



BRITISH COLUMBIA REVIEW BOARD

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

IN THE MATTER OF BRIAN CRAIG IRVING

DISPOSITION

On October 22, 2009 Brian Craig IRVING ("the accused") was found not criminally responsible on account of mental disorder by the Supreme Court of British Columbia at New Westminster on two counts of causing death by criminal negligence and seven counts of causing bodily harm by criminal negligence contrary to sections 220(b) and 221 respectively of the Criminal Code and was ordered held in custody at the Forensic Psychiatric Hospital until disposition by the British Columbia Review Board ("the Review Board");

AND on December 01, 2009 the Review Board held a hearing pursuant to section 672.47(1) of the Criminal Code and made a disposition;

THE REVIEW BOARD ORDERS AND DIRECTS that the accused be discharged, subject to the following conditions:

1. THAT he be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services ("the Director");
2. THAT he reside in such place in the Province of British Columbia considered appropriate by the Director and not change his residence without prior approval of the Director;
3. THAT as required by the Director, he attend and report to the Adult Forensic Psychiatric Clinic nearest his place of residence, or at any other place, at least once per week for purposes of assessment, counselling, assisting him with regard to any treatment, promoting his reintegration into society, or monitoring his compliance with this order;
4. THAT he return to and remain at the Forensic Psychiatric Hospital where the Director is of the opinion the accused's mental condition requires assessment as he may be a danger to himself or others;
5. THAT he not consume alcohol;
6. THAT he not acquire, possess or use any firearm, explosive or offensive weapon;
7. That notwithstanding condition #4, the Director shall forthwith return the accused to the Forensic Psychiatric Hospital where there is reason to believe that the accused has consumed any amount of alcohol;
8. THAT at his discretion, the Director may monitor the accused's compliance with this order by testing for the use of alcohol, which must be conducted no less than once per week, and the accused shall submit to such testing upon the demand of the Director or as required by this order;
9. THAT he keep the peace and be of good behaviour; and
10. THAT he present himself before the Review Board when required.

THIS DISPOSITION TAKES EFFECT on January 15, 2010.

Barry L. Long  
Alternate Chairperson

\*This disposition is further reviewable by November 30, 2010.



## **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  
BRIAN CRAIG IRVING**

**HELD AT: Forensic Psychiatric Hospital  
Port Coquitlam, BC  
December 1, 2009**

**BEFORE:                   CHAIRPERSON: B. Long  
MEMBERS:                Dr. W. Warrian, psychiatrist  
                                  L. Chow**

**APPEARANCES: ACCUSED/PATIENT: Brian Irving  
ACCUSED/PATIENT COUNSEL: D. Nielsen  
DIRECTOR AFPS: L. Lee Dr. L. Meldrum  
DIRECTOR'S COUNSEL: A. Westmacott  
ATTORNEY GENERAL: L. Hillaby**

## Introduction

[ 1 ] Brian Irving is an alcoholic. Alcoholism destroyed his life. Tragically it also caused the death of two innocent people, the severe injury of seven others, and forever altered the lives of the families and friends of his victims.

## Background

[ 2 ] The accused is 53 years old. He has a high school education and has been employed by CP Rail since about 1978. He was responsible for assembling and moving the rail cars that form a train. He married in 1985 and had two children. They are now young adults.

[ 3 ] The accused began to drink alcohol as a teenager. His consumption gradually escalated and by his late 20s or early 30s it had become overtly problematic. Like many alcoholics he came to spend a great deal of time either consuming alcohol or recovering from its effects. He developed a pattern of binges followed by short periods of abstinence. He was sometimes forced to miss work because of severe hangovers. His personal life began to fall apart. His wife and children disapproved of his drinking. His response was to isolate himself from his family when he drank. His marriage could not absorb the strain and ended in divorce in 1999. His relationship with his children was adversely affected.

[ 4 ] The accused was not without insight into his addiction. He accepted substance abuse counselling. He attended four separate residential programs over the years. These lasted from one to six months. He was able to achieve sobriety from time to time. These intervals lasted anywhere from a few months to one period that endured for two years between 2004 and 2006. However, the accused could not maintain sobriety.

[ 5 ] By early 2008 the accused's persisting alcohol abuse had led to more ominous health consequences. On January 31, 2008 the accused seriously injured himself when he fell at home while intoxicated. He sustained a serious head injury that required emergency admission to hospital. An abnormal CT prompted an emergency craniotomy. The surgery disclosed a hemorrhagic contusion consistent

with a subdural hematoma. Brain imaging also showed that the accused had experienced significant loss or shrinking of brain tissue. Such changes are associated with prolonged alcohol abuse. The accused was treated and despite the extent of the damage he made a good recovery. He exhibited little if any obvious cognitive impairment.

[ 6 ] The nature of the accused's work precluded immediate return to employment and he was placed on medical leave. His neurosurgeon recommended that he not drive for three months. The accused complied with this advice. Although cleared to return to work by March 2008, the accused was advised that he was not ready to resume driving. His employer decided that he should remain on medical leave. The accused grew frustrated by his circumstances and relapsed to drinking. Within a short time, he was consuming about 26 ounces of vodka per day. Sometime in about May 2008 the accused received medical clearance to drive. He renewed his motor vehicle insurance and returned to driving.

### Index Offences

[ 7 ] The accused's physical health began to decline again once he resumed drinking. By the end of August 2008 he had lost weight and his mental processes had slowed. The accused's daughter, Taylor Irving, described it as though his brain injury had only just occurred. On about August 26 or August 27, 2008, the accused ended the binge that had begun in March 2008, and ceased all alcohol consumption just as he had done in the past. Ms. Irving testified that she saw her father on August 27, 2008. When she arrived she found him attempting to get into his truck. He did not seem fit to drive because he was very slow and unresponsive. There was no smell of alcohol or any other evidence to suggest alcohol consumption apart from his presentation. She took his keys away from him. When Ms. Irving saw her father on the following day he did not seem to want to answer questions. He was slow and seemed "out of it"<sup>1</sup>.

[ 8 ] The index offences occurred later that day and were succinctly summarized in the Admissions entered into evidence in the court proceedings<sup>2</sup>. At approximately

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<sup>1</sup> Exhibit 6, defence written argument, page 8

<sup>2</sup> Exhibit 5

6:05 PM on August 28, 2008 the accused was observed driving his pickup truck through the parking lot of a shopping mall in Maple Ridge, BC. Without any apparent explanation, he accelerated the truck and crashed directly through the front window of a sushi restaurant located at one end of the mall.

[ 9 ] Maija-Liisa Corbett, age 19, and Hye-Shim Oh, age 46, were killed. Seven other persons were injured. Some of the victims sustained severe and permanent injuries. One victim was left with a skull fracture and brain injury.

[ 10 ] When the accused exited his vehicle he was described as "out of it". He appeared drunk or impaired by some medical issue. He had no shoes or socks and had to be carried out of the restaurant over the broken glass. He was pale, had difficulty standing and was unable to finish his sentences. He was arrested and taken into custody. His mental state worsened and he exhibited psychotic and bizarre behaviours over the next few days, leading him to be certified under the *Mental Health Act*. However his symptoms resolved within days without antipsychotic or other psychiatric medication.

[ 11 ] The accused was charged with a number of offences including murder. He was denied bail and remained in pre-trial custody.

### Court verdict

[ 12 ] The charges against the accused were eventually reduced to two counts of criminal negligence causing death and seven counts of criminal negligence causing bodily harm. Mr. Irving was independently assessed by crown and defence psychiatrists. Both experts agreed that the accused was experiencing delirium tremens induced by withdrawal from alcohol at the time of the crash. Delirium is "a mental disorder whose principal symptoms involve alteration in consciousness with reduced abilities to focus, sustain, or shift attention as well as reduced clarity of awareness of their environment."<sup>3</sup> The accused's actions were attributed to a combination of confusion-based perceptual errors, leading him to think that he was

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<sup>3</sup> Exhibit 3, report of Dr. O'Shaughnessy, February 25, 2009, page 4

either braking instead of accelerating, or more likely, on the open road without obstacle in front of him.<sup>4</sup>

[ 13 ] The trial judge's reasons<sup>5</sup> noted the thorough and professional police investigation, the lack of factual dispute, and the agreed position of senior and experienced counsel. On October 22, 2009 the Court concluded that the accused was incapable of appreciating the nature and quality of his acts or knowing that they were wrong and found him not criminally responsible by reason of mental disorder on all charges. The Court ordered the accused detained at the Forensic Psychiatric Hospital and deferred disposition to the Review Board.

#### Evidence before the Board

[ 14 ] The disposition information presented to the Board consisted of 14 exhibits. These included the expert psychiatric reports tendered at trial, a report from the accused's assigned forensic psychiatrist Dr. Meldrum, a psychological assessment, a concurrent disorders assessment, a social history, a case manager's report, victim impact statements, and a letter of support with offer of accommodation from the accused's brother and mother.

[ 15 ] Much like the court proceedings, there was little if any factual dispute in the evidence presented to the Board. The accused has been in custody since the index offences. He has not posed any behavioural difficulties and has been cooperative throughout his detention. He has remained abstinent from alcohol since he ceased drinking in the days prior to index offences. He has begun one-to-one counselling with the substance abuse counsellor at FPH.

[ 16 ] Dr. Meldrum provided additional oral evidence. She reviewed the accused's personal history before addressing his medical status. She noted that the accused continued to exhibit acute symptoms of delirium following his arrest leading him to be certified under the *Mental Health Act*. However his symptoms resolved within days without antipsychotic or other psychiatric medication.

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<sup>4</sup> Exhibit 4, report of Dr. Lohrasbe, June 9, 2009, page 16

<sup>5</sup> Exhibit 6

[ 17 ] Dr. Meldrum reiterated that Mr. Irving had no psychiatric history apart from the delirium tremens that he developed just before the index offences. She was aware of a report that the accused had experienced depression a couple of years before, but did not consider this significant. Dr. Meldrum recently learned from the accused that he may have experienced some perceptual abnormalities when he had previously stopped drinking. She believes that these were probably mild bouts of delirium tremens. Dr. Meldrum had little doubt that if the accused were to become dependent upon alcohol again and abruptly cease consumption, he would be at real risk to develop another episode of delirium tremens.

[ 18 ] Dr. Meldrum reviewed a psychological assessment<sup>6</sup> that confirmed that the accused has mild impairment as a result of the reported brain damage. Nevertheless he is surprisingly healthy and continues to function within normal range. He is cognitively intact, with organized thinking and euthymic mood. He expresses appropriate understanding of the tragic consequences caused by his behaviour and appears genuinely remorseful. There has been no further suggestion of delirium or other symptoms of mental illness since the accused's symptoms resolved shortly after the index offences.

[ 19 ] Dr. Meldrum assessed the accused's prospects for maintaining sobriety. She was concerned that he was overconfident in estimating his capacity to remain abstinent should he be discharged from hospital in the near future. She said that the accused believed that the shock and horror of the index offences would be more than enough motivation to remain abstinent. In her opinion the accused underestimated the risks of relapse once exposed the full effect of a number of serious psychosocial stressors that awaited him. The accused had been forced to sell his home to pay for legal costs. He had no employment and had yet to determine whether he was eligible for a pension. There are a number of outstanding civil lawsuits that have been brought by the victims. The accused is in real jeopardy that his total liability will exceed the \$2,000,000 limit of his insurance policy. His mother, who is a significant source of support, has been recently diagnosed with serious physical illness. The index offences and subsequent legal proceedings have exposed the accused to considerable media attention and notoriety.

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<sup>6</sup> Exhibit 8, report of Dr. Viljoen, September 30, 2008

He is likely to face further unwelcome scrutiny upon discharge from hospital.

[ 20 ] Although Dr. Meldrum agreed that the accused is highly motivated to maintain sobriety, she was firm that he will have to develop effective coping strategies if he was to successfully avoid alcohol in the future. She stressed that motivation alone would be unlikely to assure sobriety in view of the accused's well established history of failed treatment.

[ 21 ] Dr. Meldrum acknowledged that assessing the accused's risk for future dangerous behaviour was difficult. She said that typical risk assessment instruments such as the HCR-20 were not helpful. She agreed that the accused had no historical risk factors apart from his alcoholism. She concluded that the accused's risk to the public was based on the possibility of relapse to alcohol use, progression to physical dependence, followed by abrupt cessation. This would leave the accused at real risk to develop another episode of delirium tremens. The index offences logically served as an example of the type of dangerous behaviour that might recur in those circumstances. Dr. Meldrum said that it was difficult to estimate the amount of time necessary for the accused to develop dependence upon alcohol should he relapse, but when pressed, conceded that it would likely take a minimum of a couple of weeks.

[ 22 ] Dr. Meldrum recommended that the accused be detained at FPH for the next year. The accused would continue to take substance abuse counselling while gaining gradual access to the community from FPH. She noted that as a matter of policy accused persons detained at FPH are not permitted to drive. Dr. Meldrum was aware that the accused's proposed discharge plan in which he would reside with his brother and mother in Cranbrook. She opposed this because of the risk of relapse. She added that the treatment team had yet to conduct a community assessment of the proposed accommodation. There was also a shortage of forensic staff available in the Cranbrook area to supervise the accused.

[ 23 ] Mr. Irving provided evidence. He candidly admitted that alcoholism had cost him his home, job, marriage, and damaged his relationship with his children. He stressed that he never thought that his drinking could ever result in him hurting anyone else. He expressed remorse for the index offences. He described some of his prior residential treatment programs and other efforts he had made to maintain sobriety.

[ 24 ] The accused asked the Board to consider giving him a conditional discharge. He agreed that his time at FPH had been helpful, but noted that it was a hospital dedicated to the treatment of mental illness. He reviewed his plans for discharge. He noted his brother's offer of accommodation. He planned to take one to one alcohol counselling that he had learned was available in the community. He said that he intended to spend his time in counselling, involvement in Alcoholics Anonymous, part-time work, and help around his brother's home. He noted that he had had no cravings for alcohol since the index offences. He wanted to take Antabuse, a drug that would make him sick should he consume any alcohol. He added that he was quite willing to undergo any testing to check for the presence of alcohol. He stated that his driver's license had expired but that he would like to be able to drive should it be renewed.

#### Positions of the parties

[ 25 ] The Director, represented by Ms. Westmacott, submitted that the circumstances of this case were unique and rendered prediction of risk difficult. Nevertheless she argued that the combination of the accused's history of alcoholism, impending psychosocial stressors, overconfidence with respect to risk of relapse, and consequent risk of development of delirium tremens established that the accused should remain under Board jurisdiction. She further submitted that a conditional discharge would be premature in the absence of a community assessment and prior gradual access to the community from FPH. Although Dr. Meldrum did not recommend any provision for visit leave, Ms. Westmacott added that Director was not strenuously opposed to such a condition.

[ 26 ] The Crown represented by Mr. Hillaby supported the Director's recommendation. He submitted that the seriousness of the index offences in the context of the difficulty in assessing risk required that the Board exercise caution before discharging the accused. The Crown stressed Dr. Meldrum's opinion that the accused's motivation to remain abstinent was not enough to guarantee abstinence. The Crown further sought a condition prohibiting the accused from driving, arguing that the Board should not leave such a decision to the regular process of review by the Superintendent of Motor Vehicles.

[27] The accused, represented by Ms. Nielsen, agreed that assessment of risk was difficult in the circumstances. She submitted that the index offences were caused by entirely unforeseen circumstances. She noted that the accused had been in custody since the index offences. She suggested that the HCR-20 placed the accused at low risk for causing future harm. She submitted that the accused had the support of his family combined with viable accommodation in the community. Although she took no position as to what disposition the Board should make, she reviewed the accused's request for consideration for conditional discharge. She also took no position as to whether the accused constituted a significant threat to public safety.

### Disposition

[28] The Review Board's jurisdiction is set out in Part XX.1 of the *Criminal Code*. The Board's decision must be made according to the framework set out in s.672.54. The decision must take into account the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused. The Board must make the least onerous and least restrictive disposition to the accused in choosing between three possible outcomes: absolute discharge; discharge subject to conditions; or detention in hospital. If in the opinion of the Review Board the accused is not a significant threat to public safety, it must make an absolute discharge.

[29] We begin our consideration with review of some basic concepts that apply to s.672.54. The leading case interpreting these provisions remains the landmark judgment of the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)*<sup>7</sup>. This decision articulated a number of principles that bear repeating.

- The accused must be afforded the utmost liberty compatible with his situation.<sup>8</sup>
- The NCR verdict does not mean that the accused poses a significant threat to society. There is no presumption that the accused poses a threat.<sup>9</sup>

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<sup>7</sup> [1999] 2 S.C.R. 625

<sup>8</sup> *Ibid.* paragraphs 9, 42

<sup>9</sup> *Ibid.* paragraphs 35, 49

- There must be evidence of a significant risk to the public before the Review Board can restrict the accused's liberty.<sup>10</sup>
- Significant threat means a real risk of serious physical or psychological harm caused by criminal conduct. A minuscule risk of grave harm will not suffice nor will a high risk of trivial harm.<sup>11</sup>
- The accused's threat cannot be founded upon speculation.<sup>12</sup>
- Restrictions on the accused's liberty are imposed for essentially rehabilitative and not penal purposes.<sup>13</sup>

[ 30 ] The Board's first task is to answer the threshold issue of whether the accused is a significant threat to public safety. Absent such a finding, the accused must be absolutely discharged. The Director and the Crown proceeded on the basis that the accused constituted such a threat. Although the accused's counsel took no position on this issue, the Board did not take this as a suggestion that there was any genuine doubt or controversy. Significantly the accused did not challenge Dr. Meldrum's opinion. Although the Board exercises inquisitorial jurisdiction, it may be guided by the position of the parties in circumstances such as these. Considering the seriousness of the index offences, the early stage of the accused's assessment and treatment, the accused's history of chronic alcoholism, and the position of the parties, the Board accepted Dr. Meldrum's assessment that the accused's risk was sufficiently grave to constitute a significant threat to public safety.

[ 31 ] The Board must next decide the type of disposition, choosing between conditional discharge and detention in hospital. Unlike the threshold determination, this matter was a live issue in this hearing. We found that the absence of historical risk factors, apart from the accused's alcoholism, was significant. The accused was a contributing member of the community. The Crown's psychiatric expert at trial noted that the accused was described as a "completely non-violent man ... gentle, passive and conciliatory, even when drinking heavily ... never known to be aggressive, threatening, revengeful, or violent ..."<sup>14</sup>.

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<sup>10</sup> *Ibid.* paragraph 49

<sup>11</sup> *Ibid.* paragraph 57

<sup>12</sup> *Ibid.* paragraph 57

<sup>13</sup> *Ibid.* paragraph 94

<sup>14</sup> *Supra* note 4, page 12

Other evidence of the accused's character was consistent with this description. The evidence shows that the accused exercised some degree of responsibility in dealing with his addiction to alcohol. He took steps to avoid drinking and driving<sup>15</sup>. He accepted medical advice to voluntarily stop driving following his accident of January 2008 and subsequent diagnosis. He complied with his daughter's direction to not drive on the day before the index offences.

[ 32 ] Although the circumstances of this matter were described as unique, the Board has in fact had occasion to consider similar scenarios. In *Stonehouse (Re)*<sup>16</sup> the accused was a 48-year-old woman with a lengthy history of substance abuse that included alcohol. She tried to commit suicide by setting fire to a gas pump at a service station. The ensuing blaze caused approximately \$200,000 in damage and completely destroyed the service station. The accused's behaviour was attributed to delirium tremens that was triggered when she quit drinking the week before. She was found NCRMD on charges of arson and mischief. Up until the index offences the accused had led a prosocial life without history of violence or dangerous behaviour. Her risk was exclusively based on the possibility of another episode of delirium following relapse to alcohol abuse and subsequent withdrawal. The index offences occurred on a small island, leaving the accused subject to considerable public scrutiny and notoriety. The Board found that the absence of historical risk factors justified imposing a conditional discharge at the accused's first disposition review. The Board also permitted her to remain in her home on the island despite the potential for stress based on notoriety in a small community.

[ 33 ] In *Hans (Re)*<sup>17</sup> the accused was a 42-year-old alcoholic with no history of psychiatric problems, violence, or criminality. He developed delirium tremens following withdrawal from alcohol, and without provocation, unexpectedly stabbed his wife. He was initially charged with attempted murder and subsequently found NCRMD on a reduced charge of aggravated assault. Unlike Mr. Irving, Mr. Hans had little insight into his disorder. He had also previously been psychotic under the influence of alcohol and assaulted his wife. Again, the accused's risk was directly linked to the potential for a future episode of delirium tremens.

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<sup>15</sup> *Supra* note 4, page 6

<sup>16</sup> [2002] B.C.R.B.D. No. 102

<sup>17</sup> [2006] B.C.R.B.D. No. 279

[ 34 ] Despite the seriousness of the assault and the accused's absence of insight, the Board conditionally discharged the accused at his first disposition review. The Board further allowed the accused to resume cohabitation with his wife.

[ 35 ] Lastly, the accused in *Boyd (Re)*<sup>18</sup> was a 48-year-old single man with a lifelong history of gainful employment. He was a chronic alcoholic who had twice experienced seizures that required hospitalization after he tried to stop drinking. Despite this experience he relapsed to alcohol abuse and attempted to withdraw from alcohol consumption on his own. He developed delirium tremens and attempted suicide by shooting himself in the head with a shotgun. When the weapon would not discharge the accused set his home on fire with lighter fluid. After the accused was found outside his burning cabin, he punched a neighbour in the face who tried to prevent him from returning into the cabin. It was only the luck of a snow capped roof that prevented the fire from spreading to adjacent structures. The accused was charged with a number of offences and found NCRMD on a charge of arson. Once again the accused's risk was directly based on the potential for developing delirium tremens following relapse to alcohol abuse and subsequent withdrawal. The Board found that the shock of the index offences would likely be sufficient motivation to alter the accused's behaviour in the future. Although the accused had a lengthy history of alcoholism and failed treatment, the Board concluded that the unforeseen and isolated nature of the index offences rendered the accused's risk speculative. He was absolutely discharged at his first disposition review.

[ 36 ] There is a common thread that runs through these cases. Each involved extraordinarily dangerous behaviour that was wholly unforeseen and inconsistent with the personal histories of the respective accused. Although there were no lethal consequences, this appears to have had more to do with good fortune than less dangerous conduct. We found little to distinguish these cases from this matter apart from the tragic outcomes, which we hasten to add, has not been minimized.

[ 37 ] The Board's mandate stresses promoting rehabilitation while protecting public safety order. The rehabilitation prescribed for the accused consists principally of one to one counselling in an environment conducive to maintaining sobriety. The evidence shows that the type of recommended counselling is immediately available in

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<sup>18</sup> [2007] B.C.R.B.D. No. 276

Cranbrook. The accused has the support of his family combined with accommodation. Mr. Irving's brother wrote that if he caught the accused drinking, he would turn him in himself.<sup>19</sup>

[ 38 ] There are other measures available the Board to minimize the risk of relapse as well as detect any consumption of alcohol well before the accused could become dependent. The accused is willing to take Anatabuse. He can be subject to random testing as well as be required to submit to mandatory testing at specified intervals. He can be regularly monitored through mandatory reporting to representatives of the Director. The Board can authorize immediate and nondiscretionary return to custody upon reason to believe that the accused has consumed any alcohol.

[ 39 ] The Board therefore concluded that the accused's risk was manageable in the community under conditional discharge provided there were stringent conditions as mentioned. Simply put, the Board found that the possibility of the accused surreptitiously relapsing, consuming sufficient amounts of alcohol to become dependent, somehow avoiding the detection afforded by weekly reporting combined with mandatory testing and family supervision, then choosing to precipitously stop drinking, progressing to delirium tremens, and then acting dangerously was too far-fetched and improbable to justify detention in hospital.

[ 40 ] The Board has not ignored the advice of the Director regarding the absence of community assessment or shortage of forensic staff in the Cranbrook region. While it would have been preferable to have such an assessment on hand, the likelihood of the proffered accommodation proving unacceptable to the Director seemed remote considering the prosocial history of the accused and his family.

[ 41 ] While the Board is sympathetic to the challenges created by staff shortages, there is nothing to stop the Director from calling upon the accused's community substance abuse counsellor, local mental health agencies, and the accused's family to assist in monitoring and maintaining contact with the accused. The Director has demonstrated such flexibility in other cases within the Board's experience in order to give effect to the Board's order.

[ 42 ] As a further safeguard, and to ensure an orderly transition to the community, the Board delayed the effective date of the order until January 15, 2010. This delay

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<sup>19</sup> Exhibit 14, letter from accused's brother and mother, November 26, 2009

will allow the Director a reasonable time to identify and organize community resources to implement the reporting and monitoring conditions as well as provide an opportunity to conduct a community assessment, if the Director continues to consider this necessary.

[ 43 ] The Board considered the Crown's submission that the accused should be prohibited from driving. We note that there was no evidence whatsoever to suggest that the accused's driving had ever been dangerous outside of the index offences. His driver's license is currently expired. There was nothing to suggest that the Superintendent of Motor Vehicles would be unable to safely regulate the accused's driving privileges. We have also taken into account that the Board's duty to impose the least onerous and least restrictive disposition applies to the individual conditions in addition to the type of disposition.<sup>20</sup> In such circumstances, we could see no purpose in prohibiting the accused from driving other than for punitive purposes.

[ 44 ] In making this disposition the Board has not lightly dismissed the submissions of the Director and the Crown. We have reviewed the heart wrenching victim impact statements.<sup>21</sup> The pain and suffering created by such an unforeseen tragedy is truly incomprehensible to those who have not experienced such a profound loss. We recognize that our decision may not be popular with the public or consistent with the desires of the victims. We note that the trial judge acknowledged the understandable feelings of injustice that the victims may have experienced at the court verdict. We accept that the same sentiments may apply to this decision. Nevertheless we can do no better than repeat the following observation made by the trial judge:

"But ... the Court must apply the laws relating to criminal matters as enacted by Parliament. Sometimes that requires courage ... to do what is right according to the law."<sup>22</sup>

The Board therefore made a conditional discharge on the terms contained in the order already released. It will now fall to the accused to prove that the tragedy of the index offences will indeed be sufficient to maintain sobriety as he learns appropriate coping strategies and reintegrates into society.

*Reserved reasons prepared by B. Long, Dr. G. Warrian and L. Chow concurring December 11, 2009*

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<sup>20</sup> *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498

<sup>21</sup> Exhibit 13

<sup>22</sup> *Supra* note 5, paragraph 12