

Date: 19990114
Docket: AD-0782
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION**

BETWEEN:

MARTIN ALLEN LEWIS

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Before: The Honorable Chief Justice N.H. Carruthers
The Honorable Mr. Justice G.E. Mitchell
The Honorable Mr. Justice J.A. McQuaid

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Paul D. Michael, Q.C.

Counsel for the Hillsborough Hospital

Place and Date of Hearing

Charlottetown, Prince Edward Island
September 8, 1998

Place and Date of Judgment

Charlottetown, Prince Edward Island
January 14, 1999

Written Reasons by:

The Honorable Chief Justice N.H. Carruthers

Concurred in by:

The Honorable Mr. Justice G.E. Mitchell

The Honorable Mr. Justice J.A. McQuaid

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(16 pages)

Before: Carruthers, C.J.P.E.I.; Mitchell and
McQuaid, J.J.A.

Heard: September 8, 1998

Judgment: January 14, 1999

CRIMINAL LAW - Criminal Code Review Board - Mental Illness - Detention

Criminal Code Review Board made a Disposition pursuant to s.672.54 of the *Criminal Code*. Appellant questions the validity of the Disposition and whether the Review Board erred in its interpretation of s.672.54 of the *Criminal Code*. The appellant also raised issues concerning the manner in which the Review Board carries out its mandate pursuant to the provisions of Part XX.1 of the *Criminal Code*. **HELD:** The appeal is dismissed. The Review Board assessed the conflicting evidence and acted reasonably in reaching the conclusion that the appellant should be detained in the Hospital subject to conditions pursuant to s.672.54 of the *Code*. The resolution of issues before the Review Board requires the active participation of all parties concerned so the Review Board may make a fully informed assessment as to the appropriate Disposition.

CASES CONSIDERED: *Peckham v. Attorney-General of Ontario et al.* (1994), 93 C.C.C. (3d) 443 (Ont.C.A.) (leave to appeal to the Supreme Court of Canada denied); *R. v. LePage* (1997), 152 D.L.R. (4th) 318 (Ont.C.A.); *British Columbia (Forensic Psychiatric Institute) v. Johnson*, (1995), 66 B.C.A.C. 34 (B.C.C.A.); *Brockville Psychiatric Hospital v. McGillis* (1996), 2 C.R. (5th) 242 (Ont.C.A.)

STATUTES CONSIDERED: *CRIMINAL CODE*, R.S.C. 1985, c. C-46, Part XX.1, ss. 672.5, 672.38, 672.54, 672.56, 672.81, 672.83, 672.86; s-ss. 672.5(2), 672.54(a), (b), (c)

W. Kent Brown, Q.C., for the Appellant
Catherine C. Flanagan, for the Attorney General of Prince Edward Island
Cyndria L. Wedge, for the *Criminal Code Review Act*
Paul D. Michael, Q.C., for the Hillsborough Hospital

CARRUTHERS C.J.:

[1] This is an appeal from a Disposition Order made by the Criminal Code Review Board constituted pursuant to the provisions of s.672.38 of the *Criminal Code*.

BACKGROUND

[2] The appellant appeals from a Disposition Order made pursuant to s.672.54 of the *Criminal Code* by the Prince Edward Island Criminal Code Review Board (the "Review Board"), dated March 6, 1998.

[3] A review of much of the background to this case may be found in a previous decision of this Court reported as *Lewis v. The Queen*, [1995] 2 P.E.I.R. 41, where this Court allowed the appellant's appeal and directed the Review Board to hold a rehearing. A brief review of the matter since then is now set out here to provide an appreciation of the present situation.

[4] The Review Board held a rehearing on February 26, 1996, at which time the appellant had been moved from Unit 1 to Unit 3 of the Hospital. The Review Board granted a new Disposition Order dated February 26, 1996.

[5] The Review Board then held a hearing on October 4, 1996, to review the Disposition Order it made on February 26, 1996. Dr. Cronin, the Physician-in-Chief of the Hillsborough Hospital, informed the Review Board on October 4, 1996, that the appellant did not have a psychotic illness of any kind at that time. This diagnosis raised questions about the significance of the appellant's medical status and the jurisdiction of the Review Board to detain the appellant in the Hospital.

[6] The hearing was adjourned to November 15, 1996, to provide Dr. Cronin an opportunity to prepare and file a report with the Review Board concerning the appellant's medical status, the nature of the treatment he needed, if any, and whether he poses a threat to society if he was discharged from the Hospital.

[7] The Review Board reconvened the hearing on November 15, 1996, and heard from Dr. Cronin and Dr. Akhtar, a private consultant in forensic psychiatry. The Review Board then released a Disposition Order on April 11, 1997. The preamble of the Disposition Order contains several clauses including the following two:

AND WHEREAS the intention of the Review Board is to review this order on June 20, 1997, to review any case plan that may be proposed on behalf of Martin Allen Lewis with respect to discharge from the hospital pursuant to subsection 672.54(b).

AND WHEREAS, in the event that a suitable discharge plan is not presented

to the Board, it will have to consider, among other things, the possibility of transfer to another province under section 672.86.

[8] The actual Disposition made by the Review Board on April 11, 1997, is as follows:

The Criminal Code Review Board makes the following disposition pursuant to sections 672.83, 672.57 and 672.54(c) of the Criminal Code:

1. The accused shall continue to be detained in custody at Hillsborough Hospital subject to the conditions set out in the Review Board's February 26, 1996 Order;
2. This order of detention shall continue until June 30, 1997; or until the Review Board orders a new disposition.

[9] The Review Board then met on July 11, 1997, to review the Disposition made on April 11, 1997, and basically to hear about the details of any discharge plan that might have been prepared.

[10] It was pointed out at the July 11, 1997, hearing that Dr. Cronin was then on a six-month leave of absence and the appellant was then being cared for by Dr. Neilson who had taken over the appellant's care in early May, 1997.

[11] Dr. Neilson submitted a plan for a recommended discharge from the hospital whereby the appellant would gradually be placed in a community placement subject to conditions. Dr. Neilson indicated there was no funding available at that time to implement the proposed plan for discharge.

[12] The Review Board then made a Disposition dated July 11, 1997, whereby the appellant was to be detained in the custody of the Hillsborough Hospital pursuant to s.672.54(c) of the *Criminal Code* subject to specified conditions. This detention was not to extend beyond September 26, 1997, at which time the appellant was to be discharged subject to conditions pursuant to s.672.54(b) of the *Criminal Code*. One of the conditions provided that the appellant was to be placed in a private home subject to supervision.

[13] The implementation of the July 11, 1997, Disposition Order was hampered very substantially by funding uncertainties, and the plan to have the appellant discharged from the hospital to a private home fell apart because of this and other reasons as well.

[14] A review hearing of the July 11, 1997, Disposition was held on October 17, 1997, and plans for a different community placement were presented to the Review Board by Dr. Neilson. Everyone agreed to the appellant being discharged on the terms and conditions of the placement plan presented by Dr. Neilson.

[15] Once again the Review Board made a Disposition Order regarding the appellant. It is dated October 17, 1997, and provides that the appellant shall be discharged from the hospital pursuant to ss.672.54(c) and (b) of the *Criminal Code* subject to conditions.

[16] Paragraphs 1 and 2(b) of the Disposition Order state as follows:

1. IT IS HEREBY ORDERED THAT Martin Allen Lewis remain in the custody of the Hillsborough Hospital pursuant to clause 672.54(c) of the *Criminal Code*, until the fulfillment of conditions 2(b) below;
2. IT IS FURTHER ORDERED THAT Martin Allen Lewis shall be discharged subject to the conditions herein pursuant to section 672.54(b) of the *Criminal Code*:
 - (b) subject to clause (c) that Martin Allen Lewis be gradually placed in the home of Mark and Holly Acorn, and under the care of Mark Acorn, increasing to fulltime placement over the next two months.

[17] This discharge plan was never implemented due to various reasons including the fact that an incident occurred on Unit 6 of the Hospital involving the appellant and another patient as well as the fact that Mr. Acorn became sick and was not able to look after the appellant.

[18] On January 30, 1998, the Review Board held a review of the October 17, 1997, Disposition Order. Dr. Cronin had now returned from his leave of absence and had resumed care of the appellant. Both Dr. Neilson and Dr. Cronin were present at the hearing on January 30, 1998, and both presented their views as to what should happen to the appellant.

[19] Dr. Neilson stated she felt the appellant continued to be ready for community discharge as he had progressed sufficiently in his social skills to cope with a group home situation. She indicated that he posed a risk to the public but thought it was low and manageable.

[20] Dr. Cronin, on the other hand, did not agree with attempting to manage the appellant in the community. He had concerns that considerable difficulties would arise for the appellant with possible danger to both himself and others if he was discharged into the community. Dr. Cronin was of the view the appellant's limitations must be kept in mind when moving ahead with plans for his future. His long term objective was to reintegrate the appellant into the community but his immediate objective was to proceed with rehabilitation which he felt could not be carried out in the community at that time.

[21] It was Dr. Cronin's opinion that the appellant should be gradually introduced to Unit 8 of the Hospital if a number of significant hurdles could be surmounted in order to create an environment capable of providing an effective rehabilitation program. However, he was not sure when this would happen but stated he could propose a plan to the Review Board within three months which could probably be implemented over the following three months. The plan involved moving the appellant to Unit 8 of the Hospital and continuing his rehabilitation from Unit 8.

[22] Gordon MacKay, the C.E.O. of the Queens Regional Health Authority, and Peter McGonnell of the Hospital Staff also gave evidence at the hearing.

[23] The Review Board then released a Disposition Order dated March 6, 1998, and Reasons for Making A Disposition dated March 6, 1998, as well.

[24] The Disposition Order states in part:

The Review Board finds that Martin Allen Lewis continues to be a significant threat to the safety of the public but the progress in moving him to a more suitable unit and programming within the Hospital must be more urgently pursued together with diligent pursuit of his re-integration into society by the timely development of a case plan for his discharge; ...

[25] The Disposition Order then goes on to state:

1. IT IS HEREBY ORDERED pursuant to section 672.54(c) that Martin Allen Lewis be placed in the most appropriate unit to his level of functioning subject to the following conditions to which the accused shall be subject: ...

[26] The Review Board then sets forth five conditions and then continues:

2. IT IS FURTHER ORDERED that a detailed case plan be developed and submitted to the Review Board by June 1, 1998, after consultation with the family, with specific plans for Mr. Lewis' discharge.

[27] The Disposition Order then contains in clause 3 a delegation of certain powers to the person in charge of the Hospital regarding the increasing or decreasing of restrictions on the liability of the appellant.

[28] The appellant then filed a Notice of Appeal on April 1, 1998, from the Disposition Order dated March 6, 1998. The Review Board scheduled a review hearing for June 12, 1998, which was subsequently stayed by the Court, on consent of the parties, pending the determination of the Appeal.

[29] I have set out this rather lengthy background information because of the circumstances surrounding this case and because of the nature of the submissions raised on this appeal.

ISSUES

[30] The real issue on this appeal is the validity of the Disposition made by the Review Board on March 6, 1998, and whether the Review Board erred in its interpretation of s.672.54 of the *Criminal Code*. The appellant has also raised several issues concerning the manner in which the Review Board carries out its mandate pursuant to the provisions of Part XX.1 of the *Criminal Code*. He also raises concerns about the apparent lack of a coherent and detailed program in this Province for the implementation of Dispositions which the Review Board is authorized to make under s.672.54 of the *Code*. He urges the court to provide some clear direction to the Review Board as to how the provisions of Part XX.1 of the *Code* are to be applied in this Province.

[31] It will, therefore, be useful to briefly comment on the provisions of Part XX.1 of the *Code* which are most relevant for the purposes of this appeal.

[32] The Review Board is established by the provisions of s.672.38 of the *Code*. It finds its mandate in various other sections of Part XX.1 of the *Code* including s.672.5 which establishes the procedure at a Disposition hearing; s.672.54 which sets forth the nature of the Dispositions a Review Board may make; s.672.56 which enables a Review Board to delegate authority to vary restrictions on the liberty of an accused; s.672.81 which provides for a mandatory review of Dispositions, and s.672.83 which empowers the Review Board with the discretionary authority to make any Disposition which it considers appropriate in the circumstances.

NATURE OF DISPOSITION HEARING

[33] Subsections 672.5(1) and (2) of the *Code* state:

- (1) A hearing held by a court or Review Board to make or review a disposition in respect of an accused shall be held in accordance with this section.
- (2) The hearing may be conducted in as informal a manner as is appropriate in the circumstances.

[34] Section 672.5 continues through ss.3-13 to provide other guidelines as well but the section does not provide any guidance on such issues as whether the adversarial process applies, who has the burden of proof, what burden of proof applies, etc. The applicant submits that some direction should be given on these issues.

[35] Mr. Justice Doherty of the Ontario Court of Appeal comments on the nature of the hearing in *Peckham v. Attorney-General of Ontario et al.* (1994), 93 C.C.C. (3d) 443 (Leave to appeal to the Supreme Court of Canada denied). He states at p.450:

I find myself in general agreement with the approach taken by Goldie J.A. in *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269, 50 W.A.C. 111, 22 W.C.B. (2d) 275 (B.C.C.A.). The hearing before the Board is not strictly adversarial in the same sense that a criminal or civil trial is adversarial. The proceedings do not commence by way of an allegation made by one party against the other and the Board does not serve solely as the passive arbiter of conflicting evidence adduced by the parties. The provisions of Part XX.1 referable to the constitution of the Board, the designation of parties to the proceedings and the procedures to be followed during the hearing all indicate that the hearing is more in the nature of an inquiry into the factors set out in s.672.54. In so concluding, I do not suggest that a particular hearing may not be very contentious, or that the accused's liberty interest should not engage a high level of procedural protection. I mean only to indicate that the nature of the process does not suggest the assignment of a burden of proof to one or more parties to that proceeding.

[36] Mr. Justice Doherty also comments in *R. v. LePage* (1997), 152 D.L.R. (4th) 318 on the nature of the hearing as well. He states at pp.347-349:

- [73] The disposition inquiry is not an adversarial process. It is an inquiry aimed at imposing a disposition which conforms to s.672.54. The Court or Review Board is not limited to the information produced by the parties, but has the power to subpoena witnesses and order the production of documents: *Inquiries Act*, R.S.C. 1985, c I-11, s.4; *Peckham v. Attorney General of Ontario*, supra, at p.540; *Davidson v. British*

Columbia (Attorney-General) (1993), 87 C.C.C. (3d) 269 (C.A.) at 277-78. The Court or Review Board is not required simply to choose among the various dispositions put forward by the parties but must make the appropriate disposition regardless of the positions taken by the parties to the inquiry. If, in the course of its inquiry, the Court or Review Board determines that additional information is needed before it can decide whether it is of the opinion that an absolute discharge is appropriate, then the Court or Board can take the necessary steps to obtain that information. It, of course, may also adjourn the inquiry for that purpose. As Chief Justice McEachern put it in *Winko v. B.C. (Forensic Psychiatric Institute)*, supra, at p.57:

The Board, not the patient, is expected to seek out the information required to answer the questions posed by the section and Parliament was not required by the Charter to provide a legal right to absolute discharge based upon legalistic or formulaic grounds.

[74] Where the inquiry is made by the Review Board, that Board's expertise will prove valuable in determining what information is needed to facilitate adequate consideration of the full range of dispositions, which are realistically available in any particular case. The Board's expertise will also assist in determining how that information can best be obtained and brought before the Board. I have no doubt that the hospital, other state agencies and the Crown will cooperate fully with the Court and the Review Board in their efforts to make a fully informed assessment as to the appropriate disposition.

.....

[77] Some disposition hearings will be highly contentious. The parties will have very different notions as to the appropriate disposition. Lawyers and judges are accustomed to the adversarial model, complete with the burden of proof as a means of settling contentious issues. That model is, of course, not the only method of resolving contentious issues. More to the point, it is not the model selected by Parliament in Part XX.1. It would be contrary to the best interests of all involved in the disposition process to import, through judicial interpretation, adversarial concepts like the burden of proof into disposition proceedings: *Davidson v. British Columbia (Attorney General)*, supra, at p.278.

[37] I adopt these foregoing comments of Mr. Justice Doherty as an appropriate

approach to the workings of the Review Board. These comments make it very clear that the resolution of issues before the Review Board requires the active participation of all parties concerned so that the Review Board may make a fully informed assessment as to the appropriate disposition. The Review Board's composition is such that it has the appropriate expertise required to enable it to ensure that the appropriate consideration is given to the full range of dispositions.

S.672.54 OF THE CRIMINAL CODE

[38] Section 672.54 states:

672.54. Where a Court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration 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, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the Court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the Court or Review Board considers appropriate; or
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the Court or Review Board considers appropriate.

[39] It is clear from these provisions that it is the mandate of the Court or the Review Board to make a fit disposition under s.672.54 of the *Code*. In this case it is the Review Board. The British Columbia Court of Appeal makes the following comments about this role of the Review Board in *British Columbia (Forensic Psychiatric Institute) v. Johnson* (1995), 66 B.C.A.C. 34 (C.A.) at para. 50 where it states:

It is apparent from the scheme of Part XX.1 as a whole that the paramount duty of the Review Board is to craft disposition orders which achieve an appropriate balance between the liberty interests of an accused, who has been found either unfit to stand trial or not criminally responsible by reasons of mental disorder,

and the public safety interests of the community as a whole. It is also clear that, in enacting Part XX.1, Parliament anticipated that striking an appropriate balance would, in some cases, require that conditional discharge orders be made with respect to accused persons who could not be ruled out as posing a significant risk to public safety. In such cases, the Review Board is charged with the responsibility of crafting conditions which are relevant to the special and differing needs of each accused person. The principal object of those conditions is to achieve the maximum protection for the public safety with a minimum degree of interference with the accused's liberty, and not simply to enhance the accused's treatment, although in many cases, and this is one of them, the two considerations will be inextricably linked.

[40] Section 672.54 sets out the three possible dispositions a Review Board can order as well as the factors the Review Board must take into consideration when it decides which disposition it is going to make.

[41] The three possible dispositions are:

- an absolute discharge [s.672.54(a)];
- a discharge subject to conditions [s.672.54(b)];
- detention in a hospital with or without conditions [s.672.54(c)].

[42] The Review Board must take into consideration the following factors when it decides which disposition it is going to impose.

- the need to protect the public from dangerous persons;
- the mental condition of the accused;
- the reintegration of the accused into society;
- the other needs of the accused.

[43] Everyone agrees that an absolute discharge is not a viable alternative in this case at this time. The Review Board made a finding that the appellant poses a significant threat to the safety of the public. It, therefore, had to decide whether to impose a discharge subject to conditions or detain the appellant in a hospital. It must also impose the disposition which is the least onerous and the least restrictive to the appellant.

[44] As I have already indicated, supra, the Review Board decided on July 11, 1997, that the appellant was to be discharged subject to conditions pursuant to s.672.54(b) of the *Code* by September 26, 1997. This discharge did not materialize for various reasons and a review hearing was held on October 17, 1997, when the Review Board once again decided the appellant was to be discharged subject to conditions pursuant to s.672.54(b) of the *Code*. Once again circumstances were such that this discharge plan was not carried through either and the appellant remained in the Hospital where he still remains.

[45] Another review hearing was held on January 30, 1998, and the Review Board gave

a Disposition on March 6, 1998. I will restate the relevant portions of it here for convenience.

The Review Board finds that Martin Allen Lewis continues to be a significant threat to the safety of the public but the progress in moving him to a more suitable unit and programming within the Hospital must be more urgently pursued together with diligent pursuit of his re-integration into society by the timely development of a case plan for his discharge; . . .

[46] The Disposition then goes on to state:

1. IT IS HEREBY ORDERED pursuant to section 672.54(c) that Martin Allen Lewis be placed in the most appropriate unit to his level of functioning subject to the following conditions to which the accused shall be subject: . . .

[47] The Disposition then contains five conditions and then continues:

2. IT IS FURTHER ORDERED that a detailed case plan be developed and submitted to the Review Board by June 1, 1998, after consultation with the family, with specific plans for Mr. Lewis' discharge.

[48] The appellant now submits the Review Board erred in law and in its application of s.672.54 of the *Criminal Code* when it ordered his detention on March 6, 1998, after it had already ordered his discharge on two previous occasions. He submits the Review Board only detained him because it was satisfied he was a significant threat to the safety of the public, and it did not attempt to relate this finding to the previous two Dispositions where it had ordered his discharge.

[49] The appellant further submits the Disposition made by the Review Board on March 6, 1998, is invalid and ought to be set aside as it is a hybrid of the two separate orders contemplated by ss.672.54(b) and (c) of the *Code*, and as such it is not contemplated by the statutory scheme established in Part XX.1 of the *Criminal Code*.

THE REASONABLENESS STANDARD

[50] Section 672.78(1) of the *Code* sets forth the powers of the court on an appeal. It states:

- 672.78(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

- (a) it is unreasonable or cannot be supported by the evidence;
- (b) it is based on a wrong decision on a question of law; or
- (c) there was a miscarriage of justice.

[51] Mr. Justice Doherty comments on this section of the *Code* in the *Peckham* case. He held that the case law developed under s.686.1(a)(i) of the *Code* has direct application to s.672.78(1)(a) of the *Code*. This case law holds that an appellate court may only interfere where it is satisfied, upon an independent review of the evidence, that a trier of fact, properly instructed and acting reasonably, could not have convicted.

[52] Mr. Justice Doherty goes on to state that when a court applies the reasonableness standard created by s.672.78(1)(a) of the *Code*, it must be cognizant of the Review Board's expertise and show that expertise appropriate curial deference. He then states on p.455:

In the present case, the Board had to review extensive psychiatric material and consider somewhat conflicting psychiatric opinions. In doing so, the Board was required to assess the mental condition of the accused, the dangerousness of the accused, the treatment prospects of the accused and the treatment regime which would best fit the dictates of s.674.54. All of these judgments called into play the Board's medical expertise and its knowledge of the various facilities available within the mental health system. The court has neither that expertise nor that knowledge, and must show curial deference to those judgments in applying the reasonableness standard in s.672.78(1)(a). That said, if after due regard to the Board's advantaged position and its expertise, the court concludes that the disposition is unreasonable, it must intervene.

[53] It is clear from the Record placed before this court that the Review Board was confronted with conflicting psychiatric opinions during the hearing on January 30, 1998. Dr. Neilson stated she felt the appellant continued to be ready for community discharge and that he had progressed sufficiently in his social skills to cope with a group home situation. She indicated that the appellant poses a risk to the public but thought it was low and manageable.

[54] Dr. Cronin testified on January 30, 1998, that if a management structure could be set up in the community to mirror the management the appellant receives in the Hospital, then he could live in the community. However, he did not agree with attempting to manage the appellant in the community as things stood at that time. He had concerns that considerable difficulties would arise for the appellant with possible danger to both himself and others if he was discharged into the community.

[55] Dr. Cronin's long term objective is to reintegrate the appellant into the community, but his immediate objective was to proceed with rehabilitation which he felt could not be carried out in the community at that time. It was his opinion that the appellant should be gradually introduced to Unit 8 of the Hospital if a number of significant hurdles could be surmounted in order to create an environment capable of providing an effective rehabilitation program.

[56] Mr. Randall Fletcher, a Sexual Deviance Specialist, testified that he had assessed the appellant, and it was his opinion the appellant represented a low moderate risk to re-offend generally but that he needed to be monitored very closely.

[57] The appellant now submits the Review Board did not address this conflict in the testimony regarding the fundamental issue of whether the appellant should be discharged upon conditions or detained in the Hospital.

[58] He also submits the Review Board did not make any clear finding as to whether a discharge structure currently exists for patients who are under the jurisdiction of the Criminal Code Review Board.

[59] I cannot accept the appellant's submission that the Review Board did not address the conflict in the evidence. The Review Board gave reasons on March 6, 1998, for making the Disposition it made on March 6, 1998. These reasons clearly establish that the Review Board was fully aware of the conflicting evidence and that it considered it in arriving at its Disposition of the matter. The Review Board states in its Reasons For Making A Disposition dated March 6, 1998, as follows:

There was much conflicting evidence from witnesses, from written reports, argument from counsel representing the various parties, as well as answers to questions by Board members, and all of this was taken into consideration in making the disposition.

. . . On the basis of this and all the evidence, oral and written, which was presented, the Review Board has decided it CANNOT determine at this time that Mr. Lewis is not a significant threat to the safety of the public. The Board further realizes that Mr. Lewis must be reintegrated into society and although the former case plan has broken down those directed by the Board must continue working toward Mr. Lewis' reintegration into society.

[60] The Review Board obviously reviewed this conflicting evidence concerning the ongoing difference in the medical opinions as to the best approach which should be taken in carrying out its task of assessing the mental condition of the appellant, the need to protect the public, the reintegration of the appellant back into society and the other needs of the appellant as per the requirements of s.674.54 of the *Code*.

[61] I am not persuaded that the Review Board acted unreasonably in reaching its conclusion the appellant should be detained in the Hospital subject to conditions pursuant to s.672.54(c) of the *Code*. There was ample evidence before the Review Board to enable it to reach the conclusion it did despite the fact it had previously ordered the appellant discharged subject to s.672.54(b) of the *Code*. I dismiss this ground of appeal.

[62] I will have more to say later about the submission regarding a proper discharge structure being in place.

VALIDITY OF THE DISPOSITION DATED MARCH 6, 1998

[63] The appellant submits the Disposition made by the Review Board on March 6, 1998, is invalid as it is a hybrid of the two separate orders contemplated by ss.672.54(b) and (c) of the *Code*, and as such, it is not contemplated by the statutory scheme established in Part XX.1 of the *Criminal Code*.

[64] The wording of the provisions of the Disposition which give rise to this submission is as follows:

The Review Board made the following disposition pursuant to sections 672.83, 672.57 and 672.54(c) of the *Criminal Code*:

1. IT IS HEREBY ORDERED pursuant to section 672.54(c) that Martin Allen Lewis be placed in the most appropriate unit to his level of functioning, subject to the following conditions to which the accused shall be subject:
 - (a) that the person in charge of the Hospital is satisfied that appropriate security and supervision can be provided;
 - (b) that such placement of Martin Allen Lewis in any unit of the Hospital is subject always to the discretion of the attending psychiatrist and the psychiatrist's assessment of the degree of risk presented to others;
 - (c) that Martin Allen Lewis be supervised at all times when off the Hospital grounds, by a person approved by the administration;
 - (d) that supervision of Martin Allen Lewis while on Hospital grounds shall be at the discretion of the person in charge of the Hospital;

(e) that Hospital staff shall encourage visits from family and friends of Martin Allen Lewis;

2. IT IS FURTHER ORDERED that a detailed case plan be developed and submitted to the Review Board by June 1, 1998, after consultation with the family, with specific plans for Mr. Lewis' discharge.

[65] The appellant submits this Disposition required the Hospital to proceed in opposite directions at the same time. On the one hand, the appellant was to be detained in the Hospital while on the other hand, a detailed case plan was to be developed with specific plans for the appellant's discharge from the Hospital.

[66] The appellant relies on the decision of the Ontario Court of Appeal in *Brockville Psychiatric Hospital v. McGillis* (1996), 2 C.R. (5th) 242 where the court states in para.3:

The Board's order was a hybrid of two separate orders contemplated by s.672.54(b) (conditional discharge) and s.672.54(c) (detention order) and is not contemplated by the statutory scheme in Part XX.1 of the *Criminal Code*: *Forensic Psychiatric Institute (B.C.) v. Johnson et al.* (1995), 66 B.C.A.C. 34 (C.A.) at 48-49.

[67] It appears to me the situation created in the *McGillis* case is different than the situation which exists in this case. The Review Board in the *McGillis* case was obviously of the view the respondent should be conditionally discharged from the Hospital but it required him to reside in accommodations in the community approved by the administrator of the Hospital. The evidence before the Review Board in the *McGillis* case established, however, that no such accommodation was available in the community. The order therefore, effectively required the respondent to be detained in the Hospital.

[68] The Court held the Review Board should have ordered the continued detention of the respondent under ss.672.54(c) of the *Code* and given the Hospital Administrator the discretion to permit him to reside outside the Hospital if suitable accommodations could be found.

[69] It is clear in the case before this Court, the Review Board ordered the detention of the appellant under ss.672.54(c) of the *Code* because of the evidence of Dr. Cronin the appellant was not yet ready for a community placement. It is also clear from the Disposition the Review Board realized the appellant had to be reintegrated into society as soon as it was feasible to do so. This is why the Review Board made it clear the Hospital had to more urgently pursue his progress in the Hospital and develop a case plan for his timely discharge.

[70] I interpret the provision of the Disposition which orders the development of a case plan for the appellant's eventual discharge as a condition of the Order pursuant to ss.672.54(c) of the *Code*. I do not interpret it as a distinct and separate Order apart from the Order of Detention and, therefore, do not agree with the submission the Disposition dated March 6, 1998, is a hybrid of two separate orders. I dismiss this ground of appeal.

CHARTER ISSUES

[71] The appellant submits his continued detention in the Hospital offends s.12 of the *Charter of Rights and Freedoms*.

[72] The Supreme Court of Canada heard argument on June 15 and 16, 1998, in four appeals involving the constitutionality of s.672.54 of the *Criminal Code*, but it has not released a decision to date. I believe, therefore, this issue should be reserved until the Supreme Court of Canada releases its decision regarding the constitutionality of s.672.54 of the *Criminal Code*. Counsel may then speak to the issue, if they wish to do so, after the Supreme Court of Canada releases its decision.

[73] I, therefore, dismiss the appeal subject to the right of the parties to present submissions on the Charter issue after the Supreme Court of Canada releases its decision.

LACK OF RESOURCES AND FACILITIES

[74] This case clearly highlights the lack of appropriate resources and facilities in this Province to deal with people who find themselves in the position of the appellant. This court pointed out in its earlier decision involving the appellant the problem that can exist in this country when one level of government enacts legislation and another level of government is left with the task of implementing the legislation. This situation cannot however, be allowed to deny the appellant his rights under the legislation.

[75] Part XX.1 of the *Criminal Code* has been in force since February 4, 1992, over six years, and any reasonable period of time required to provide the appropriate measures for its implementation has long since expired. The previous decision of this Court reported as [1995] 2 P.E.I.R. 41, cannot be interpreted as meaning there is no obligation on the Government of this Province to provide the appropriate resources and facilities to implement the provisions of Part XX.1 of the *Code*. 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. It is the responsibility of the Government of this Province to provide those facilities or else exercise the jurisdiction of s.672.86 of the *Code*.

The Honorable Chief Justice N.H. Carruthers

I AGREE: _____
The Honorable Mr. Justice G.E. Mitchell

I AGREE: _____
The Honorable Mr. Justice J.A. McQuaid