



BRITISH COLUMBIA REVIEW BOARD

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

REASONS FOR DISPOSITION IN THE MATTER OF

**MLA
(A Young Person)**

**HELD AT: Maples Adolescent Treatment Centre
Burnaby, BC
November 24, 2016**

**BEFORE: ALTERNATE CHAIRPERSON: F. Hansford, Q.C.
MEMBERS: Dr. R. Stevenson, psychiatrist
B. Walter (dissenting in part)**

**APPEARANCES: ACCUSED/PATIENT: MLA
DEFENCE COUNSEL: A. Timothy
DIRECTOR: Dr. J. Quan, Dr. S. Hosenbocus,
J. Broughton
DIRECTOR'S COUNSEL: K. LeReverend, Q.C.
DIRECTOR OF CHILD WELFARE: K. Gutsche
ATTORNEY GENERAL: G. Nelson**

***Publication of information identifying the young person is prohibited pursuant to s.110 of the Youth Criminal Justice Act.**

****Pursuant to s.672.5(4) of the Criminal Code, the Director of Child Welfare, guardian of the accused, is designated a party.**

INTRODUCTION AND BACKGROUND

[1] ALTERNATE CHAIRPERSON: On November 24, 2016, the Review Board convened a hearing pursuant to s. 672.94 of the *Criminal Code* in respect of MLA, a young person within the meaning of the *Youth Criminal Justice Act*. MLA is 15 years old and of First Nations heritage. She is charged with three counts of assault, three counts of uttering threats, possession of a weapon, mischief, and breach of undertaking. The index offences were allegedly committed on May 6, May 8, and August 24, 2015. All of the offences occurred at the care home in Prince George in which she then resided. The victims in each case were caregivers employed at her residence.

[2] MLA appeared in court on September 9, 2015 and was found unfit to stand trial. She first appeared before the British Columbia Review Board (“the Board”), on October 16, 2015, and was again found unfit to stand trial. The Board made a disposition of conditional discharge in the expectation that MLA would be placed at “Eaglet Place”, a new facility created for her in Kamloops, offering 24/7 supervision from trained staff with experience in dealing with potentially violent, developmentally disabled individuals.

[3] MLA’s personal history has been reviewed in the Board’s Reasons for Disposition of October 16, 2015. Although we have considered all the evidence on record, for the purpose of these Reasons we only recite that which is necessary to our decision.

[4] MLA faces multiple challenges. She has developmental disabilities and an IQ of approximately 43. Historically, she has been diagnosed with posttraumatic stress disorder, attention deficit hyperactivity disorder, intermittent explosive disorder, and reactive attachment disorder. In his recent report, Dr. Quan limited his diagnosis to Reactive Attachment Disorder, Moderate Intellectual Disability, and Premenstrual Dysphoria. His diagnosis is limited because he has not personally observed the behaviours that generated the additional diagnoses advanced by Dr. Hosenbocus and Dr. Stefanelli, but does not dispute them.

[5] MLA displayed profound behavioural disturbances at an early age, requiring her to be taken into care by the Ministry of Children and Family Development. Her deficits leave her

prone to significant episodic aggression, characterized by impulsive and reactive violence. She is approximately 6 feet tall and weighs over 200 pounds. Her size and strength renders her capable of inflicting serious physical harm on others. MLA is described as a “very tall, sturdy young lady who appears older than her actual age”.

[6] MLA continued to be a management challenge after placement at Eaglet Place. Her behaviour escalated and put staff members at significant risk of physical harm. On two occasions, she assaulted staff, requiring one victim to take three days off work. In other episodes, she punched holes in the wall, threatened to pour boiling water on staff, broke furniture, and punched holes in walls. MLA was therefore returned to the Inpatient Assessment Unit (IAU) in Burnaby on March 30, 2016. She stabilized, was discharged, and returned to Eaglet Place.

[7] MLA’s behaviour continued to pose challenges that Eaglet Place staff found difficult to manage or moderate. MLA became increasingly aggressive and used offensive language. She was returned to the Inpatient Assessment Unit after an enforcement order was issued in Provincial Court. This process was triggered by the accused screaming at a staff member, calling him names, throwing her body into his, and then pushing him on the chest with both hands.

[8] At a mandatory hearing on August 29, 2016, the Board found that MLA remained unfit to stand trial despite diligent efforts to educate her respecting her charges and the trial process. The Board accepted the parties’ joint submission that her behaviour had improved to the point where she could again be managed safely in the community. MLA was returned to Eaglet Place on a conditional discharge, reviewable within six months.

[9] MLA’s behaviour again escalated. On October 23, 2016, she attacked one staff member by pinching and biting her. Attempts were made to de-escalate her behaviour but she refused to comply, kicking a manager several times and pushing him in the chest. She then retired to her room where she took off all her clothes after hearing that the police have been called. Staff at Eaglet Place reported that she had recently been experiencing “one good day followed by several bad days, then one good day”. They did not believe that they could manage her at Eagle Place without undue risk to her care givers.

[10] The Director initiated breach proceedings and an enforcement order was made in Provincial Court in Kamloops on October 24, 2016, requiring MLA to be detained at IAU or the Maples. This triggered a mandatory hearing of the Board pursuant to S. 672.94 of the

Criminal Code. Our task at this hearing was first to determine whether MLA was fit to stand trial, and if not, to review her disposition.

[11] The Board made an order adding the Director of Child Welfare as a party under s. 672.5(4). We agreed unanimously that MLA was not fit to stand trial. The majority of the panel found that the necessary and appropriate disposition in her circumstances was a broad custodial disposition, reviewable within six months.

EVIDENCE AT THE HEARING

[12] Additional materials received and reviewed by the Board for this hearing included a psychiatric report prepared by Dr. S. Hosenbocus, a psychiatrist practicing at the Youth Forensic Psychiatric Services outpatient clinic in Kamloops, dated November 3, 2016, (Exhibit 21) a case management report prepared by Ms. J. Broughton, a Registered Social Worker, dated November 15, 2016, (Exhibit 22) and a further psychiatric report prepared by Dr. J. Quan, a psychiatrist practicing at the crossroads unit of the Maples Adolescent Treatment Centre.

[13] A case management plan was in place for MLA during her residence at Eaglet Place. It was based on the Youth Forensic Case Management Manual, under whose terms she was considered to be “high risk”. MLA had weekly individual sessions with her case manager, Ms. J. Broughton (either in the office or in play therapy), received a weekly home visit with Ms. Broughton, and was seen monthly by Dr. Hosenbocus and by her pediatrician. Her case was reviewed monthly by a professional care team including representatives of YFPS, her care provider, Eagle Nest Community and Aboriginal Services Ltd., (ENCASS), her family counsellor, and the Ministry of Child and Family Development’s (MCFD) Youth Team social worker.

[14] MLA is now a permanent ward of MCFD. Her management plan makes provision for family support through YFPS but this has not been accessed. She was supervised by two caregivers funded by MCFD and employed by “ENCASS”, a society dealing with First Nations clients. They were on site 24 hours per day. A recreation plan was in place but over the last few months, MLA expressed disinterest in recreational activities she formerly enjoyed. She also refused to participate in the Special Olympics bowling program.

[15] After her last return to Eaglet Place, there were significant changes in MLA’s behaviour. She became preoccupied with food to the point where she was found eating rotten fruit, eating from the home’s garbage cans and taking raw food being prepared for

cooking. On one occasion, she ate coffee beans displayed on a retail store counter. This led to conflict with staff at her care home. It also left her so preoccupied and distracted with the smell and sight of food that she was unable to participate in class activities. The most recent incident leading to the Enforcement Order was precipitated by a relatively minor incident respecting a pear taken from the care home refrigerator.

[16] MLA struggled to control her emotions while at Eaglet Place. She had difficulty identifying the emotions of others. She regularly reported herself as happy even when demonstrating anger, frustration and sadness. Her behaviour was best when Ms. Broughton visited, but deteriorated rapidly after she left. She appeared to be responding to her knowledge that Ms. Broughton, as case manager, monitored the conditions of her conditional discharge and had the power to revoke it if MLA violated them. Her behaviour also prevented her from attending or remaining at her modified school program on a number of occasions. On one occasion, she shouldered aside another youth who was in her way. She alienated another student, previously regarded as a friend, as a result of conflicts arising from her poor social skills and emotional dysregulation. She demonstrated little insight into her behaviour and had no remorse for the physical contact with her other classmate. She considered that the other student “deserved it”.

[17] Dr. Hosenbocus testified that MLA appeared to destabilize after the resolution of a dispute between MCFD and her grandmother respecting her custody and guardianship. She became more distressed and depressed as a result of this change in her status, lost interest in her activities and became tired and unmotivated. Her hygiene deteriorated and she was reluctant to shower. The deterioration of MLA’s behaviour was likely the result of the continuing effects of her childhood trauma. She was also stressed at Eaglet Place by staff turnover and the need to come to terms with being unable to live with her grandmother. When stressed or frustrated, small triggers are capable of generating a disproportionately violent response.

[18] Both Dr. Hosenbocus and Dr. Quan opined that MLA’s intermittent aggressive behaviour is also likely reactive to management techniques and management styles. Her behaviour could also be affected by her medications. Her communication difficulties, poverty of thinking and impulsive aggression, are, in their opinion, due to her limited intellectual skills. She operates at a preschool level of complexity.

[19] MLA's Behavioural Management Plan at Eaglet Place was based on an Assessment completed in 2014, formulated with respect to her residence in a group home in Prince George. That assessment does not deal with her current behaviours or how they might be properly addressed. The author of this assessment considers that it now requires updating. He also reported that resource staff at Eaglet Place had not received the training required to fully interpret and apply the behavioural intervention recommendations set out in the 2014 Assessment. They did not appear to fully comprehend the strategies suggested for managing MLA and did not have the core competencies necessary to de-escalate her behaviour successfully so as to moderate her aggressive outbursts.

[20] It was common ground among the parties that ENCASS needed to work with MCFD to ensure that caregivers receive necessary training to implement a new behavioural management plan. In Dr. Hosenbocus' opinion, a new and more effective behavioural management plan must incorporate trauma-informed management techniques to address what both he and Dr. Quan agreed are impulsive and aggressive responses rooted in her early childhood traumas. Dr. Hosenbocus stated that management responses at Eaglet Place contributed to the escalation of aggressive behaviours that led to her return to the Maples.

[21] The MCFD committee responsible for arranging for an assessment, identifying and acquiring resources necessary to develop such a plan and arrange for funding is not expected to address the issue before December 15, 2016. MCFD will continue as MLA's guardian and will be responsible for providing housing. Obtaining funding for an updated assessment from MCFD may prove difficult in light of the relatively recent 2014 Assessment, even though it does not deal with MLA's new community (Kamloops), her new residence, her recent mood issues, food fixation, the reduction in her activities, her attendance at school, her new status as a ward of the ministry, and continuing episodes of violence at Eaglet Place.

[22] MCFD will look to Youth Forensic Services in Kamloops for MLA's treatment and assistance in managing her mental health issues. They expect YFS to "help rollout the plan" to be developed to enhance ENCASS staff's management capabilities.

[23] Other possible resources were identified. Ms. Gutsche testified that Interior Health has people who are able to train caregiving staff to take a trauma informed approach to managing MLA. This training would take approximately 6 to 8 weeks, but there is no current commitment for funding it. Dr. Quan testified that most of the staff at the Maples are trained in trauma informed management techniques. If MLA is detained in custody, the treatment plan

is to complete a behavioural assessment and thereafter to develop and implement a behavioural management plan using trauma-informed techniques. Dr. Quan advised that staff at Crossroads would be pleased to assist ENCASS staff in learning such techniques, and implementing the behavioural management plan once developed. MLA's prospective caregivers would be welcome to attend at the Maples to observe the implementation of that program.

[24] Dr. Quan testified that upon admission to the Crossroads program at the Maples on November 2, 2016, MLA was wary, quiet and cooperative. She has maintained this low-key demeanour throughout her residence at Crossroads. She takes her medications without comment or complaint. She rarely speaks and has so far been unable to sustain a conversation with anyone. She was cooperative and affable, although nearly mute and generally uncommunicative. She often appears perplexed as she stands in the corridors without moving, apparently waiting wait for someone to engage her. She will frequently stand in front of staff, mute, when she wishes attention. She is only animated in matters related to food.

[25] Dr. Quan found it difficult to assess MLA's current mental status because of her absent or, at best, laconic replies to questions. She appears perplexed by inquiries about her mental status. When asked how she is feeling, she generally replies "I don't know". She will not respond to questions intended to elicit evidence of depression, mood swings or hallucinations. She also remains silent when asked how she is progressing at Crossroads. As a result, Dr. Quan considered that she presented "as a toddler who has yet to develop much language". Dr. Quan suspected that her presentation is, at least in part, a product of her unfamiliarity with him because she was slightly more forthcoming in discussions with Dr. Hosenbocus and Dr. Stefanelli. Staff at Crossroads report similar difficulties in communication. At best, MLA will engage in a very limited conversation, but only in non-stressful situations.

[26] MLA has not shown any signs of psychosis, major mood swings, or attention deficit disorder while at Crossroads. She acted aggressively toward staff on only one occasion during a dispute over a book. She charged the staff member in a very threatening manner. She was sent to seclusion and took several hours to settle. There have been no other incidents of violence. Dr. Quan observed that the turmoil and disquiet that the treatment team anticipated, having regard to her recent history, had not emerged at Crossroads.

[27] Dr. Quan considers that MLA's current placement represents the stable, calm, predictable environment, with familiar caregivers, required to maximize MLA's chance of remaining non-violent. In addition to developing a behavioural assessment and a behavioural management plan, both of which require observation, he intends to implement, in consultation with Dr. Hosenbocus, a trial of a new medication, amantadine. While this medication was originally intended for antiviral use, the literature indicates that it may be effective to reduce her reactivity and introduce a greater degree of calmness into her interactions with others. It may also reduce impulsive spikes in behaviour.

[28] If this medication is efficacious, Dr. Quan may be able to reduce MLA's antipsychotic medication. He anticipated that the beneficial effects, if any, of this new medication may be seen as early as January 2017. It will likely be several months thereafter before the optimal dosage can be determined. He conceded that this process could be implemented and monitored in the community, although he would prefer this to occur at Crossroads where experienced professional staff would be involved.

[29] The treatment team intends to return MLA to Kamloops to reside in an appropriate facility as soon as possible. The treatment team expects that she will be able to go on 28 day visit leaves to a more stable environment, with a greater degree of resiliency, in the near future

[30] Dr. Hosenbocus advised that caregivers in Kamloops will require time to set up a new management and care program, given MLA's sensitivity to changes in her environment. He considered it to be essential that she be returned to a stable situation in Kamloops to minimize the stress of being placed in a different environment with different staff applying trauma informed management techniques. He expects this planning would take 3 to 6 months to institute. He considers it essential to avoid re-traumatizing MLA by additional sudden changes in her environment. An additional possible stressor of an early return to Kamloops would be the expected replacement in early 2017 of her current MCFD management team by a differently constituted guardianship team.

[31] MLA attended for most of the hearing. She said little and occupied herself with a number of snacks that were available in the hearing room. She was excused from attending the balance of the hearing, with the agreement and consent of all parties, pursuant to section 672.5 (10) of the *Criminal Code* after the Board was advised that her behaviour was likely to

escalate inappropriately if she were compelled to return after a short adjournment. All parties agreed that the hearing should continue in her absence.

ANALYSIS AND DECISION

Fitness to Stand Trial

[32] All parties submitted that MLA remained unfit to stand trial, and that the evidence was insufficient to displace the findings of unfitness made at earlier hearings.

[33] Dr. Quan conducted a fitness assessment of MLA on November 13, 2016. MLA advised him that she did not remember having been in court before, could not describe the role of the judge, defence counsel or Crown Counsel and stared silently at him when these questions were posed to her. She was “visibly perplexed” when asked about the meanings of the words “guilty” and “not guilty”. The assessment was discontinued when she became frustrated and irritated.

[34] Dr. Quan interviewed MLA the day before this hearing. Every question he asked about the presence of various parties at the trial and their respective roles in a criminal trial generated the answer “to make us safe”, without any indication that MLA appreciated the significance of the questions. She acted as if she had never heard of any of these concepts before. Dr. Quan attributed her inability to understand or give replies, or to communicate effectively, to her intellectual deficits. He concluded that she would not be able to advise or instruct counsel, nor follow the proceedings of a criminal trial.

[35] Ms. Boughton testified that during MLA’s residence at Eaglet Place, she had employed techniques to further educate MLA respecting the trial process, including play therapy. These attempts were unsuccessful in increasing MLA’s comprehension of the trial process or the parties to it.

[36] An accused’s fitness to stand trial must be assessed as at the date of the hearing. As a result, the Board generally hears from an accused respecting this issue. In this case, we did not interact with MLA because she was unable to tolerate attending the hearing any further and was excused further attendance. In this case, Dr. Quan interviewed MLA the day before the hearing and his opinion respecting her fitness and her inability to communicate with counsel remained unchanged. We considered his evidence to be sufficient for present purposes. It is also consistent with the other relevant evidence before the Board. There was

no evidence to displace earlier findings of unfitness. Accordingly, we found MLA unfit to stand trial.

DISPOSITION REVIEW

[37] All parties submitted that the necessary and appropriate disposition in this case was a broad custodial disposition with provision for 28 day visit leaves. The Board is not bound by that recommendation. We are obliged to make the least restrictive and onerous decision that is necessary and appropriate in MLA's circumstances, having regard to the criteria set out in S. 672.54 of the *Criminal Code*.

[38] Dr. Quan provided a risk assessment which differs little from those provided during earlier hearings. Although MLA has proven that she can be stable and cooperative for days at a time, she has a marked vulnerability to acute rages that are impulsive and difficult to predict. They have led her to act aggressively, up to and including significant assaults upon staff at her various care homes. The triggers for these assaults can be relatively trivial and her aggressive responses, disproportionate.

[39] Although her responses have moderated at Crossroads, ENCASS staff at Eaglet Place reported continuing aggression that they have proven to be unable to manage. These episodes of rage and aggression, coupled with her significant size and strength, make MLA a significant risk of causing serious harm to her caregivers, with whom she must of necessity be in near constant proximity, and who are vulnerable by reason of their need to maintain an ongoing, supportive relationship with her.

[40] We must make the necessary and appropriate disposition, having regard to S. 672.54 of the *Criminal Code*. This makes the safety of the public, including her caregivers, our primary concern. Attempts to place MLA in the community in Prince George and in Kamloops have been unsuccessful, and her episodic violence has not been optimally managed by caregiving staff. This has resulted in a number of returns to the IAU and Crossroads when her aggressive behaviour escalated. These returns are in and of themselves disruptive and stressful to MLA, who has made plain her desire to remain at her home in Kamloops.

[41] Dr. Quan testified that MLA's behaviour stabilized at the Maples Crossroads Program, where MLA resides in a secure unit managed by professional staff offering a predictable routine. Dr. Hosenbocus and Dr. Quan both consider that the management style offered by staff formerly employed at Eaglet Place may have inadvertently contributed to

some of her impulsive aggression. Dr. Quan considers that a custodial disposition of six months duration will enable the development of management and medication regimes that will likely improve MLA's stability of mood and behaviour and reduce her aggression. During the term of this custodial disposition, ENCASS staff will have the opportunity to attend at the Maples Crossroads Program for exposure to trauma informed management techniques and additional training.

[42] If a custodial disposition is granted, additional time will be afforded for the hiring and training of necessary staff in Kamloops. These staff will have time to train in the techniques recommended by Dr. Hosenbocus. By the end of the six month recommended custodial disposition, a new MCFD guardianship team should also be in place for MLA and she will have time to adapt to it. If she is returned to Kamloops once these aids are in place, her behaviour will likely be better regulated internally and the risk she poses of harming her caregivers would be significantly moderated. The implementation of more effective management techniques should also, based on the evidence before us, reduce the likelihood that her impulsive behaviour will escalate to significant violence.

[43] When MLA was originally discharged conditionally, the ability of staff to properly manage her was an issue. The Board heard evidence that ENCASS staff had or would acquire the necessary competencies and determined that in the case, the least restrictive and onerous disposition was a conditional discharge. Unfortunately, MLA's behaviour significantly challenged these skills. When staff could not manage her behaviour, MLA's aggressive outbursts escalated requiring periodic returns to IAU and the Crossroads program. If returned to the community to live in an environment where appropriate management skills are not in place, a behavioural assessment has not been completed and a plan has not been formulated, it is quite likely that additional aggressive and impulsive behaviours will occur and caregivers will again be at significant risk. We therefore concluded that the protection of the public required a short custodial disposition to carry out the treatment and management plans advanced by Dr. Quan and Dr. Hosenbocus. At the moment, no other authority has stepped forward to take the steps they recommend despite their responsibility to do so.

[44] If we were to grant an immediate conditional discharge, MLA would have to be placed in a facility where the competency of the staff would be unknown, or whose skills have proven to be inadequate. This could prove significantly disruptive and would likely result in escalated aggression and violence that would be difficult to manage and which would place

new caregivers at significant risk. It would also likely result in further enforcement proceedings. Given MLA's need for a consistent and stable environment, we do not consider it to be in her interest to return her to the community only to have her returned to the IAU on multiple occasions, thereby preventing the development of a long term and stable relationship with her caregivers in a community-based residence.

[45] Furthermore, Dr. Quan has proposed introduction of a new medication, amantandine that will hopefully provide additional emotional and behavioral stabilization. This trial would best be undertaken in the relatively more stable and predictable environment of the Maples Crossroads, rather than returning her to the community where the confounding factors of a different placement with potentially new and/or untrained staff could nullify or confuse the assessment of the medication's efficacy.

[46] We therefore concluded that the protection of the public and MLA's medium and long-term interests made a custodial disposition of the terms suggested by the Director and endorsed by the parties both necessary and appropriate.

Reasons written by F. Hansford, Q.C. in concurrence with Dr. R. Stevenson

MR. WALTER DISSENTING IN PART:

[47] I do not disagree with the opinion of my colleagues that MLA remains unfit to stand trial as of the date of this hearing. Her fitness to stand trial is not in issue and is not the subject of my dissent.

[48] MLA is under the continuing custody of MCFD as represented by the Director of Child Welfare, a party to these proceedings. These entities are MLA's legal guardians under the Child, Family and Community Service Act (1996)(C.F.S.A.), and are accountable for meeting her needs, which are implemented through her child welfare guardianship social worker.

[49] As of 2015, MLA has been placed, supervised and treated in a single person-staffed resource developed, designed, and maintained specifically for her (EAGLET). Although her staff and caregivers are employed by an independent contracting agency, her care, treatment, accommodation and staffing are funded by her guardians, MCFD.

[50] MLA's status and situation are rendered more complex by her involvement with the Criminal Justice system and the BCRB, by virtue of her September 9, 2015 verdict of unfit to stand trial.

[51] While the BCRB conducts hearings and makes dispositions in relation to an accused, those dispositions, and in particular the terms and conditions which attach to them are, in the case of an accused youth the joint responsibility of, and are implemented by, the Directors of MATC, for custodial accused, and the Director of YFPS in the case of conditionally discharged youth or those who are on temporary leave from MATC. The reasons for the bifurcation of responsibilities and the functional impacts have been the subject of the Board's comments in the past.

[52] In crafting its dispositions, the BCRB is governed by the considerations and criteria in s.672.54 of the *Criminal Code* (as amended):

672.54 When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:

...

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

[53] In the case of an accused who is unfit to stand trial, only s.672.54(b) and (c) apply. The current version of s.672.54 was proclaimed in force on July 15, 2014. Early on in its interpretation of the amended s.672.54, for example in *Lacerte*, BCRB July 15, 2014, the Board concluded:

To summarize, the NCRRA amendment to s. 672.54, to substitute the words "necessary and appropriate" for "least restrictive and onerous", does not change the substantive nature of the legal question before the Review Board at a hearing. We are still required, as we were before the NCRRA came into force, to make the least onerous and restrictive disposition which reflects the objects set out in s. 672.54 and which is crafted, so far as possible, to meet the particular needs of an accused: (para 53)

[54] Similarly the BCRB held:

The amended provision emphasizes that the safety of the public is now the “paramount consideration”. The Board has concluded that this addition is but a restatement or codification of the previous jurisprudence and Board practice, developed under Part XX.1 since promulgation in 1992: *Re Davis*, BCRB July 15, 2014, paragraph 82: *Baranyais*, BCRB September 11, 2014, para 74.

[55] In *Baranyais* at paragraphs 87 to 89, the BCRB reiterated:

In further attempting to assess Parliament’s intention in amending s. 672.54, the Board has previously had resort to Hansard and the proceedings of the Senate Standing Committee on Legal and Constitutional Affairs, where, on February 27, 2014, the Minister of Justice and Attorney General of Canada, the Honourable Peter Mackay testified:

“The second change is to the disposition-making provision as it relates to the terms “least onerous and least restrictive”... Bill C-14 proposes to replace those terms with a clearer phrase: “necessary and appropriate in the circumstances.” This proposed wording is consistent with how this requirement was described in 1999 Supreme Court of Canada decision *Winko v British Columbia (Forensic Psychiatric Institute)*, such that “the NCR accused’s liberty will be trammelled no more than is necessary to protect the public safety”. This amendment is not intended to eliminate the requirement that a disposition be the “least onerous and least restrictive”, but rather to make the concept easier to understand.”

It appears clear to us that any interpretation of the new legislation that does not balance the rights of the accused with the safety of the public will not survive *Charter* challenge. Thus it is self-evident that the Board should interpret the new provisions in the *NCRRA* in a manner that complies with the *Charter*. This approach leaves little room for a more restrictive treatment of an NCRMD accused.

Based on the foregoing discussion, we conclude the change from least onerous and least restrictive to “necessary and appropriate” changes little. Any disposition or condition, whether “least onerous” or “necessary and appropriate”, must be made having regard to the enumerated factors in s. 672.54. To satisfy s. 7 of the *Charter*, the accused’s liberty interests must be trammelled no more than is necessary to protect public safety. Given the Supreme Court of Canada’s treatment of Section XX.1, and the need to read this legislation in a manner that comports with the *Charter*, the “necessary and appropriate” disposition or condition must be that which is also the “least onerous and least restrictive”. The new legislation does not fundamentally alter the essence of the former provisions.

- [56] In *Evans v. British Columbia (Adult Forensic Psychiatric Services)*, 2009 BCCA 560, the Court made it clear that the admonition to impose the least restrictive and least onerous disposition applies equally to accused who are unfit to stand trial. The court also appeared to accept the notion that the underlying policy objectives and approach to the drafting of Part XX.1 of the *Code* create a presumption against detention, irrespective of, and not rebutted by the nature of the index offence or the clinical status of the accused (para 21).
- [57] In the current case it was suggested that MLA requires the development of a new behavioural management plan by a “behavioural consultant.” This was based on the evidence of Dr. Hosenbocus who testified insistently on the unconditional need for MLA to be treated by staff who were trained and competent in a “trauma-informed management” approach to managing her behaviours.
- [58] With respect, Dr. Hosenbocus’ “evidence” was in its entirety focused on the necessity for, and benefits of, such a treatment approach. He based his clinical belief on the etiology of the accused’s difficulties—her childhood traumas, including separation from her family—leading to an exquisite reactivity or hyper-arousal when confronting or responding to certain environmental triggers. Dr. Hosenbocus’ sole reason for resisting MLA’s return to her residence was that it lacked the program he feels is necessary and because staff there lack the training and competency to identify and implement treatment interventions which would minimize future trauma.
- [59] While the BCRB has the legal authority to supervise treatment, it does not in fact prescribe or implement treatment because clinical considerations are secondary to the overall purpose of the legislation: protection of the public and maximization of liberty interests: *Mazzei v. BC* [2006] 1 S.C.R. 326; 2006 S.C.C.7.
- [60] Though well-intended, Dr. Hosenbocus’ evidence giving was clearly unaffected by any appreciation that this hearing was a legal proceeding with its dominant focus on MLA’s right to the least restriction on her liberty interests.
- [61] Further, although it accepts full responsibility for MLA, MCFD’s evidence was that even the funding to develop and implement the recommended plans had not been, and indeed might prove difficult to secure.

- [62] I find myself legally and morally unable to subjugate MLA's liberty interests to an as yet unfunded assessment and plan; to be developed by an as yet unidentified expert consultant; to be implemented by unidentified and untrained staff resources; within an indeterminate time frame. To do so would in my view violate the purpose of the Code. I therefore would have discharged MLA subject to conditions.
- [63] Finally I must express my sense of the appropriateness of the overarching legal construct or regime to this case. It became clear in the course of the evidence, for example that YFPS assumes no responsibility for any aspect of MLA's care and management. It provides no resource to this youth, beyond possibly helping to "roll out" an eventual new management plan. I confess I do not know what that means but it was clear that YFPS has no role or capacity to train staff or any other in "trauma-informed" treatment.
- [64] In my opinion the admixture of two additional bureaucratic entities (YFPS, MATC) to MLA's already complex situation has the potential for negative benefit. I would therefore urge the Crown to consider a stay of MLA's charges to remove the involvement of YFPS and MATC from the care and treatment web. It is my sense that MATC could still be accessed during times of behavioural upheaval through MLA's guardianship status or by civil means, without the additional complication and weight of the criminal justice system.

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