



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

TED JOHN

**HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
November 28, 2007**

REASONS RELEASED: December 20, 2007

**BEFORE: CHAIRPERSON: B. Walter
MEMBERS: Dr. P. Constance, psychiatrist
N. Avison**

**APPEARANCES: ACCUSED/PATIENT: Ted John
ACCUSED/PATIENT COUNSEL: D. Nielsen
HOSPITAL/CLINIC: A. Smith Dr. M. Riley Dr. Widajewicz
ATTORNEY GENERAL: L. Hillaby
COUNSEL AFPS: D. Lovett**

1.0 INTRODUCTION

[1] On November 28, 2007, the BC Review Board (BCRB) convened a somewhat unique hearing in the matter of Ted John (46) who is under our jurisdiction as of a May 29, 2003, verdict of NCRMD.

[2] That verdict was predicated on an unprovoked and violent assault on a woman on a Prince George thoroughfare. The seriousness of the attack has been commented on repeatedly in the course of the BCRB's decisions in this matter.

[3] Mr. John has a 20-year-plus history of schizophrenia including numerous hospital admissions. He also has a history of alcohol and substance abuse, and was evidently intoxicated at the time of the index offence. Mr. John is also cognitively impaired and functions at a "borderline" intelligence level.

1.1 Circumstances Giving Rise to the Hearing

[4] After a period of custodial treatment at FPH followed by several visit leaves, Mr. John was conditionally discharged in December 2004: **Ex.15**. He has lived in Prince George since then, under successive dispositions.

[5] On November 14, 2007, at his sixth annual hearing, Mr. John was given an absolute discharge (**S.672.54(a)**): **Ex.25**.

[6] Although the Board granted the accused an absolute discharge, it relied on its authorities under **S.672.63** of the **Code** to delay the coming into force of its disposition until December 30, 2007. After concluding that the accused did not pose a significant threat it said:

“Considering his voiced intention to leave Prince George and travel to Vancouver, we considered that it would be appropriate and in his best interest and his safety, and the safety of those around him, to delay the effective date of this discharge. Accordingly his absolute discharge will take effect on November 30, 2007.: **Ex 25, par 26**

[7] It appears that the order was delayed to allow time for Mr. John to be reconnected with his former caregivers at Strathcona Clinic in Vancouver, thereby avoiding any discontinuity in his care and treatment.

[8] On November 21, 2007, counsel for the Director AFPS, wrote to the BCRB indicating the Director's intention to initiate breach of disposition proceedings against the accused and also requesting an expedited hearing of the BCRB to further review the accused's disposition under **S.672.82(1)** of the **Code: Ex. 26**

[9] The request for hearing cited a significant change in the accused's mental health and consequent risk. The reasons for requesting that the hearing be convened on an expedited basis was that the November 14, 2007, disposition would come into force on November 30, 2007, whereupon the Board would lose jurisdiction over the accused.

[10] According to evidence filed at the hearing, Mr. John appeared before a court and was remanded to FPH pursuant to an **Enforcement Order (S.672.93 CC)** on November 26, 2007: **Ex.29.**

2.0 PRELIMINARY ISSUE: JURISDICTION OF THE BOARD TO REVIEW ITS DISPOSITION

[11] At the commencement of the hearing, Ms. Nielsen, Mr. John's assigned counsel, presented a preliminary argument that the BCRB, as a result of the November 14, 2007, disposition is functus officio and, having made a final order, has no further jurisdiction to review its disposition with respect to this accused.

[12] Under the circumstances and prevailing time constraints, the BCRB invited submissions from all parties on the preliminary jurisdictional issue and, without ruling on the matter, went on to hold a typical evidentiary disposition review hearing.

The Accused

[13] The accused argues that an absolute discharge is a final decision The BCRB cannot rescind or reconsider a final decision such as that rendered on November 14, 2007. The provisions of the **Criminal Code** which provide for periodic disposition reviews do not allow the Board to review an absolute discharge disposition granted under **S.672.54(a)**. The only means of review of an absolute discharge is by appeal to the Court of Appeal: **Ss.672.72, 672.78.**

[14] Therefore the BCRB is functus officio with respect to the accused.

The Director

[15] The Director argues that insofar as the BCRB delayed the force and effect of its November 14, 2007 order until November 30, 2007, the previous conditional discharge disposition has not been replaced and remains in effect and reviewable.

[16] The specific provisions of the **Code** expressly define the circumstances under which hearings may be convened. The MDO scheme under **Part XX.1** of the **Code** contemplates ongoing oversight and review and includes provisions for mandatory and discretionary reviews as dramatically changing circumstances warrant.

[17] In this case, circumstances changed shortly after the granting of the absolute discharge disposition but before it took effect. The Board is not functus and may review its disposition.

The AGBC

[18] The November 14, 2007, absolute discharge was properly made but is not in effect. Until November 30, 2007, the accused remains under his previous **Criminal Code** disposition. The Board's supervisory jurisdiction and its duty to manage risk continues until then.

[19] The accused is now before the Board both at the Director's request (**S.627.81(2)**) and principally as a result of the **S.672.93 Enforcement Order** of the Court. The BCRB is now under a duty to convene and further assess the matter pursuant to **S.672.94**.

3.0 THE STATUTORY FRAMEWORK & NATURE OF THE CURRENT HEARING AND RULING ON JURISDICTION

[20] Given the progressive nature of the BCRB's jurisdiction or process, it may be helpful to try to characterize or establish the legislative basis for the current hearing. The following provisions of the Code establish the framework governing the circumstances under which the Board convenes to conduct what have come to be referred to as **mandatory** and **discretionary** disposition review hearings:

Mandatory annual Review

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that

it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a).
(Emphasis added)

[21] In order to give meaning to the accountabilities imposed and the safeguards provided under this scheme, the Board must review its dispositions annually. We agree that the requirement to hold a mandatory annual review hearing under **S.672.81(1)** specifically excludes from its requirement “an absolute discharge” under **S.672.54(a)**. This tribunal has traditionally and consistently operated in a manner which considers an absolute discharge a final disposition; one which ultimately terminates its jurisdiction over an accused. Under such an understanding, it would make no sense to even consider an annual review of such a disposition.

[22] We do observe however, notwithstanding our operational assumption that, in light of ARBOUR, J’s (dissenting) comments in **R.v. Owen**, the matter of the finality of absolute discharge is not entirely beyond debate:

“Moreover, I wish to point out that contrary to the assumption expressed by my colleague Binnie J. at para. 56, it is not clear that an absolute discharge of an NCR detainee terminates the state’s capacity to supervise and monitor the respondent’s mental condition. Indeed, s.672.82(1) of the Criminal Code provides for discretionary review of any disposition of the Board. When read in comparison to s. 672.81, which specifically excludes absolute discharges from mandatory annual reviews, s. 672.82(1) arguably opens the door to discretionary review even of an absolute discharge by the Board based on fresh evidence of dangerousness.”: **2003 SCC 33 at par.112** (Emphasis added)

Director requested mandatory hearing

(2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend requests the review.

[23] It has been the constant practice of Canada’s Review Boards, and consistent with the very specific language of this clause, to treat a request from the Director of AFPS as a requirement to convene a hearing on a mandatory basis whenever one is asked for.

Mandatory Hearing due to significant restriction on accused liberty

(2.1) The Review Board shall hold a hearing to review a decision to significantly increase the restrictions on the liberty of the accused, as soon as practicable after receiving the notice referred to in subsection 672.56(2).

Discretionary hearing

672.82 (1) A Review Board may hold a hearing to review any of its dispositions at any time, of its own motion or at the request of the accused or any other party.

[24] We note that to some extent, Arbour J.'s interpretation (**par 25, supra**) is supported by the language of **S.672.82(1)** which appears to contemplate a future review of "any disposition", although arguably the specific exception in **S.672.81(1)** exempts absolute discharge.

[25] The "own motion" authority is relatively recent (**2005, c 22,s.28**), and has never been utilized. Generally, this clause has been used to authorize a hearing at the accused's request which is granted in the discretion of the Board based on a significant change in circumstances. It has never been used to convene at the request of the Director, which was always considered to trigger a mandatory hearing: (**par 26, supra**).

[26] On first blush, given the expressed urgency of counsel for the Director in her November 21, 2007, letter to the Chair (**Ex. 26**) and notwithstanding her reference to **S.672.82(1)**, it was the Tribunal's understanding and determination that the current hearing is in fact mandated under the more specific and directive language of **S.672.81(2)**.

Scope of Review

672.83 (1) At a hearing held pursuant to section 672.81 or 672.82, the Review Board shall, except where a determination is made under subsection 672.48(1) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

Enforcement Proceedings

672.93 (1) A justice shall release an accused who is brought before the justice under section 672.92 (arrest) unless the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition or an assessment order.

672.93(1.1) If the justice releases the accused, notice shall be given to the court or Review Board, as the case may be, that made the disposition or assessment order.

672.93(2) If the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition or an assessment order, the justice, pending a hearing of a Review Board with respect to the disposition or a hearing of a court or Review Board with respect to the assessment order, may make an order that is appropriate in the circumstances in relation to the accused, including an order that the accused be returned to a place that is specified in the disposition or assessment order. If the justice makes an order under this subsection, notice shall be given to the court or Review Board, as the case may be, that made the disposition or assessment order.

Mandatory Review Pursuant to Enforcement Order

672.94 Where a Review Board receives a notice given under subsection 672.93(1.1) or (2), it may exercise the powers and shall perform the duties mentioned in sections 672.5 and 672.81 to 672.83 as if the Review Board were reviewing a disposition.

[27] In the wake of counsel's request, steps were taken to bring the accused before a court on the basis of an alleged breach of his disposition. The Court found that the accused had contravened, or failed to comply with, his disposition and issued an enforcement order under **S.672.93**, returning him to FPH: **Ex. 29**

[28] Under such circumstances, the BCRB is of the view that it is now directed to and must convene the current hearing on a mandatory basis under **S.672.94**. No party has alleged or argued that the Enforcement Order (**Ex. 29**) was without jurisdiction as a result of the BCRB's November 14, 2007, disposition.

[29] Finally, we consider **S.672.63** which specifically contemplates or authorizes the Board to order a delay in the effective date of its disposition:

672.63 A disposition shall come into force on the day on which it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the Review Board holds a hearing to review the disposition and makes another disposition.

[30] This provision is frequently applied to enable various plans to be developed and resources to be secured prior to a disposition coming into force. It has, to a lesser extent, been applied in the case of absolute discharge dispositions, for example, to enable a supported transition of an accused's case and treatment to a community health regime. The intent is clearly to allow for the implementation of transitional strategies under supported and supervised circumstances **before** the Board's intended order comes into legal effect.

[31] The imposition of a delay in an accused's disposition cannot operate so as to create a vacuum or lacuna in the accused's legal status. Clearly the accused's previous status or disposition must continue in full force and effect until it is replaced by the operation of **S.672.63**. Otherwise, the section would have no utility.

[32] The referenced provisions do more than identify the timelines and the circumstances under which the Board must convene. They also support the notion that the Tribunal's process is a longitudinal one; an ongoing, rolling or incremental review of the accused's entire history and progress within this special stream of the Criminal Justice system, one founded on a broad range of current and historic evidence:

The court or Review Board may have recourse to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive: ***Winko v BC (FPI), 1999 2SCR, 625 par 62(14)***

[33] Such an understanding also accords and is consistent with the waxing and waning nature of mental illness.

[34] Our analysis of the submissions of the parties, can do no better than to adopt the approach of the Supreme Court of Canada in ***Chandler v. Alberta Association of Architects***,

[1989] S.C.J. No.102, that is, to examine the statutory framework within which the BCRB operates and then to consider:

(a) whether the BCRB has already made a final decision; and

(b) whether it is therefore functus officio: **par.9**

On our reading we see nothing about or decision which appears to contradict **Chandler** The current hearing is convened to review new evidence which has arisen while the accused is under conditional discharge.

[35] Without belabouring the issue of whether or not Parliament intended this Tribunal's absolute discharge decisions to ever be "final" ones, in this case no final decision had yet come into legal effect. The principle of functus officio simply does not apply.

4.0 DISPOSITION

[36] The accused's generally accepted criminal and psychiatric history are adequately reviewed and documented over previous reviews and reasons for disposition.

[37] We also generally accept the evidence of Mr. John's progress in the past year and the analysis of the BCRB Panel which conducted the November 14, 2007, hearing with minor exceptions.

[38] The longitudinal, historic evidence has consistently identified Mr. John's key risk factors including:

(i) His Mental Illness

[39] Mr. John has a diagnosis of schizophrenia, the symptoms of which were active and influencing his behaviours at the time of the index offence. His illness has, despite consistent treatment remained somewhat refractory. The accused has, throughout, acknowledged at least residual psychotic symptoms.

(ii) Alcohol/Substance Abuse

[40] The accused has a substance abuse diagnosis. He quite consistently tested positive for the use of prohibited substances, both in and out of hospital, year over year, until October, 2005. He was intoxicated at the time of the index offence.

(iii) Insight

[41] Mr. John, has throughout, continued to lack insight into his mental illness, its treatment and into the demonstrated negative effects of overt acute psychosis or of substance abuse on his mental stability and in turn on his behaviour.

[42] Moreover, his treatment “weakens” or sedates him in a manner which could reasonably be expected to discourage long-term future compliance, especially given the lack of perceived benefits therefrom.

(iv) The Accused’s Plans

[43] Mr. John’s plans for his independent functioning are variable and may be unrealistic. His reintegration is incomplete or evolving.

(v) History of Violence

[44] Despite the absence of a formal record of serious violence beyond the index offence, Mr. John has, in the past, resorted to aggressive behaviours or outbursts (1993).

New Evidence

[45] Further evidence has arisen in the less than two week period following his last hearing which directly relates to Mr. John’s identified risk factors:

- Despite Mr. John’s apparent compliance with medical direction, and his stated intention to continue to so comply, the evidence indicates, and he admits to, at least some recent non-compliance in October and November.
- Within a period of a few days following his November 14 hearing, Mr. John experienced and demonstrated a very rapid decompensation in his mental state into an acute psychosis which resulted in his hospitalization and certification.

- His acute decompensation was contributed to or exacerbated by (admitted) drug use.
- He had no viable or definitive plans as to where he would be living except to state that he would live in Vancouver. and he has not been reconnected to a Mental Health team.
- Mr. John is approaching his baseline functioning, but if he were once again precipitously left unattended/unsupported, it is probable and foreseeable that he would rapidly decompensate in his mental state leading to behaviour that would pose a significant threat to others.

[46] Without concluding that Mr. John may not once again, relatively quickly, restabilize and qualify for an absolute discharge in the future, recent events and circumstances have conspired to elevate his potential to pose a significant threat to others.

[47] In keeping with his own sense of his needs, the BCRB has determined to detain the accused in hospital, albeit for a period of six months rather than a full year, during which Mr. John can be assisted in, once again, assuming his place in the community.

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Reasons by Mr. B. Walter with Dr. P. Constance and Mr. N. Avison concurring

BW/jl/ck