Mitchell's assigned, supervising psychiatrist. Dr. Wanis considered Mr. Mitchell a high risk as:

"There has not been any outstanding changes in his thinking or behaviourally pattern. He continues to show minimal insight as to what brought him into the hospital and he has a distinctive ability of displacing blame onto others. His response to medication has been minimal. Hence, overall, Mr. Mitchell presents a high risk of reoffending": [Ex. 55].

During the period June 1996 to May 1997 the following incidents were documented [Ex. 56]:

- August 30, 1996: bothering a female patient for 2 weeks asking for sex.
- October 7, 1996: verbal aggression toward staff; he apologized.
- November 1996: refusal to take direction from vocational supervisor.
- November 23, 1996: inappropriate behaviour on an S.E.O.
- December 2, 1996: observed with female patients' head between his knees.
- December 28, 1996: female visitor observed fondling Mr. Mitchell's genitals; accused taken to sideroom.
- January 17, 1997: verbal threats to one-to-one worker.
- January 21, 1997: observed kissing female patient

On June 23, the BCRB encouraged high level Inter-ministry discussions of Robert Mitchell's housing needs.

In September 1997 Robert Mitchell was found out-of-bounds and engaged in sexual relations with a female co-patient.

In November 1997 Mr. Mitchell's treatment team approached Ministry of Social Services to discuss a 24 hour supervised community placement. Funding for such an opportunity was to be pursued at management levels between FPI, the Ministry of Health (MOH), and the Ministry of Children and Families (MCF).

Mr. Mitchell was introduced to staff from South Surrey residence a possible placement, but refused to visit the facility or accept his need for 24 hour supervision: [Ex. 68]. This facility would consider housing Mr. Mitchell at $300.00 per day: [Ex. 70].

Subsequently Ministry of Children and Families rejected Mr. Mitchell for its S.P.M.H./C.L.S. mandate: [Ex. 69].

On February 4, 1998 the BCRB convened a hearing to receive further evidence relevant to the inter-ministerial or "systemic" issues which posed barriers to funding an appropriately supervised out-patient program for Mr. Mitchell. The following is an excerpt of the reasons for the Board's custodial disposition:

On November 26, 1997, the Regional Operating Officer, East Kootenay Region of the Ministry of Children and Families wrote to Mr. Westell, a social worker at FPI that Mr. Mitchell was not eligible for Ministry of Children and Families services. According to Mr. Phillips, the Ministry of Children and Families' Child Family and Community Service Policy Manual defines adults with a mental handicap as those assessed at or below and IQ of 70.

As Mr. Mitchell had been assessed at an IQ of 72, he was deemed ineligible for Services to Persons with Mental Handicaps (SPMH) and accordingly: "We have no ability, nor is it within our mandate, to provide the type of service and supervision that he requires…" [Exhibit 69].

Mr. M. Quinn, FPI Director, attended the hearing to provide an update on the progress of negotiations with respect to service funding for Mr. Mitchell. We were told that senior management of the Ministries of Health and Children and Families had met to discuss revising the existing protocol between the Ministries in relation to funding responsibilities. Agreement in principle, has been achieved to raise the SPMH IQ limit for eligibility to 75. Pending finalization of this agreement, the Ministry of Children and Families has approved interim funding for 3 FPI inpatients, including Mr. Mitchell, who meet the new criterion for eligibility.

However, this acceptance of responsibility for funding translates in practical terms to a commitment of only $96.00 per day. Previously submitted disposition information [Exhibits 69 & 70] indicate that appropriate programming for the accused would cost $300 per day. The question of responsibility for this shortfall remains unresolved.

We were then told that no concrete, comprehensive community based care/treatment plan for Mr. Mitchell had in fact been developed and that therefore, it was not possible to ascertain its final cost. Moreover, we were told that the resource proposed in Exhibit 70 would not be available to accommodate Mr. Mitchell until the end of February. In conclusion, we were left with the message that despite the adjournment, and although Ministry of Health's Adult Mental Health Services would be expected to contribute to Mr. Mitchell's service plan neither the services for the funds were in place on the day of the hearing.

Dr. Wanis, Mr. Mitchell's supervising psychiatrist attended to provide information with respect to the level of risk which Mr. Mitchell might pose to the safety of the public.

Dr. Wanis' opinion is that the accused would remain a high risk (80-100% likelihood of re-offending) even with 1 to 1 supervision. He believes that level of risk is unlikely to abate or respond to intervention given the organic basis for Mr. Mitchell's affliction.

He acknowledges that the accused is not now nor had he been psychotic, but rather that his overall mental condition or his diagnostic issues in combination, as well ass his "predatorial" nature render him a possible public threat.

Dr. Wanis defines "mental condition" as a broader constellation of psycho-social elements, including organic factors, than the narrow legal concept of "mental disorder".

In coming to his assessment of Mr. Mitchell's risk, Dr. Wanis cited a number of HCR 20 factors.

In summary, Dr. Wanis would be reluctant to discharge Mr. Mitchell under any service plan beyond an institutional setting.

On Mr. Mitchell's behalf, Mr. Arbogast argues that insofar as the accused's "mental condition" is deemed to be permanent/constant, the BCRB ought to place greater emphasis upon the companion elements of s.672.54. He also argues on the basis of the *Chambers* decision that despite the treatment team's pessimistic view of the accused level of "clinical" risk, the BCRB ought to focus its attention on risk of "criminal" behaviour. No evidence was rendered which would assist us in separating these two notions: [Ex. 74].

In conclusion the Board maintained the status quo:

Under the circumstances, it appears that notwithstanding the issues of funding and despite the arrangement of a second hearing, no plan for this accused exists. Clearly, the high level of case management, coordination, assessment, service brokerage and negotiation required by the accused's unique configuration of needs, has not occurred despite the hiatus of 1 ½ months.

Whether this is due to the lack of consensus amongst the treatment team or the unresolved allocation of funding responsibility is unclear and perhaps ultimately secondary.

What is clear is that this accused, like any other is entitled to a full exploration of program options which have some likelihood of meeting the competing considerations dictated by Parliament under s.672.54. Failing such a fulsome exploration, the accused's current disposition is tantamount to a life sentence.

In the face of the Director's strong views as to Mr. Mitchell's potential threat to public safety and in the absence of any alternative at this time, we have no choice but to continue Mr. Mitchell's custodial situation.

We are however concerned that custodial dispositions do not become Mr. Mitchell's fate by default and consequently, this disposition is further review able by April 30, 1998.

We trust that on or before that date, the BCRB can be provided with a clear position and plan for Mr. Mitchell's future, in lieu of the need to continue this rather wasteful pattern of having to marshall the extensive clinical, legal and BCRB resources required to conduct proceedings which result in inconclusive dispositions: [Ex. 74].

On April 28, 1998 the existing order was extended for a further period of two months at the request of Mike Quinn, Director, Adult Forensic Psychiatric Services (AFPS):
I write to report that discussions are still ongoing between the Ministries of Health and Children & Families with reference to the above patient. I have received financial support for three patients, who come within the category of MCF, and am awaiting a decision with respect to the remaining three patients, making a total of six patients.

In discussions with the proprietor of the home in Surrey, they would need a minimum of 4/5 residents to 'open' the house.

I will continue with discussions to hopefully bring this issue to closure, and would request that the present order be allowed to continue: [Ex. 75].

Clearly the Director appeared to hold out hope of establishing/achieving a suitable discharge program for Mr. Mitchell.

On May 29, 1998 a new hearing was convened resulting in a reserved decision. Following evidence and submissions the Board awarded yet another disposition of custody, essentially by "default":

All parties agree that Mr. Mitchell does not need to reside in a hospital setting, and he could function in the community if there were available an appropriate community facility that would provide the kind of structure and supervision that he requires in order to ensure public safety. In the absence of this, the default position is a custodial disposition in a hospital: *Brockville Psychiatric Hospital v. McGillis* (Ont. C.A., Oct. 4, 1996).

Like previous panels of the Review Board, the members of this panel are very concerned that the effect of the shortage of supervised community placements in British Columbia is to prevent many mentally disordered accused, like Mr. Mitchell, from being granted the least onerous and least restrictive appropriate disposition on the basis of the considerations set out in sec. 672.54. The Review Board therefore urges the ministries and agencies involved to redouble their efforts to resolve this systemic inadequacy as soon as possible. The Board is sure that development of appropriate community resources would be welcomed not only by those persons detained in FPI primarily for security reasons, but also by the administration and staff of FPI who could then concentrate more attention on those patients who really need hospital care.

The Review Board also noted that unless a suitably supervised placement can be found, it is likely that Mr. Mitchell will remain in custody at FPI for the rest of his life. This is because the psychiatric assessment that he is a sexual predator, preying upon intellectually challenged females, is likely to stay with him as he is incapable of learning abstraction such as the need to respect other people's rights and feelings. The Board believes that given the extremely serious consequences of concluding that he is a high risk sexual predator, Mr. Mitchell is entitled to an independent psychiatric assessment of his level of risk, preferably by someone who is knowledgeable regarding supervised residential facilities for the mentally disordered and who carry the diagnosis of Axis I Organic personality disorder and Axis II Borderline mental retardation significant anti-social personality traits. The Board stresses that this does not indicate any lack of confidence in the expertise of Dr. Wanis, but rather a recognition of the patient's right to a second opinion. Accordingly, the Review Board has provided its disposition for another hearing to take place before November 30, 1998, to review Mr. Mitchell's case once again, and to receive the assessment prepared by the independent psychiatrist: [Ex. 82].

A further hearing was scheduled for November 12, 1998. In the interim Mr. Mitchell's former one-to-one worker, M. Best was "encouraged to submit a written proposal" to Mr. Mitchell's treatment team regarding his capacity to provide a 24 hour supervised, structured and staffed residential environment: Ex 83.

Mr. Mitchell was offered a trial of Sertraline to decrease his sexual drive which he refused: [Ex. 84].

On October 8, 1998 a female Riverview patient reported an offer of money for sex from Mr. Mitchell.

In addition an independent psychological assessment by Dr. Peter Johnson was submitted by Mr. Mitchell's counsel. Dr. Johnson's assessments provides, inter alia:

Given that Mr. Mitchell has spent so many years living at FPI, there can be little doubt that the environment has significantly influenced his behaviour. From his point of view, it is largely an environment of mentally-ill patients, secure buildings, and a complex system of rules. Relationships with trained staff are transitory. Staff change shifts and wards, and doctors are only available for a few hours a week. Supportive friendships between patients are unusual. Clearly, the negative environment factors outweigh the positive influences in this man's life.

Mr. Mitchell has been criticized for having adopted the "con" lifestyle, i.e. not trusting staff or other patients and trying to manipulate the system in order to meet his own needs. From his point of view, this appears to be a method

of dealing with a hostile environment. In spite of staff's promises and their best intentions, he is still confined in FPI. He now seems to lack the level of trust of professional staff which might bring about positive changes in his status. Further lengthy confinement at FPI is unlikely to improve this man's behaviour: [Ex. 86]."

"The Board imposed a further disposition of custody for 6 months noting Mr. Mitchell's progress.

In preparation for Mr. Mitchell's next hearing scheduled for May 4, 1999 Dr. Wanis indicated that Mr. Best's "proposal" to provide residential care would be critically reviewed contingent upon funding commitments: [Ex. 89]. The "Best proposal" is at [Ex. 91]. In April the MCF and MOH executed a protocol agreement respecting collaboration in discharge planning for developmentally disabled adults from FPI: [Ex. 92]. In reviewing the document at its May 4 hearing the Review Board remarked:
"Now the Treatment Team in conjunction with MCF social worker Gordon Towers should be able to move forward to identify a suitable placement. Mr. Quinn believes that Robert Mitchell's name is near the top of the list of those persons needing specialized placement facilities:" [Ex. 93].

The Board ordered a further period of custody in the hope that either the "Best proposal" or another suitable placement would be identified by September 1999.

Ministry for Children and Families was designated a party to the proceedings pursuant to S.672.5(4)C.C."

2.0 RECENT PROCEDURAL/HEARING HISTORY

On October 25, 1999 an early hearing was convened to allow the Board to review anticipated discharge program proposals; to learn about the extent of MCF Community Living Services (CLS) participation in providing and funding services for Mr. Mitchell pursuant to the "protocol" [Ex. 92]; to learn of the outcome of any visit leaves enjoyed by Mr. Mitchell since May 1999.

The evidence addressed at that hearing and considered by the Review Board consisted of the following:

- MCF is currently funding Mr. Mitchell's one-to-one worker at a cost of $25,000 per annum.
- Gordon Towers is the assigned CLS social worker in the East Kootenay region. He has explored both the "Best" and South Surrey proposals.
- Given Mr. Mitchell's constellation of needs and challenges a placement opportunity might be more likely to develop in the lower mainland.

- MCF does not see Forensic Services' role of safeguarding public safety as part of its mandate or expertise.

For AFPS Mr. Shieh, CMC provided an updated progress report citing occasions when the accused's behaviour has brought about suspension and reinstatement of privileges. On June 23, 1999 the accused was transferred to Elm Unit for increased supervision due to an escalation of verbally abusive and threatening behaviours directed at female staff.

On July 22, 1999 it was reported that Mr. Mitchell had threatened his one-to-one worker to the point where Dr. Wanis later told the hearing he was considering removing this benefit from his patient. Mr. Mitchell later apologized though it is difficult in the context to consider the incident described as anything amounting to a threat of violence or to imagine it inspiring fear in the recipient, although it has resulted in the loss of the accused privileges as well as having raised the potential for his transfer to the most secure unit at FPI.

Mr. Shieh summarizes his patient's behaviours over time:

Mr. Mitchell's behaviour appears to have been escalating and deteriorating since May of this year, resulting in his transfer to Elm House and suspension of privileges.

He continues to lack insight, refuses to accept responsibility for his behaviour and instead projects blame onto others. Recently, he has been more demanding, argumentative and verbally aggressive with nursing staff and his 1-1 worker, threatening to report them or speak to his lawyer when given directions or when confronted about his inappropriate behaviour: [Ex. 74].

Dr. Wanis' evidence is that he continues to consider Mr. Mitchell as a high risk to re-offend and not suitable for community placement. He believes the level or risk posed by Mr. Mitchell is currently so unmanageable as to obviate even a consideration of a community program. Dr. Wanis gave as grounds for his assessment Mr. Mitchell's impulsive behaviour, his brain damage, and borderline retardation, his need for structure, his consistent historic "acting out behaviour" and lack of insight.

Dr. Wanis was not able or willing to couch his patient's risk in the context of likelihood of violence. He stated that this was not the threshold or criteria by which FPI assesses risk. Rather he interprets Mr. Mitchell's non-cooperation as indicative of his inability to function outside FPI or in a "Mini-FPI" with 24 hour supervision, locked doors at night and professional and one-to-one staffing during the day.

On the other hand it is Dr. Wanis' view that his patient has essentially exhausted the benefits of the programs and services which have been provided to him at FPI.

On behalf of Mr. Mitchell the Board heard from Mr. Best who had submitted the proposal to accommodate Mr. Mitchell in the community: [Ex. 91] and 97.

Despite the apparent earlier trajectory of case planning for the accused as well as the evidence noted in the Reasons at Exhibit 93, the proposal remains unassessed and not responded to. No visit leaves have occurred: [Ex. 98]."

After the conclusion of this hearing the Review Board stated:

> We have no evidence before us of recent overt physical violence or serious aggression, beyond persistent, unpleasant, inappropriate, annoying, testing, even anti-social behaviour. We also know that the accused has exhausted the services of FPI to the point where at this time much of his behaviour is likely dictated, by or reactive to his environment.
>
> This state of affairs was foreshadowed by Dr. Hearn in 1996 at Exhibit 50 and reflected by Dr. Johnson at [Ex. 87]. It also emerged clearly in the course of this hearing.
>
> It is our unanimous opinion that the level of public threat posed by Mr. Mitchell is manageable and ought to be managed in a sufficiently supervised, structured and equipped community program model. It is our belief that there are two potential settings which currently or with altogether reasonable modifications or adaptations could accommodate and manage Mr. Mitchell. We therefore propose to delay the implementation of this disposition until December 1, 1999.
>
> We also strongly believe that it is important to attempt to reintegrate Mr. Mitchell <u>now</u>, before his current circumstances become the fulfillment of the potentially prophetic statement found in [Ex. 74] supra:
> What is clear is that this accused, like any other is entitled to a full exploration of program options which have some likelihood of meeting the competing considerations dictated by Parliament under s.672.54. Failing such a fulsome exploration, the accused's current disposition is tantamount to a life sentence: [Ex. 98].

On December 4, 1999 the Review Board received a "postdated" notice stating that as of December 8, 1999, Mr. Mitchell's liberties were being restricted by his non discharge, "due to recent assaultive behaviour on a Health care worker on November 17, 1999.": Ex. 99.

The assaultive incident referred to resulted in a charge of assault (S.266 CCC) brought on January 13, 2000.: Ex. 100. The allegation consisted of the following:

> "…Mitchell had a verbal argument with a staff member… the victim Ramsay…was to escort Mitchell to solitary confinement…just as they were entering the confinement room (the victim) advised Mitchell "walkman" is not permitted in the room".
>
> The "victim" attempted to take the "walkman from Mitchell who" turned around and punched (the victim) with his closed right fist…one time…in the upper facial area." [Ex. 100].

This incident constituted the first act of violence by the accused in his (then) 9 years at FPI: Ex. 103. He was ultimately acquitted on the charge of assault.

On February 28, 2000 a mandatory hearing was convened pursuant to S.672.81(2)(a). At that hearing previously identified residential options remained unassessed. The Board ordered a further short period of custody:

> "Our disposition will extend for a period of four months to be reviewed on or before June 30th, 2000. It will contain directions that M.C.F., in consultation or partnership with F.P.I., undertake a thorough review and assessment of both the "Best" proposal and the South Surrey Residence with a view to determining and informing the Board of their suitability to house and supervise Mr. Mitchell, including where or why those programs may be deficient in that regard.": [Ex. 103].

A hearing planned for June 12, 2000 was postponed to July 28, 2000 at the request of counsel for the accused in order to obtain an independent psychiatric assessment.

2.1 THE HEARING OF JULY 28, 2000 AND ITS CONTINUATION

Prior to this hearing counsel for accused filed Notice of Constitutional Question: asserting:

> 1. "The Applicant/ Accused has been detained in custody at the Forensic Psychiatric Institute following a verdict of not guilty on account of insanity rendered on January 21, 1991 on charges of assault with a weapon and aggravated assault.
>
> 2. Since at lease June 23, 1997, the Review Board has repeatedly indicated that the Applicant/Accused would be eligible for a conditional discharge if a suitable community placement were located and adequate funding secured.
>
> 3. Since at least June 23, 1997, the Review Board has encouraged the Forensic Psychiatric Institute to pursue discharge planning for the Applicant/Accused and, in particular, to negotiate funding arrangements for a community placement with other government agencies, including the Ministry of Health and the Ministry for Children and Families.
>
> 4. The Government of British Columbia as represented by the forensic Psychiatric Institute and the Ministry of Children and Families, have failed adequately to pursue discharge planning for the

> Applicant/Accused and, in particular, have failed to conclude funding arrangements for a community placement for the Applicant/Accused.
>
> 5. Having regard to the factors set out in s.6762.54 of the Criminal Code, the continued detention of the Applicant/Accused at the Forensic Psychiatric Institute is not the least onerous and least restrictive disposition to the Applicant/Accused.
>
> 6. The ongoing detention of the Applicant/Accused at the forensic Psychiatric Institute infringes his rights under sections 7, 9 and 12 of the Carter and entitles him to seek relief under s.24(1) of the Charter." Ex. 106.

This necessitated the involvement of counsel of behalf of the AGBC who argued that:

> (a) "The Review Board did not have jurisdiction as it is not a court of competent jurisdiction for the purposes of Section 24(1)of the Charter;
> (b) Alternatively, the applicant has not established that his rights have been infrindged pursuant to sections 7, 9, 12 or of the Charter; and
> (c) In the further alternative, any such infringement is saved under section one.

The MCF took no position as to disposition but argued:

> "if the order of the Review Board was to be a Conditional Discharge with a provision for funding or a direction to reside at a specific facility, then Ms. St. Clair took the position that such an order would be tantamount to a payment order and beyond the jurisdiction of the Review Board."

AFPS and Crown Counsel both supported a custodial disposition.

It bears mentioning that all parties (including the accused) before the Board were in agreement that an absolute discharge ought not to be ordered: Ex. 119.

The hearing which commenced on July 28, 2000 could not be completed in one day. Written interrogatories, answers and closing submissions with authorities were directed. The Board considered this additional evidence and material on October 16 and made its disposition of discharge subject to conditions to take effect November 16, 2000.

Given the progress of this case, the evidence considered by the Board as summarized in its Reasons for Disposition [Ex. 119] is once again summarized below:

"EVIDENCE OF THE DIRECTOR ADULT FORENSIC PSYCHIATRIC SERVICES

Two reports were tendered; a report dated July 4, 2000 from Dr. Wanis at Exhibit 108; and a report dated July 5, 2000 from Mr. Shieh at Exhibit 109. In addition, these individuals appeared at the hearing.

Evidence of Dr. Wanis'

In his report dated July 4, 2000 Dr. Wanis makes the following comments on the issues of risk and placement. After reciting earlier reports of Dr. Lohrasbe and Dr. Riar, Dr. Wanis concludes that:

"Mr. Mitchell remains a high risk to re-offend. His aggression started at an early age, it does have an organic basis to it, and has not responded to psychological or medication treatment. He continues to rationalize and displace blame, hence revealing poor insight as to his acting out behaviors. This presents a significant problem in his management and his future placement.
I recommend that Mr. Mitchell be detained in custody at the Forensic Psychiatric Institute. It is the opinion of the treatment team that he is not currently suitable for any structured placement in the community... He has a one-to-one worker, Dan, who has been escorting him to programs. Depending on Dan's degree of comfort and perception, as well as the clinical opinion of risk by the treatment team, we will continue to increase Mr. Mitchell's privileges and allow him access into the community. He appears to be doing well on A2 and this is due to the structure and supervision provided there.

At the hearing, Dr. Wanis elaborated further on his opinion, as follows:

Risk:

Violent Behavior

Dr. Wanis conceded that aside from the index offence and the November 1999 assault, (of which Mr. Mitchell was acquitted), there has been no other assaultive or violent acting out behavior by Mr. Mitchell. In fact, Dr. Wanis agreed that in a recent altercation between Mr. Mitchell and a co-patient, on June 9, 2000, in which Mr. Mitchell was the victim that Mr. Mitchell did not retaliate. Nevertheless, Dr. Wanis emphasized that absence of violence on part of Mr. Mitchell was because of Mr. Mitchell's placement in a secure custodial facility. Dr. Wanis maintained that Mr. Mitchell was a high risk to re-offend.

"Sexual Predator"

Part of Dr. Wanis' risk assessment was based on his categorization of Mr. Mitchell as a "sexual predator". When asked exactly what he meant by this phrase, Dr. Wanis responded that "Mr. Mitchell knows the weaknesses of other people and tends to exploit women with mental retardation."

As for specific examples of inappropriate sexual behavior Dr. Wanis testified that aside from an incident which occurred before 1997, when Mr. Mitchell tried to solicit prostitution, that there was no other incidents. In fact, Dr. Wanis conceded that this incident was five years ago, November 30, 1995 (Exhibit 51, p.3).

However, Dr. Wanis pointed out that last year Mr. Mitchell was found in possession of pornographic material, supplied to him by a visitor. Dr. Wanis explained, that this was one of the reasons for canceling Mr. Mitchell's Internet privileges, there were concerns that "he could use the Internet to entice women and children in cyberspace." But Dr. Wanis agreed that the actual reason for terminating Mr. Mitchell's internet usage was the hospital's understanding that Mr. Mitchell was misrepresenting himself to musical artists in order to solicit free CDs.

Dr. Wanis insisted that Mr. Mitchell has the "antennas for vulnerable people" and that the reason there have been no recent incidents of sexually inappropriate behavior is, again, because Mr. Mitchell is in a custodial ward and subjected to strict supervision.

Discharge into the Community

Dr. Wanis emphasized that the hospital had no plan to discharge Mr. Mitchell at this time. Dr. Wanis maintained that the purpose of keeping Mr. Mitchell in FPI is to cascade him into the community. He repeated a number of times that the hospital wants Mr. Mitchell to model after Dan Campbell, the one-to-one worker. Dr. Wanis further stated that in his opinion he believes that Mr. Mitchell still does have room to move within FPI.

Dr. Wanis was of the opinion that Mr. Mitchell can improve his impulsivity, despite his concession that extensive psychological treatment in this regard has already been tried in the past and failed. Dr. Wanis explained that despite the past failure that currently Mr. Mitchell is on a low dose of Triazadon, a drug used to curve impulsivity, and that if that dosage is increased there is room to improve in this area.

Dr. Wanis agreed that Mr. Mitchell has already been in the hospital for 10 years, that he has not been granted unescorted day leaves since 1995, that his escorted privileges were suspended in July of 1999, and that there is the risk of institutionalization. Nevertheless, Dr. Wanis advocated for the cascading approach. Dr. Wanis stated that if the hospital observes a period of stability they would move Mr. Mitchell to the Elm unit and then to the Dogwood unit, less secure facilities within the hospital. Dr. Wanis explained that if Mr. Mitchell does well at those levels his outings into the community would be increased with his one-to-one worker, and if that goes well, then community placement would be considered. He was adamant that without this cascading through the system community placement was not a possibility.

Evidence of the Accused

Mr. Mitchell:

Mr. Mitchell testified at the hearing as follows on the issues of risk and placement:

Risk

Violent Behavior

Mr. Mitchell testified that the allegation of hitting a health care worker in November of 1999 was a result of self-defense. Mr. Mitchell explained that he had been placed in a chokehold and was trying to free himself. He further testified that he was acquitted of this matter when it was tried in court.

"Sexual Predator"

As to the evidence that he had been found in possession of pornographic material Mr. Mitchell explained that he was told that he could have this type of material if he kept it locked up and if the female staff would not take offence. He stated that the Director, a Mr. McGuiness, had told him this.

As to his Internet usage Mr. Mitchell testified that he was trying to create his own music newsletter to be distributed in the community. He explained that he had a few friends in musical bands and he communicated with them on the Internet asking them to send him their CD's for his review. Mr. Mitchell said that he had advised them that he was going to start his own publication. In fact, he said that everything was ready to go to print when he lost his computer access, and that some of his reviews had been published in the Burnaby Mental Health Newsletter. He denied the hospital's allegation that he was misrepresenting himself.

Discharge into the Community

Mr. Mitchell confirmed that mid June 1995 was the last time that he had exercised unescorted access to the community.

Mr. Mitchell testified that he is currently at Level 3 privileges which means he can participate in Power Hour, a gym program; participate in Act I, a physical education program; he can have escorted grounds with the staff; and have staff escorted outings ("SEOs") with his one to one worker.

Mr. Mitchell asserted he wanted to be out in the community, that having done ten years in custody already that he has served his time and ought not to be penalized any further.

Dr. Noone: The independent psychiatric expert called on behalf of Mr. Mitchell.

Dr. Noone's expert report is found at Exhibit 109. In this report, Dr. Noone summarizes his opinion as follows:

"... My clinical and consulting opinion on this matter supports that Mr. Robert Mitchell is manageable and ought to be managed in a sufficiently supervised structured and equipped community program model.... …I do not see that he is a paraphillic, ie. has a sexual deviation, and I do not see him as meeting the criteria as a sexual predator. My assessment would concur with the statement of the Review Board 'we have no evidence before us of recent overt physical violence or serious aggression, beyond persistent, unpleasant, inappropriate, annoying, testing, even antisocial behavior... ... Certainly Mr. Mitchell at this stage could be aptly described as a square peg in a round hole for which his current placement at FPI is ill suited. ... More than a decade later we remain with Mr. Mitchell as a square peg in a round hole. We are back at square one, hopefully with the ability

this time to execute a least restrictive and most appropriate disposition in the community."

Dr. Noone elaborated on his report at the hearing as follows:

Risk

Violent Behavior

Dr. Noone was asked to express his opinion about the future possibility of violent behavior by Mitchell. Dr. Noone responded that we have the index offence, which was an offence involving personal violence using a weapon, we have some gray area regarding an incident in November 1999, and aside from that we have evidence of verbal aggression and inappropriate nuisance behavior. He stated we really only have two incidents upon which to predict serious violent crime. He emphasized that Mr. Mitchell is not a physically intimidating person, he has a shuffling gate, and neurological impairment due to epilepsy.

On questioning by the hospital as to Mr. Mitchell's history of violence in boarding homes and whether that concerned him, Dr. Noone responded, yes, but emphasized that while that information was historically true we do not know if it holds true ten years later.

Dr. Noone was asked whether he considered impulsivity to be a risk factor, and Dr. Noone responded that it depended on the situation, that violence is very interactional, and that how you treat a person can stimulate aggression including impulsive behavior.

"Sexual Predator"

As to Mr. Mitchell's sexually inappropriate behavior Dr. Noone stated that, in his opinion, there was a moderate risk for sexually inappropriate behavior, whether it was at the criminal level he did not know, since most of the past behavior was consensual.

As to usage of the term 'sexual predator' Dr. Noone did not accept this label and said that instead one could describe Mr. Mitchell as more of an opportunist. He explained that predators don't get mad, just even, they stalk, and they issue no threats, whereas Mr. Mitchell is more verbally aggressive and moody. For these reasons he classified Mr. Mitchell is an opportunist not a predator.

Discharge into the Community

Dr. Noone agreed that Mr. Mitchell would continue to be a challenge. He has an impairment of social judgment and externalizes blame. However, in his opinion, Mr. Mitchell would be manageable in the community, in a 24-hour supervised facility. Dr. Noone said that after Mr. Mitchell exhibited a short period of appropriate behavior, a couple of months, at FPI he should be discharged into such a facility. He emphasized that an indefinite detention at FPI was not the solution.

In addition, Dr. Noone stated that Mr. Mitchell does not need to be dropped back down all the way to the maximum-security level each time there was an incident. He stated that there has to be a goal (ie. to achieve the least onerous and least restrictive placement) within a set time limit and if that time limit has to be extended it must be on the basis of concrete observation of behavior.

Dr. Noone explained that the eventual release into the community facility should initially be coupled with one-to-one escorted passes and with a back up plan. Dr. Noone explained that the back up plan would be the return to FPI if Mr. Mitchell's behavior warranted such a return. It was critical that any return be based on Mr. Mitchell's behavior and that impressing responsibility for behavior is the key issue. If the behavior warranted, in addition to a return to FPI, criminal sanctions should also be addressed to get this point across to Mr. Mitchell.

According to Dr. Noone, the difficulty in making FPI anything other than a back up facility was that traditionally the forensic institutes deal with psychotic individuals and they are not really well geared for mental retardation and personality disorder type individuals. His opinion was that a community program potentially had more to offer. Dr. Noone reiterated what he wrote in his report, that Mr. Mitchell is a square peg in a round hole, he is not the norm in an institution, which deals with severely psychotic individuals who have committed serious offences. He said that Mr. Mitchell has an organic disorder which is substantial and that he would be best dealt with out in the community.

Dr. Noone reiterated that FPI is not the appropriate setting that it is only appropriate as a back up to community placement. He stated that Mr. Mitchell has been warehoused in a total institution, held in a secure setting for ten years and not progressed beyond that. He restated that FPI is not the optimal setting, but can be the stepping stone to an optimal setting.

Evidence of the Ministry of Children and Families ("MCF")

Dan Campbell: Mr. Mitchell's one-to-one worker,

Mr. Campbell testified that currently he has a good rapport with Mr. Mitchell, but that every once and a while Mr. Mitchell needs redirection.

As for the incident that led to withdrawal of SEO's last year, (Tab 94, p.3) July 22, 1999, Mr. Campbell responded that it arose after a discussion with Mitchell about his Internet usage. During this discussion Mr. Campbell stated that Mr. Mitchell was posturing and banging his fists on the table as a result of which he discontinued the meeting and cancelled outings for that day and progressively for the whole year.

Mr. Campbell explained, however, that those outings have recently resumed, that in the past three weeks Mr. Mitchell has had nine outings, of four hours or less. Mr. Campbell anticipated more staff escorted outings.

As to why it took a year to get Mr. Mitchell reestablished on SEO's Mr. Campbell said it was because of Mr. Mitchell's lack of ability to take and follow direction, and because they were also working on restoring the trust and comfort level between himself and Mr. Mitchell.

Mr. Gordon Towers: The designated social worker for the Ministry of Children and Families

Mr. Towers testified via teleconference. He testified that he has been involved, since 1986, on a continuous basis, with Mr. Mitchell's case. He stated that he had inquired into the two community placements, the "Best Proposal" and the South Surrey Residence, and the results were as follows:

"Best Proposal"

In regards to the 'Best Proposal' Mr. Towers stated that he met Mr. and Mrs. Best in December 1999, at their home in Port Coquitlam. He discussed with them how they would manage Mr. Mitchell in their home, how they would keep the community safe, and how Mr. Mitchell would spend his time.

After his meeting Mr. Towers explained that he concluded that the "Best Proposal" was not a suitable facility for Mr. Mitchell for the following reasons:

-the facility, which was the house of Mr. and Mrs. Best was located right behind a park;

-Mrs. Best had no experience working with mentally challenged persons;

-the Bests had there own children for whose safety Mr. Towers was concerned;

-the program did not meet Mr. Mitchell's special needs and was really just aimed as having him become a part of their family.

In addition, Mr. Towers expressed concern that Mr. Best had made comments that he was an approved caregiver at this meeting, but he later found this to be untrue and in fact discovered that Mainstream would not recommend him. For all these reasons Mr. Towers was not recommending the "Best Proposal" as a community placement option for Mr. Mitchell.

South Surrey Residence

Mr. Towers testified that he met individuals from this residence twice in May of 2000. He described this residence as being a 5-bedroom home at 152nd street in Surrey. He stated that he had a good feeling from the staff. He indicated that the John Howard Society operated this facility and it has been running since March of 1997.

Mr. Towers explained that the facility serves the mentally ill or challenged who come into contact with the criminal justice system. The individuals at this residence have quite a bit of experience dealing with clients with sexual issues. In fact, Peter Johnson a psychologist assists in this regard. Residents see Dr. Johnson once a week. In addition, the residence has a life skills component and they encourage individuals to develop connections with the community.

Mr. Towers further testified that the South Surrey Residence was a secure facility, they have an alarm system, 2 full time staff at all times, and a full time director. He stated that the program is quite well structured around the five residents there.

Mr. Towers concluded that if the treatment team decided that Mr. Mitchell could go into the community this is the place where he could go. Mr. Towers was convinced that this resource could cater to Mr. Mitchell's special needs and at the same time ensure that public safety was not an issue. As to whether there was an opening available now, Mr. Towers indicated that there was not but there would be in the near future, in the next few months, within the year. Mr. Towers verified that the South Surrey Residence has had residents from FPI in the past.

Mr. Towers also provided evidence on funding. Mr. Towers indicated that MCF currently pays for the one-to-one worker for Mr. Mitchell. Mr. Towers explained that the annual ceiling is $25,000.00 for the one-to-one worker

and that any placement contribution would have to come out of that. He advised that the cost of the facility is $400.00 per diem and an extra $100.00 per week for a visit to Peter Johnson.

Ms. Paula Grant: Manager for Community Living Services for Adults of the Ministry of Children and Families.

Due to time constraints, Ms. Grant gave evidence in written format by way of letter dated August 1, 2000 and October 10, 2000. In the August 11, 2000 letter Ms. Grant provides general information on the Ministry's capacity to develop a resource plan for Mr. Mitchell. The October 10, 2000 written statement from Ms. Grant responds to questions posed by Mr. Smith arising from her prior statement. As these letters pertained essentially to funding issues, which did not impact our ultimate decision, the contents are not being recited here.

Evidence of the Forensic Psychiatric Institute

Evidence of Jim Broom Case Management Supervisor of the Forensic Psychiatric Institute

Likewise, due to lack of time at the hearing, Mr. Broom provided his evidence in writing, by way of a Memo dated August 17, 2000, and by way of an attachment to a letter dated September 18, 2000. Mr. Broom confirms that he is employed as the supervisor of admissions and case management services of the Forensic Psychiatric Institute and that he has been employed in that capacity for approximately 15 years and worked in Forensic Services for more than 25 years.

As with the evidence of Paula Grant, Mr. Broom's evidence focused on budgetary and funding issues, which did not weigh in our ultimate decision in this matter, accordingly, detailed reference to the same is not made here.

Request for Updated Information by the Review Board

As quite some time had lapsed since the onset of the hearing, on July 28, 2000, and the receipt of evidence from Paula Grant and Jim Broom, the Panel requested an update from the hospital. Specifically, the panel requested an update of Mr. Mitchell's mental status and behavior and an update on the current availability of placement at the South Surrey Residence. Initially, the panel received a response from counsel, Ms. Acheson, dated September 28, 2000, stating:

"At the date of the last hearing, July 28, 2000, Mitchell was having community outings in the company of his one-to-one worker. These were terminated on September 8, 2000. On August 25, 2000, he was teasing a co-patient and later that evening, struck the same co-patient on his head. On September 7, during an outing with his one-to-one worker, Mitchell was found to be accessing a chat line… which is conduct he has been prohibited from engaging in. He then became verbally aggressive to his caseworker. The outing was immediately terminated. Mitchell denied he was accessing the chat line when questioned by FPI staff and referred to his one-to-one worker as a 'liar'. His present privileges include Act I and power hour. He is refusing to participate in Act I. On September 8, 2000, while attending OT with his one-to-one caseworker he once again became verbally aggressive. It was after this incident that his outings with his case worker were terminated."

On the issue of placement Ms. Acheson advised in this letter that:

"Although the staff at South Surrey place have met with Mitchell and the treatment team, we have received no feedback from the South Surrey Place. The treatment team has not pursued community placement because it is our opinion that Mitchell is not yet ready for such placement."

Ms. Acheson suggests that perhaps Mr. Towers can be directed to contact the South Surrey Residence to find out such information. Accordingly, such a request was by the Registrar and in a letter dated October 5, 2000 Mr. Towers responded:

"I spoke with Lynn Jones, Director of Forensic Services for the John Howard Society who manages the South Surrey Residence. She states there is a bed available but due to significant staffing changes at the resource, and the mix of the clients in the resource, it may not be in Mr. Mitchell's best interest to access the resource at this time, even if the treatment team feels Mr. Mitchell should be placed in the community."

Then counsel for Mr. Mitchell, Mr. Smith himself wrote to the Registrar in a letter dated October 5, 2000 in which he provides the following additional evidence on behalf of his client:

"Mr. Mitchell has instructed me that he strongly denies the allegations the he struck a co-patient on August 25, 2000 and improperly accessed a computer chat line on September 7, 2000.

….

I have also taken the liberty of contacting Ms. Lynne Jones, Director of Forensics for the John Howard Society. She advised as follows:

- She attended a case conference regarding Mr. Mitchell in late July or early August but has not heard anything further since that time.

- At present, only three of the five beds in South Surrey Residence are occupied and they could accommodate at least one more resident.

- Before approving Mr. Mitchell she would be required to consult with the Provinces' brain injury contractor who has responsibility for one of the other residents.

- John Howard Society has recently hired a new coordinator for the South Surrey Residence who is a nurse. The Life Skills Coach is formally certified and is experienced in the mental health field.

- The South Surrey Residence is presently hiring new frontline staff. Preferred candidates will combine formal training with demonstrated skills and experience working with people with cognitive disabilities or mental illness, including management of difficult behavior.

- The Emphasis in Life Skills Programming is shifting from counseling oriented approaches to Activities of Daily Living (ADL).

- The per diem cost for residence with 24-hour supervision remains about $400.

- If the South Surrey Residence is selected, they will require some lead time (at least a few weeks) to make the necessary arrangements, including assessing the compatibility of Mr. Mitchell and current residents."

The above is the entirety of the evidence that was presented to the Review

Panel from the hearing date, July 28, 2000 to October 10, 2000. All parties then provided closing submissions on the merits of the case.: [Ex. 119].

The closing arguments and submissions as summarized in Ex. 119 are repeated below:

"Submissions of Counsel for the Hospital Ms. Mary Acheson

Ms. Acheson provided written submissions in which she stated the following:

1. Mr. Mitchell is not ready for a conditional discharge. Both the defense psychiatrist and Dr. Wanis are in agreement on this point. He has not yet been successfully cascaded. To go from the high level of custody on A4 directly to the community would be precipitous.

2. Dr. Noone and Dr. Wanis disagree only on one thing and that is the length of time this cascading should occur. Dr. Noone recommends the Board set an arbitrary date, and Dr. Wanis recommends that the release date be determined by Mr. Mitchell's conduct.

3. Protection of the public with an immediate discharge would require what amounts to a custody setting in the community, a "mini-FPI", involving a high degree of supervision, locked doors, and one-to-one supervision, which is nothing but custody.

4. Public protection is the primary mandate of the Board in making and reviewing disposition orders.

5. The evidence is that the only reason there has not been violent acting out behavior is because of intervention by staff at FPI. The actions Mr. Mitchell has taken, such as verbal aggression etc. are precursors to violence. These have not escalated into violence because of experienced staff in a secure setting. Such would not be the case in a community boarding home.

6. If the Board were to order the relief sought by Mr. Mitchell the Board would be making a payment order. It is beyond the jurisdiction of the Review Board to issue a disposition order specifying that a specific program, facility or resource be provided or funded by the ministry.

Submissions Crown Counsel Mr. Ochitwa

Mr. Ochitwa in his written submissions reviews the evidence and emphasizes that until Mr. Mitchell accepts responsibility for his acts, he is a great danger to re-offend. He points out that Dr. Noone also agrees that Mr. Mitchell must be held accountable for his actions including criminally. He submits that Mr. Mitchell displays no evidence of taking responsibility for his actions, and, therefore, cannot be released even conditionally.

In summary, he submits that should the Board release Mr. Mitchell immediately, he would be a high risk to re-offend violently. He states that it is incumbent on the Board to leave Mr. Mitchell in detention for the year sought and allow him to 'cascade' through FPI as planned by his treatment team.

Submissions for the Accused Mr. Mitchell

On behalf of Mr. Mitchell, Mr. Smith provided written submissions the highlights of which are:

Protection of Public from Dangerous Persons

1. Mr. Mitchell's level of risk is manageable within a properly structured and supervised setting.

2. Since becoming Mr. Mitchell's treating psychiatrist in 1997, Dr. Wanis has consistently stated that Mr. Mitchell remains a high risk to re-offend if discharged into the community prematurely. He has emphasized Mr. Mitchell's pattern of challenging authority, lack of insight, and antisocial personality traits.

3. Dr. Wanis has characterized Mr. Mitchell as a sexual predator who 'plans his campaigns of conquest' against intellectually challenged females. However, the incidents described in the record disclose consensual activity that is deemed illicit because it occurs within the FPI setting. The July 5, 2000 report of Mr. Sheih indicates there have been no incidents of sexually inappropriate behavior in the past year by Mr. Mitchell.

4. As for 'non-sexual' violence, the only significant act of violence since the 1990 index offence was the incident in November 1999, which lead to a criminal charge of assault for which Mr. Mitchell was acquitted. " It is submitted that the Board's previous characterization of his behavior as essentially annoying and disruptive rather than seriously violent or aggressive still holds."

Mental Condition

5. Mr. Mitchell's diagnosis is mild mental retardation and an organic personality disorder, both traceable to a severe form of epilepsy. Unlike the vast majority of FPI patients Mr. Mitchell does not suffer from a major mental disorder. He has been described by the Board as a "bit of a square peg in a round hole".

6. The Board has previously acknowledged that "the accused has exhausted the services of FPI to the point where at this time much of his behavior is likely dictated by, or reactive to his environment." Despite this, Dr. Wanis proposes that Mr. Mitchell should not be cascaded through the FPI system and into a community placement until his behavior shows significant improvement.

Reintegration Into Society

7. Residence in a hospital setting has resulted in a severe curtailment of Mr. Mitchell's access into the community such that:

- he has had only two staff escorted outings between December 1995 and June 1996.
- he has not had any unescorted day leaves since June 1995.
- despite the Board granting liberal access to the community, including overnight visits, there have been no such visits
- despite the Boards hope that there would be visit leaves to the Best Residence none have been undertaken

- in July 1999 Mr. Mitchell's SEO's were suspended due to an alleged threat Mr. Mitchell made to his one-to-one worker and this suspension has remained in force until just before the July 28, 2000 hearing.
- in August 1999 Mr. Mitchell's computer privileges were suspended
- in December 1999 the treatment team terminated contact between Mr. Mitchell and his former one-to-one worker Mr. Best
- In April 2000 Mr. Mitchell was transferred to a high security unit (A4) after being found in possession of pornographic material and becoming upset when confronted. Mr. Mitchell remained in A4 as of July 28, 2000.

8. Mr. Smith submits that apart from restricting community access there is the danger that Mr. Mitchell's ongoing detention for such an extended period will lead to institutionalization and effectively foreclose the possibility of a return to community living.

Other Needs of the Accused.

9. Counsel submits that FPI does not serve the other needs of Mr. Mitchell, in particular his need for physical and psychological security, for the development of meaningful relationships and for a subjective sense of hope and purpose.

Availability of a Conditional Discharge

10. He further states that the inadequacy of community based resources cannot dictate a custodial order that is not otherwise warranted.

11. Counsel cites the Regina v. Olsen case, where the court was advised of a placement option, a supervised boarding home, which Crown Counsel admitted was the best alternative. However, Crown Counsel in that case took the position that because of a government spending freeze and this facility not being available that a jail sentence was the only way to ensure the accused received appropriate therapy. The court imposed a sentence involving 24-hour community supervision and in so doing stated:

"Those are the realities of society that is experiencing restraint in every quarter… The easy – and at one level justifiable response – is to throw one's hands up in the air, and yield to market forces. But the administration of justice is above all a principled institution. If I determine by reference to the principles of sentencing that Mr. Olsen need not and for his own sake and society's sake, should not, go to jail, but send him there because Mr. Reid tells me there is no money to permit the better approach, the I have resorted to the 'illusory solace' through which judges and society avoid confronting reality…Pushing me to send Mr. Olsen to jail by reason of a spending 'freeze' is precisely the sort of institutional bullying I should be vigilant in resisting.

12. Counsel also refers to Regina v. Lewis for the proposition that the failure to provide the appropriate resources for a mentally disordered accused cannot be allowed to deny the appellant his rights under the legislation. The court in this case states:

" It is not enough for the Attorney General of the province to submit that medical opinions become moot if no community facility or caregiver will accept the appellant. Efforts must be made by those responsible to provide the required services and facilities so the Review Board can fulfill its mandate…."

13. In conclusion, counsel for Mr. Mitchell submits that the Review Board ought to make an order directing that Mr. Mitchell be discharged conditionally to reside at the home of Michael Best or such other community facility as the Board deems appropriate.

Submissions of the Ministry of Children and Families

Counsel for the Ministry of Children and Families provided detailed submissions regarding the issue of payment orders. Counsel relies on Auckland Harbour Board v. The King for the proposition that "no money can be taken out of the consolidated fund into which the revenues of the state have been paid except in a distinct authorization from Parliament itself.

Counsel then refers to a series of other cases in which the principal of Auckland is adopted and submits that these cases are consistent that neither a court nor an administrative tribunal, such as the Review Board, can order the Crown to pay money out of the Crown's consolidated revenue fund without clear and express legislative authority to do so.

Counsel then reviews Section 672.47(3) and 672.54 of the Criminal Code which are provisions regarding the Review Board's authority on disposition orders. She submits that there is nothing in the wording of those provisions indicating an express intention by Parliament that the Review Board has the authority to order a minister of the crown to provide funding for services for an accused as part of a disposition order.

She further submits that:

"Courts and administrative bodies, such as the Review Board, cannot assume the responsibility to determine that a program or residence needs to be set up for an accused, no matter what the cost. To do so would take away the ultimate discretion of the minister who, as the courts have affirmed, has responsibility to decide where the limited funding that is available will go, in order to do the most good."

In the absence of prescribed residential community resources for accused who may be subject to a conditional discharge order, the Review Board has no jurisdiction to order that a specific community residential resource be made available for an accused or that the Minister for Children and Families must spend public funds to provide specified services….

Aside from the absence of express legislative authority to make a payment order, the Review Board does not have any jurisdiction over third parties, namely a contracted service provider.

The creation and continued existence of contracted resources are not only dependent upon the ability and discretion of the government to expend the necessary funding, but as well, the ability and willingness of the contractor to enter into a contract and continue to fulfill the contractual obligations. These are factors that would make it impractical to have, as a term of a conditional discharge order that an accused reside in a specified community resource."

In conclusion, counsel submits that it is beyond the jurisdiction of the Review Board to issue a disposition order specifying that a specific program, facility or resource be provided or funded by the ministry.

Submissions by Counsel for the Attorney General of British Columbia, Mr. Loenen

Counsel for the Attorney General provided submissions dated July 27, 2000 that dealt with the applicability of the Charter. Given our disposition on the

> merits of the case the Charter arguments did not surface and need not be addressed.
>
> Otherwise, counsel took no position with the disposition aspect of the case. However, by way of letter dated October 10, 2000 he does express concern with the quality of 'evidence' tendered at this hearing. Specifically, he refers to Mr. Smith narrating a conversation he had with Ms. Lynne Jones of the South Surrey Residence and submits that:
>
> "not being privy to the conversation the Board and the other parties are unable to assess the accuracy, completeness or context of the statements attributed to Ms. Jones… While there is some utility in adopting an informal procedure it is lost when the poor quality of the 'evidence' results in unfairness to the other parties and provides a wholly inadequate basis for the Board to render its findings."
>
> In response to Mr. Loenen's concerns regarding to the quality of evidence presented to the Review Board, the Review Board takes the position that being an administrative body that it has a fair amount of flexibility in the manner in which evidence is presented. Ultimately, it is a question of what weight is to be given to the evidence. We find nothing in the manner in which the evidence was presented that resulted in unfairness or prejudice to any party. Accordingly, we were able to proceed with our assessment of the evidence and arrive at a unanimous decision in support of a conditional discharge, the reasons for which we detail below.: [Ex. 119]"

In its reasons the Review Board elaborated its analysis of what it had heard and found:

> "It is an undisputed fact that for the past ten years Mr. Mitchell has remained under a custody order and resided within the confines of the Forensic Psychiatric Institute on the basis that the strict custodial setting is required to protect the public. Within the Forensic facility Mr. Mitchell's placement has ranged from the most secure unit to lesser secure units depending on his behavior. For instance if his behavior was deemed by the hospital to be threatening he would be moved to the more secure units or privileges would be withdrawn.
>
> We agree with Dr. Noone that this method of withdrawing privileges and transferring Mr. Mitchell to a maximum-security ward is ineffective. This approach has failed to produce any notable results in the past ten years and, furthermore, is effectively a bar to the successful cascading of Mr. Mitchell into the community. In addition, we find the length of time that certain privileges have been withdrawn to be disproportionate to the behavior that led to the withdrawal.
>
> As stated by Counsel for Mr. Mitchell, the Review Board has, at least for the past three years been of the opinion that Mr. Mitchell could be maintained in the community in a secure boarding home, with 24 hour supervision. The Review Board has consistently stated the public safety could be achieved in such a setting in the community. However, because of issues primarily involving funding, such placement into the community has never come to fruition.
>
> The index offence was an assault on a caregiver while Mr. Mitchell was in

the community, and occurred on November 26, 1990, ten years ago, since that time, and we agree with Mr. Smith, Mr. Mitchell's behavior is best described as disruptive as opposed to violent behavior.

In the more recent years there have been only two incidents of physical aggression. One was an incident of physical aggression in November 1999 against a health care worker when the staff worker attempted to remove Mr. Mitchell's Walkman. This incident resulted in criminal charges being laid, and the matter proceeding to trial, with the outcome being an acquittal. The second incident is an alleged incident of striking a patient in August of 2000, which Mr. Mitchell disputes.

We accept that, despite the two recent incidents of physical outbursts, that for the most part the past ten years reveals a persistent pattern of "unpleasant, inappropriate, annoying, testing, even anti-social behavior"(Exhibit 98, page 17). We do not accept Dr. Wanis' characterization of the past as being a 'chronic pattern of assault on his caregivers'. We note that during the hearing Dr. Wanis toned down somewhat to accept that Mr. Mitchell's behavior over time can be described as the "persistent pattern of verbal aggression and threats".

With respect to the November 1999 assault, Dr. Wanis subsequently opined that when the Review Board ordered, on December 1, 1999, a Conditional Discharge and ordered that Mr. Mitchell "reside in the Province of British Columbia in a place which is staffed and supervised on a 24 hour per day basis" that this order set off the assault. Dr. Wanis was concerned that the 'false hope' created by such an order was a catalyst to the assaultive behavior and discourages against the same.

The Review Board rejects this theory of Dr. Wanis, and finds that it is equally plausible that Mr. Mitchell is reacting to his ongoing strict custody. He is in a facility that caters to seriously psychotic individuals who have committed serious criminal offences. He is in a facility that does not cater to individuals who have organic based disorders as does Mr. Mitchell. In such a facility Mr. Mitchell has had no unescorted day leaves since June of 1995, his SEO's have been quite limited, his privileges have been withdrawn on a number of occasions for appearing verbally threatening. No doubt these factors have played a part in Mr. Mitchell's behavior while at the institute.

To further justify a disposition of custody Dr. Wanis relies on his characterization of Mr. Mitchell as a "sexual predator." However, the Review Board is not convinced on the evidence before us that Mr. Mitchell bears such a title. We are inclined to accept the opinion of Dr. Noone that Mr. Mitchell may be somewhat of an opportunist but not a paraphillic. However, Dr. Wanis maintains his description and would suggest that it is the strict confines of the hospital that controls this dimension of Mr. Mitchell's behavior also.

Dr. Wanis does not rule out placement in the community but is adamant that such placement can only be achieved after Mr. Mitchell successfully cascades through the hospital to less secure settings. At the hearing, Dr. Wanis maintained that in his opinion Mr. Mitchell still does have room to move within the forensic facility. He explained that the hospital can give him more privileges and that there was no reason why the hospital can not curve [sic] Mr. Mitchell's impulsivity.

The Review Board finds this to be at odds with Dr. Wanis' earlier testimony before this Board, in October of 1999 where he testified that Mr. Mitchell "has essentially exhausted the benefits of the programs and services which have been provided to him at FPI" (Tab 98, page 15)

We accept Dr.Wanis' earlier testimony, that the hospital has provided Mr. Mitchell with all that it could. Ten years have lapsed and nothing much has changed, Mr. Mitchell's troublesome behavior has continued. We find that the cascading approach and withdrawal of privilege approach has been exhausted in this setting. We are no further ahead than we were ten years ago. We agree with the concerns of previous Review Boards that the continued detention of Mr. Mitchell at the Forensic Psychiatric Institute is tantamount to a life sentence.

We remain cognizant of the need to protect the public but must equally pay adherence to the other factors set out in S-672.54. Mr. Mitchell's mental condition is one that doesn't fit into the general rubric of those confined at the forensic facility. He requires a facility that understands his mental condition. Mr. Mitchell deserves a sincere and concerted effort to reintegrate him into the community.

The South Surrey Residence where we have directed Mr. Mitchell's placement in our opinion is a facility, which has a bed available, and which would best meet Mr. Mitchell's needs. Mr. Towers from the Ministry of Children and Families endorsed this facility as it is experienced in serving the mentally ill or challenged individuals who have come into contact with the criminal justice system. The facility is a 24 hour supervised facility with experienced staff.

The updated information about the South Surrey Residence was that there may be staff changes taking place but that overall the critical structure of this residence, a fully supervised facility that catered to the mentally challenged who have become involved in the criminal justice system, remains intact. In addition, the evidence was that only 3 of the 5 beds were currently occupied, and that, therefore, there was a space available. Accordingly, we found that the least onerous and least restrictive disposition was one of a conditional discharge to this specific facility.

However, we agree with Dr. Noone, that if Mr. Mitchell was to become involved in criminal activity while on a conditional discharge in the community then he must made to realize that this would not be tolerated. In such circumstances Dr. Noone recommends that Mr. Mitchell be criminally charged and referred back to the Forensic Psychiatric Institute. We further agree with Dr. Noone that rather than continuing on with the indefinite cascading strategy, which has yet to succeed, Mr. Mitchell must be given the opportunity to try himself out in the community at a facility such as South Surrey Residence.

The Ministry of Children and Families along with the Hospital take the position that the Review Board does not have the jurisdiction to specify the institution of facility to which Mr. Mitchell can be discharged. They argue that the effect of such an order would be to make a payment
order.

We rely on the case of Pinet v. Ontario (1995), 100 C.C.C. (3d) 343 (O.C.A.) for the authority that the Review Board does in fact have the power to specify the facility that Mr. Mitchell is to be discharged to. When the evidence before us is that the South Surrey Residence is available and is a setting that is the most appropriate for Mr. Mitchell we not only have the authority to direct placement in that specific residence, we are mandated to do so.

S-672.54 mandates the Review Board to make the least restrictive and least

> onerous disposition. This mandate can not be undermined or clouded by administrative issues of funding or by an ineffective ministerial protocol.
>
> We take the position that our order is not a payment order. Our order does not impose upon any branch of government a duty to pay or disburse monies from their funds in a particular manner. Inevitably, in this case, with the different ministries involved, someone will have to sort out the funding issue and come to a resolution, but it is not our responsibility to become involved in such affairs. To ask that of the Review Board is to impose upon us matters that are not within our control and would unduly fetter our mandate under S-672.54.
>
> Accordingly, we maintain that Review Board has the authority to order a conditional discharge, directing the release to a specific facility, and that such an order is in keeping with our legislative mandate to impose the least restrictive and least onerous disposition. We conclude that the South Surrey Residence is the appropriate facility for Mr. Mitchell to be discharged to.: [Ex. 119]."

3.0 THE HEARING OF FEBRUARY 7, 2001

The circumstances necessitating this hearing are outlined at 1.0 INTRODUCTION AND BACKGROUND, supra at P.1.

3.1 POSITIONS OF THE PARTIES

(i) AFPS

The Director, AFPS sought a further disposition of custody at FPI.

(ii) CROWN COUNSEL

Mr. Ochitwa supported the position of AFPS.

(iii) THE ACCUSED

Mr. Smith, on behalf of the accused asked for a conditional discharge to a specified residential resource. In the alternative if the Review Board were to decide the evidence supported a custodial disposition due to the non-availability of a placement resource, Mr. Smith intended to argue this would violate Mr. Mitchell's charter rights and would be asking for a remedy pursuant to the charter as outlined in his written submission at Ex. 106, (p. 12 supra).

(iv) **MINISTRY OF ATTORNEY GENERAL: LEGAL SERVICES BRANCH**

Mr. Loenen took no position with respect to the appropriate disposition and reasserted the position reflected in his previous written submissions, ie. that the Review Board lacks the jurisdiction to offer charter relief; that Mr. Mitchell's charter rights are not being violated; that in any event such a breach is justified under S.1 of the Charter (see P.12, supra)

(v) **MINISTRY FOR CHILDREN AND FAMILIES**

Ms. Grant took no position as to disposition but relied on her counsel's previous written submissions summarized at P.12, supra.

Subject to citing additional authorities the parties rested on the written submissions tendered for the July 2000.

3.2 EVIDENCE AT THE HEARING OF FEBRUARY 7, 2001

(i) **AFPS**

Following the Board's decision and disposition of October 16, 2000 Dr. Wanis wrote the following letter on October 27, 2000; addressed to the "Manager" of the South Surrey Residence:

> "Dear Sir;
>
> Re: Robert Allan MITCHELL
>
> In the spirit of cooperation with you, we are forwarding the disposition of the B.C. Review Board, effective November 16, 2000.
>
> We draw your attention to condition #2, which orders Robert Mitchell be discharged to reside in your facility by November 16, 2000.
>
> This discharge is contrary to the Forensic Psychiatric Service's clinical opinion.": Ex. 121

The evidence at hearing indicated that the letter was in fact written by Mr. Carew. On October 30, Ms. Beaman, Manager of the residence, wrote Mr. Carew that Mr. Mitchell had not been accepted into the residence because:

> 1) Intake Process has not been completed
> 2) Would not accept any client discharged against medical advice: [Ex. 121].

A substantial part of this hearing dealt with the substance of the additional or behind the scene discussions which may have ensued between AFPS staff and South Surrey Residence staff resulting in Mr. Mitchell's non-placement at South Surrey Residence.

The Board heard from Ms. Lynne Jones the previous manager of South Surrey Residence whom it had subpoenaed for this hearing.

She stated that when she first visited FPI in July or August, 2000, Mr. Mitchell expressed his disinterest in the South Surrey Residence as he found it too restrictive. It was also Ms. Jone's evidence that:

- Gordon Towers the MCF Social Worker in charge of Mr. Mitchell's file would not fund Mr. Mitchell's placement "against medical advice"
- Ms. Jones felt Mr. Mitchell could be safely accommodated at South Surrey Residence and would have accepted him despite Mr. Towers' reservations and lack of funding commitment.
- That her successor, Gail Beaman, had told her that AFPS staff (Mr. Parnell) had communicated that AFPS was extremely angry at the prospect of South Surrey Residence accepting Mr. Mitchell and, as a "funder" of 2 other

residents @ South Surrey Residence, would, at an upcoming meeting, reconsider its funding of a FPS clients at South Surrey Residence and whether it would refer clients there in the future.

- Ms. Beaman stated she would not accept Mr. Mitchell due to FPS' objections

This lead to the letter of Mr. Towers dated October 5, 2000 that:

> "it may not be in Mr. Mitchell's best interest to access the resource at this time…": Ex. 117.

Ms. Jones said that she would have accepted Mr. Mitchell for placement at South Surrey Residence; she did not consider Mr. Mitchell as substantially more difficult or ill than other residents and would have had no difficulty accommodating him.

In response to Ms. Jone's evidence the Board heard from Mr. Parnell, an AFPS social worker, that:

- He was concerned about the placement of Mr. Mitchell at South Surrey Residence due to its potential effect on his 2 other patient/clients in that residence.
- He did not express or convey anger toward Ms. Beaman with respect to the Mitchell placement.
- He did indicate a need to review the "referral process".

Ms. Acheson arranged to hear from Ms. Beaman, the current manager of South Surrey Residence, who essentially denied any memory of discussions about Mr. Mitchell with Ms. Jones, and confirmed the contents of her letter at, Ex. 121, supra.

She reiterated that at the effective date of Mr. Mitchell's discharge no placement at South Surrey Residence was available to him.

The foregoing evidence makes it clear that as of the effective date of Mr. Mitchell's disposition and indeed well before November 16, 2000, the South Surrey Residence was not an available placement for this accused. To that extent Mr. Mitchell's non-discharge in compliance with the letter of his disposition was justified.

Despite this finding, and without purporting to comment on the credibility or neutrality of any of the witnesses, we feel obligated to leave some observations on the record. Clearly the scheme of Part X.X.1 of the Criminal Code exists precisely because of the potential tension that can exist between clinical opinion and an accused's rights. The law expects, failing appeal to the BCCA, that a disposition of the Review Board is to be complied with and implemented by the Director of AFPS, notwithstanding medical opinion. To the extent that the tyrpe of correspondence and discussions alleged above have the effect of removing decision making about an accused from the Board's oversight, they fly in the face of the social policy underlying Part X.X.1 of the Code. They may also violate an accused's Section 7 Charter Rights.

We commend the evidence herein to Senior Management of AFPS for their review, to the extent that it raises any policy, practice or indeed ethical issues which these managers may wish to address.

On behalf of AFPS the Board next heard from C.M.C. M. Shieh whose evidence

essentially indicated that :

- The accused remains on A-4, a maximum secure, ward at FPI. His privileges include Fir Hall, Act 1, O.T., Power Hour, 1-2 Grounds access (prior to resignation of his one-to-one worker
- Little has changed in his overall presentation: he remains “manipulative” and “splits” staff.
- He has been “verbally abusive and threatening” toward staff and his one to one worker.
- On September 29, 2000 there were concerns that the accused was physically aggressive toward a lower functioning co-patient whom he was teasing, pushing, name calling.
- In October the same co-patient stated Mr. Mitchell wanted him to get in to the bathtub.
- On October 31, Mr. Mitchell threw milk at a co-patient.
- On November 10, Mr. Mitchell was told South Surrey Residence would not accept him for placement.
- On November 14, Mr. Mitchell’s grounds privileges with his one to one worker were terminated due to “verbal threats”.
- On November 15, Mr. Mitchell was placed into seclusion for “abusive verbal behaviour” over an electric extension cord for his radio. He struck a staff member in the face while resisting direction to undress in seclusion. He was released from seclusion November 17 and grounds privileges were reinstated.
- Mr. Mitchell refused to talk Dr. Wanis.

- December 1: exploitation of lower functioning co-patient in the purchase sale of a walkman?
- December 12: “inappropriate” conversation with a female staff member.
- December 20: verbally harassed a co-patient.
- December 27: community outing with one to one worker and accused’s mother.
- Mr. Mitchell’s one to one worker has tendered his resignation for personal reasons and a replacement is being requested.
- He continues to deny responsibility for his behaviour when confronted.

On cross examination of Mr. Shieh, Mr. Smith elicited that:

- The events described have generally not been witnessed by Mr. Shieh.
- Mr. Mitchell’s “threats” usually do not include, indeed there have been no threats involving personal violence. His verbal threats tend to consist of statements such as “I’ll have you fired”; “I’ll report you to my lawyer”; “Where I come from people like you get a punch in the nose”.
- Mr. Mitchell has had only 2 or 3 outings since August, 2000.
- Mr. Mitchell is currently enrolled in no programs or formal behaviour modification plans, protocols or treatment.
- Although Dr. Wanis regularly reviews medications, there have been no significant medication changes since the last hearing, when Dr. Wanis indicated a possible increase in Tarazadone, which curbs impulsivity. This medication has in fact been reduced to 100mg.
- FPI offers Mr. Mitchell security structure and supervision.

- Mr. Mitchell has requested a change of treatment teams.
- Mr. Mitchell is not ready or suitable for placement, including at South Surry Residence.

Dr. Wanis did not provide evidence.

(ii) MR. MITCHELL

Mr. Mitchell told the Board that:

- "He attends Act 1, Power Hour and Fir Hall but remains on A-4 ward
- He has had no outings other than over Christmas holidays with his mother, since August 2000
- He denies the September 29 "pushing" incident
- He alleges assault by his health care worker in relation to the November 15 radio cord issue
- He finds South Surrey Residence too restrictive and would prefer to reside in the "Best" home, the owner of which he has known for 8 years

(iii) THE "BEST PROPOSAL"

The proposal to house Mr. Mitchell remains in substance as described in Exhibits 91 and 97. Mr. Best sought to rebut some of Mr. Towers concerns as articulated at Page 18, supra, in particular:

- His home, while bordering on public park is separated from it by a 12' fence.
- Mr. Best asserts he has extensive experience working with mentally challenged individuals.
- There are no children living in the Best home.

Mr. Best went on to describe his day programming plans for Mr. Mitchell if the

accused is placed in his residence.

4.0 DISPOSITION

In it's review of all of the historic as well as the recent evidence in this matter the Board has identified that an unfortunate pattern of inertia in planning and decision making has befallen this case. We find that for at least the past 3 years there has been no rigorous scrutiny or critical analysis with respect to the threshold issue of Mr. Mitchell's significant threat to the safety of the public. The Board has repeatedly ordered Mr. Mitchell's detention based on a combination of the consensus or concession of all parties, including his various counsel, and the absence of any less restrictive placement options to FPI. As recently as October, 2000 the Board acknowledged this:

> "There was no question at this hearing that Mr. Mitchell was a significant threat to the public safety and that an Absolute Discharge was not even a consideration. The sole issue was what was the least onerous and least restrictive disposition given that Mr. Mitchell continues to be a significant threat: Ex. 119.

It has become clear that Mr. Mitchell finds himself in the midst of a deadlock; that AFPS is unwilling or unable on the basis of what is characterized as clinical judgment or "medical advice" to participate in Mr. Mitchell's discharge under supervision despite the Board's orders to that effect.

In that regard the status quo offends Mr. Mitchell's rights to fair and dignified treatment: ***Winko*** Par. 21, 22, 30, 42. It is therefore appropriate that we once again engage in a thorough review of the evidence with respect to that the threshold issue. With respect to Mr. Mitchell's **mental condition** we note:

- He has been afflicted since childhood with epileptic seizures and assessed as

functioning at a borderline intelligence level.

- He has no history of an Axis I mental disorder diagnosis, nor does he exhibit symptoms thereof.
- His organic personality deficits require that he be provided with a degree of structure and supervision.
- His intellectual deficits limits his capacity to incorporate abstract reasoning and principles into his behaviour or to take into account the point of view of others; he tends to blame others rather than take responsibility for his actions.
- His capacity for emotional bonding in relationships, for example in such aspects as loyalty, trust, commitment, is limited or lacking; his most positive historic relationship has in fact been with Mike Best.
- He is neither paraphiliic nor a “sexual predator”; there have been no incidents which support these pejorative labels: Ex. 109.
- Extensive behaviour modification treatments have been tried and failed after some initial progress: Ex. 98, P.15.

With respect to Mr. Mitchell’s **reintegration into society** the Board considers:

- Mr. Mitchell’s behaviour can be controlled with supervision and instruction: Ex. 27, Ex. 109.
- AFPS is clearly unwilling to discharge/integrate Mr. Mitchell under any readily conceivable circumstances or conditions: Ex. 74.
- The Director has for several years, held out promise of establishing a medically acceptable discharge plan. The accused has in effect been deprived of the right to discharge planning.

- He has exhausted (except for physical security) the therapeutic benefits of FPI: Ex. 86; Ex. 98.
- He is no longer suitable for placement at FPI: Ex. 109, Ex. 119.
- Despite repeated promises and direction to that effect the “Best” proposal has never been objectively or impartially assessed.

With respect to Mr. Mitchell’s **danger to the public** the Board notes:

- His history of childhood behavioural problems and alleged sexual misconduct.
- His 3 admissions to FPI related to assaultive behaviour as well as the index offence for which he has been in custody for a decade.
- He has been observed to behave in a sexually inappropriate manner, e.g. exposure in the company of his “girlfriend”.
- He has repeatedly been put on behaviour modification programs and had his privileges scaled back or withdrawn.
- In December 1995 he was accused of soliciting sexual partners for his girlfriend.
- In 1996 he was accused of “behavioural transgressions” such as “crossing sexual boundaries” or “conning staff”.
- Dr. Wanis has consistently labeled him as a high risk to reoffend (unspecified) and this assessment is unlikely to amellorate or abate with intervention.
- Ex. 56 describes 8 incidents of inappropriate behaviour over a 12 month period none of which meet the legal definition of “significant threat”: ***Winko***, Par 57, 59.
- In 1998 he offered money for sex.

- An Independent Assessment concludes that his behaviour is largely reactive to his environment; that FPI's negative environment outweighs any positive influence in his life; that lengthy ongoing confinement is unlikely to improve his behaviour: Ex. 86.
- He does not meet criteria for the label of a sexual predator: Ex. 109; his sexual behaviour has lacked the element of coercion.
- There is little basis upon which to predict future violence considering there is no evidence of overt violence or serious aggression in a decade; the alleged assault in December 1999 was his first violence in 9 years and resulted in acquittal. His frequently mentioned "verbal threats" do not in our opinion, involve threatened violence.

At his most recent previous hearing the Review Board concluded:

- That FPI's approach to managing Mr. Mitchell's behaviour is ineffective and disproportionate, having demonstrated no clear results in 10 years; moreover it poses an effective barrier to discharge within any reasonable foreseeable future timeframe.

- Statements that Mr. Mitchell presents a "chronic or persistent pattern of assault on caregivers" or a "persistent pattern of verbal aggression and threats" are overstated and mischaracterizations.
- Mr. Mitchell is not a sexual predator.
- The resources of FPI qua the accused have been exhausted.

At the current hearing we learn nothing that contradicts the foregoing. Mr. Shieh acknowledges the absence of violent behaviour or threats of violence beyond what he calls “verbal abuse”.

We therefore conclude that despite Mr. Mitchell’s persistently annoying and testing demeanor [Ex. 109], the evidence falls short of demonstrating that the accused poses a significant threat to community safety. Mr. Mitchell is therefore entitled to an absolute discharge: ***Winko***, Par 48, 49, 57; see also ***Jones***, BCCA 1997, Par 59. To conclude otherwise would amount to the imposition of an inappropriate evidentiary burden on the accused that his current circumstances would, for an indefinite period, prevent him from dislodging: ***Winko***, Par 52,53.

It is our expectation that once discharged Mr. Mitchell will be able to access the services of M.C.F. to which we have repeatedly heard he is eligible and entitled, on a voluntary basis: Ex. 114. In addition he will of course also be subject to the previsions of Sections 1 and 22 of the **Mental Health Act** (R.S.B.C. 1996, ch. 288); see also ***Winko***, Par 61.

_____

Reserved reasons prepared by Bernd Walter
with concurrence of the panel members
February 22, 2001

****