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

IN THE MATTER OF A DISPOSITION HEARING VIA CLOSED-CIRCUIT TELEVISION

ERIC KONRAD WILLIAM NELSON

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
June 25, 2015

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr. J. Smith, psychiatrist
N. Avison

APPEARANCES:
ACCUSED/PATIENT: Eric Konrad William Nelson
ACCUSED/PATIENT COUNSEL: M. Rankin
DIRECTOR AFPS: Dr. G. Wiehahn S. Finnie
DIRECTOR'S COUNSEL:
ATTORNEY GENERAL: M. Wong

INTRODUCTION AND BACKGROUND

[1] On June 25, 2015, the British Columbia Review Board (the "BCRB") held a special early hearing in the matter of ERIC KONRAD WILLIAM NELSON (the "accused"). The hearing was convened pursuant to s.672.82(1) of the *Criminal Code* which provides:

> **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.

[2] The authority for the Board to convene of its own motion was introduced into the *Code* by way of amendments in 2005. This is a discretionary authority which has, in the interim, been only rarely utilized. In recent memory it has been applied on only one previous occasion. In 2011, shortly after an annual hearing involving a high profile case, the Board learned that the community to which the accused might, at the discretion of the Director, be given escorted access, was home to a victim of the index offence. That information was not placed in evidence before the Board at the original hearing. Out of respect for the victim and on the basis of its responsibility to place a high value on public safety in its decision making, the Board, within weeks, convened a further hearing of its own motion to review the issue.

[3] The current hearing came about in a similarly unusual fashion.

THE ACCUSED'S HISTORY

[4] Mr. Nelson's first hearing, was on March 4, 2015, in Kamloops, following his *BC Supreme Court* verdict of *Not Criminally Responsible on Account of Mental Disorder* ("NCRMD"), made on December 18, 2014, on eight offences pursuant to s.672.47 of the *Code*. The evidence introduced in summary indicated that:

- the accused is 54 years old and had no prior criminal record;
- the accused was a self-employed framing contractor of twenty years;
- the accused was a regular user of cannabis from age 15; he denied using that substance since 2013, until before the index offences;
- the accused has experienced episodes of racing thoughts or apparent mania, interspersed with seasonally affected episodes of depression, apparently with

paranoid ideation, but had never had formal psychiatric or mental health involvement;

- the accused's mood episodes remitted without medication;
- Dr. Wiehahn diagnosed Mr. Nelson with Bipolar Disorder, with the highly unusual or rare presentation of only one manic episode perhaps every decade or two, rather than the statistical average of every 18 months; these have apparently resolved spontaneously and without treatment;
- Mr. Nelson subjectively acknowledges having experienced six manic episodes, since age 15, and more regular, seasonal bouts of depression; and
- Mr. Nelson was entirely symptom-free and compliant with the medications and requirements of his treatment team and he displayed "remarkable insight"

[5] In its analysis of the evidence, the Board carefully considered the index offence and the physical and emotional harm occasioned to the victim, D.E., including his ongoing trauma, fears, disturbing memories and dreams, and his extensive medical and dental procedures.

[6] The Board concluded its jurisdiction over Mr. Nelson was warranted but that he could, while symptom-free, be safely managed in the community under close supervision and restrictions. Mr. Nelson was conditionally discharged pursuant to s.672.54(b) and ordered to return to BC from Alberta.

[7] The Director provided Mr. Nelson with a subsidized residential placement in Kamloops.

CIRCUMSTANCES GIVING RISE TO THE CURRENT HEARING

[8] In July 2014, amendments to the *Code*, referred to as *Bill C-14*, the *Not Criminally Responsible Reform Act* ("NCRRA"), were proclaimed. Among the new provisions, s.672.5(5.2) states:

> **(5.2)** If the accused is discharged absolutely under paragraph 672.54(a) or conditionally under paragraph 672.54(b), a notice of the discharge and accused's intended place of residence shall, at the victim's request, be given to the victim within the time and in the manner fixed by the rules of the court or Review Board.

[9] Thus a victim is given the right to request notice of the intended place of residence of an accused who is absolutely or conditionally discharged. Since July 2014, the Board has provided victims who request it, such information, though generally at the level of the proposed community of residence, rather than an exact street address, which may or may not be known unto it in any event.

[10] Not long after Mr. Nelson's first hearing in March 2015, the victim D.E. began to contact the Crown and then the Board. D.E. communicated that, unbeknownst to the Board, he had relocated to Kamloops. He said he had been doing well but when he heard that Mr. Nelson was living in the same community, he experienced stomach pains, loss of appetite, insomnia and intense fear. He asked that Mr. Nelson not be allowed to live in Kamloops.

[11] After a number of intense communications, which were brought to the Chair's attention by the Board Registry, the Board determined to convene a further hearing of its own motion to consider the circumstances. The hearing was carried out using video conferencing technology. The Board convened at the Forensic Psychiatric Hospital ("FPH"), where D.E. also attended. Crown Counsel, Mr. Nelson and his counsel, and his forensic treatment team were in Kamloops. We reflect for the record that the logistics of the hearing were such that D.E. was never visible to Mr. Nelson. We further understand that the accused would not recognize D.E. in any event.

THE INDEX OFFENCES(S)

[12] Mr. Nelson's bizarre crime spree between May 15 and May 28, 2015, involving eight separate counts, including attempt murder and a number of firearms offences, are described in the Board's March 4, 2015, Reasons for Disposition*:*

> On May 15, 2013, the accused attended the home of DE in Spences Bridge, arriving just after midnight. Hearing a noise outside his trailer, DE looked out his bedroom window to see an unidentified male, now known to have been the accused, fire a shotgun at the driver's side window of his 2003 Mercedes-Benz automobile. The accused screamed "you better keep your fucking head down!" at the victim. DE located his telephone and dialed 9-1-1. While he was on his cordless phone, he heard further shots. DE then located the powerful lamp that he intended to shine on the accused. However, when he looked out the window again, he felt the impact of birdshot

> to the left side of his face. The accused had fired at him, aiming at the illuminated dial of DE's telephone. DE went to his bathroom to find a towel to staunch his bleeding, and the accused discharged another shot at him through the trailer's rear door. The accused then fled the scene. DE remained in his trailer, awaiting the arrival of the police and an ambulance.
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> The accused used #8 birdshot, which contains about 400 pellets per ounce. He discharged the weapon 11 times, twice at DE and nine times at the Mercedes-Benz automobile, shooting out the back window, both front side windows and the windshield. Police located an Alexander Keith's beer bottle, five discharged 12 gauge Federal brand #8 shotgun casings and 11 shotgun wads at the scene. DE suffered severe injuries to his face, neck, chest, eye, and mouth. He lost several teeth. The Mercedes-Benz vehicle sustained serious damage.: *Exhibit 11, paras 5, 6*

[13] Regarding the impact of these events on D.E., the Reasons note at paras 104 and 105:

> The Board received a letter from a Registered Clinical Social Worker on behalf of DE, as well as his victim impact statement. They record the development of post-traumatic stress disorder involving repeated disturbing memories and dreams. DE is constantly fearful he will see Mr. Nelson in the community again. He continues to experience physical, emotional and other negative impacts of being shocked and threatened. He has been forced to sell his home and relocate as a result of this trauma. He felt unable to live alone after the offence.
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> DE underwent 6 surgeries to remove pellets from his face, neck and chest. He was in the hospital for 8 days followed by 7 months of sleeping on his back. Two of his teeth required caps. He required a bone graft and implant surgery to replace missing teeth. He was in the dentist/periodontist chair for 18 hours and did not have his teeth replaced for a year. Additional pellets have been removed by being squeezed out or emerged independently. He has been told that he should expect pellets to continue to work their way out of his body over time. Further surgery is not an option. He finds the emergence of pellets causes intense pain.

EVIDENCE AT THE HEARING

EVIDENCE OF THE DIRECTOR

[14] On behalf of the Director of FPH, Dr. Wiehahn provided an updated assessment of Mr. Nelson: *Ex. 12*

[15] Dr. Wiehahn confirmed that Mr. Nelson resides in Kamloops in a Forensic Psychiatric Services ("FPS")-supported residence. Since returning to Kamloops Mr. Nelson has secured employment at a ranch. He has been seen by the treatment team on at least four occasions. He has shown no evidence of any symptoms of mental disorder or of instability. He is considered insightful, pro-social, intelligent and of sound judgment.

[16] Dr. Wiehahn continues to adhere to his opinion that, given the highly unusual presentation and pattern of Mr. Nelson's illness, marked by episodes of mania separated by periods of ten years or more, and more frequent intervening bouts of depression, it is clinically reasonable, as well as ethical, that Mr. Nelson is not prescribed medication. He says it would not be appropriate to prescribe medication in the circumstance or for symptoms that may not emerge for another 10 years.

[17] The cornerstone of Dr. Wiehahn's treatment and safety management plan is close observation and monitoring by the treatment team, so that any onset or emergence of symptoms is detected at the earliest moment. Therefore, Mr. Nelson is seen at least every two weeks, including at work, at home, in the community and at the FPS offices.

[18] To implement this plan, Dr. Wiehahn believes that Kamloops is the only location, apart from the Lower Mainland, where the appropriate and necessary level of supervision can be provided by the FPS. Mr. Nelson needs gainful employment. Given his background and experience, this must be in a rural area. In relation to housing, Kamloops happens to have two residential placements for forensic patients. Other nearby rural centres do not have appropriate subsidized housing, and Mr. Nelson could not afford to live there. To send Mr. Nelson to a larger urban area where subsidized housing may be available would be to cut him off from his work.

[19] Dr. Wiehahn's said his psychosocial treatment approach is premised on careful supervision. It would not be feasible for a case manager to drive to Lillooet every six to eight weeks with telephone calls in between. Kamloops seems the only viable locale. He said that access to forensic services in the Interior or North are inadequate to meet Mr. Nelson's needs. He fears that moving Mr. Nelson to another location would come

with serious organizational and social costs. He believes that relocation would adversely impact Mr. Nelson's three most robust protective factors or features: occupation, recreation and prosocial attitude. The last of these relies heavily on a therapeutic alliance with the current treatment team. He agreed that Mr. Nelson's risk is entirely embedded in decompensation due to mental illness.

[20] Dr. Wiehahn believes that he has sufficient information to manage Mr. Nelson's illness. A neuropsychological assessment, which could be carried out in Kamloops, might be of interest, but would likely contain no surprises. In Mr. Nelson's case, prodromal symptoms would be sleeplessness and increased, goal-oriented, activities. Mr. Nelson's treatment plan has been underway for only a few months, and identifying individuals in Mr. Nelson's life, who can look out for these symptoms is part of this plan.

[21] Dr. Wiehahn believes that Mr. Nelson experiences true remorse, as evidenced by his physical presentation when reviewing the index offences as well as his verbal statements. Mr. Nelson has expressed his mortification at his actions and he has said that he does not wish to cause any further harm or hurt to the victim, whom he would not recognize in any event.

[22] On the central issue of future risk, Dr. Wiehahn has applied two well-known and respected assessment instruments. On the HCR-20 v.3, Mr. Nelson's risk of future risk is low. On the START scale the statistical risk of future violence is also low on the basis of Mr. Nelson's active recreational life and his very prosocial attitude. He has been entirely co-operative. The sole, prominent risk factor is the unusual presentation or variant of Mr. Nelson's bi-polar illness. It is the target component of Dr. Wiehahn's treatment plan utilizing close supervision.

MR. NELSON

[23] Mr. Nelson experienced the Review Board's ordered relocation from Strathmore, Alberta, where he was gainfully and usefully employed as somewhat disruptive and a setback. He said another move this year would be further disruptive as he is just settling into the Kamloops area.

[24] Mr. Nelson is regretful that his presence in Kamloops is distressing to the victim D.E.

[25] Mr. Nelson was invited to address D.E. directly and said:

> "Mr. E, I'm terribly sorry for my actions towards you. They were wrong. They were antisocial and I don't know if there's any way in this lifetime that I could ever make it up to you. All I can think about is that somehow in my life I want to pay it forward. Thank you."

THE VICTIM D.E.

[26] Victims are of course not parties to court or Review Board proceedings. However Section 672.5(15.1) of the *Code* provides victims with the right to request to make a statement to the Review Board:

> **(15.1)** The court or Review Board shall, at the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (14), or to present the statement in any other manner that the court or Review Board considers appropriate, unless the court or Review Board is of the opinion that the reading or presentation of the statement would interfere with the proper administration of justice.

[27] We note that since the introduction of this provision into the *Code* in 2005-6, and despite the information it distributes to all victims in every case, the Review Board has never had a request from a victim to present or read a statement.

[28] Although D.E. made no specific request to address the Board under this provision we considered that, given the circumstances under which the hearing had been convened and out of respect for the fact that he had gone to significant effort to attend, he should be provided with the opportunity to be heard if he wished it.

[29] D.E. did not present a victim impact statement per-se. He advised the hearing that:

- he worked for CN rail for 35 years, 32 of which were spent in Kamloops;
- the day of the index offence was the day he retired;
- he was not notified of the date of trial and learned only four days later of the NCRMD verdict;

- when he learned by email of Mr. Nelson's move to Kamloops he lost 20 pounds and became bedridden;
- he has had to consult a psychiatrist;
- he has had little or no satisfaction from the Crown office responsible for NCRMD cases;
- he is deep into PTSD and it's going downhill; and
- he knows exactly where Mr. Nelson lives;

[30] D.E. wants Mr. Nelson to be relocated, otherwise he said he would go to the media.

[31] Regrettably, rather than focusing his presentation on the personal impacts and loss occasioned by the index offence, D.E.'s presentation took a somewhat troubling turn.

[32] D.E. said that he knows where Mr. Nelson lives and that his peers have been offering to go and "tune Mr. Nelson up"; that they see him every day; that "somebody's going to go out there and do something to him and I'm going to get blamed; and it's nothing I can do" (*sic*).

[33] D.E. said his other choice would be to confront Mr. Nelson in a "reactive manner".

[34] Of concern to the Tribunal D.E. said:

> "Well guess what? He's already missed at least one vicious attack. One of my friends told me he was driving by and he got stopped because he got his wife and his children in the car with him but he was going to get out and thump the guy.
>
> So it's going to happen. And I don't want it to happen. You know it's nothing I'm planning on happening and I'm trying to dissuade it but I know a lot, a lot of people and they don't like this. And I can't control the city. He's in danger". (*sic*)

[35] D.E. was asked what he would like to have happen and he said he would like Mr. Nelson moved.

[36] D.E. added a further ominous note:

> "It's the same – it's the same as this peer pressure that I discussed with Dr. Jayaprakash. It's something that I have to deal with. It's the peer pressure from my friends to be a man to go up and stand up to this guy and **take him out or to have my friends take him out**. And it's not anything that I want. I've been very legal through all the proper channels and all the proper protocols but it's been three months. I know what he looks like. I have his picture. And I'm distributing it to my friends, too, by the way, when they ask what he looks like. So more and more people will recognize him".

SUBMISSIONS

[37] Dr. Wiehahn, representing the Director, reiterated that Mr. Nelson poses a statistically low risk to reoffend violently. The treatment plan for his mental illness requires the treatment team to observe him closely. The subsidized residences available to forensic patients in Kamloops are located in the downtown area. To ask Mr. Nelson to move to a more rural area would involve searching for market price rental accommodation, which would be beyond his present means.

[38] Mr. Wong, for the Crown, supported the treatment plan but said that Mr. Nelson should be removed from Kamloops. Mr. Wong noted that Mr. Nelson had done well in Strathmore, Alberta and there should be some way in which he could return there for appropriate supervision. In the Crown's view, removing Mr. Nelson would not unduly elevate the risk. In addition, the Crown noted the potential risk to which Mr. Nelson himself was being subjected.

[39] Mr. Rankin argued that Mr. Nelson poses no risk to the public and especially not to D.E. Mr. Nelson is very remorseful. The main focus of attention for the Board should be protection of the public and the treatment of the accused. The evidence is that there is no danger to the public and the treatment plan is working well. There is evidence that a change to the treatment plan would elevate risk. Finally, Mr. Rankin emphasized D.E. is mistaken in thinking he knows where Mr. Nelson lives.

ANALYSIS AND DISPOSITION

[40] The threshold or jurisdictional question of whether or not Mr. Nelson poses a significant threat to public safety, is not in issue in the context of this unique and special

proceeding of the Board. That determination was made just three months ago and was not a focus of our current inquiry.

[41] This hearing was convened of our own motion to address an unusual and unfortunate confluence of circumstances which have obviously and evidently caused D.E. considerable distress. Thus the focus of our inquiry was much more upon a reconsideration of whether, under s.672.54, Mr. Nelson's recent disposition is both necessary and appropriate in the circumstances.

[42] Section 672.54 provides:

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

[43] In *Baranyais* (BCRB Sept 11, 2014), the Board noted that the amendment to this provision, brought about by the *NCRRA*, emphasizes that public safety is the "paramount consideration" in the Board's disposition making. It noted that this confirmation of the previous law has always been the practice of Review Boards under *Part XX.1*: *para 74*.

[44] The Board also commented on the amended provision's replacement of the requirement to impose the "least onerous and least restrictive disposition" with the words "necessary and appropriate in the circumstances": *para 75*.

[45] In assessing the impact of the change in language, the Board said:

The task confronting a court or Review Board is to discern Parliament's intentions in replacing "least onerous and least restrictive" with the words "necessary and appropriate", and more to the point, their impact on its decision making.

First, we observe that the word "appropriate" has always been part of s. 672.54, in reference to the conditions to be appended to a disposition of conditional discharge under clause (b), or to an order of detention in custody, under clause (c). In *Winko*, the Court used that language, saying:

> "Any disposition regarding an NCR accused must be made in accordance with s. 672.54. The court or Review Board may order that the NCR accused be discharged absolutely, that he or she be discharged on conditions, or that he or she be detained in a hospital and subject to the conditions the court or Review Board considers appropriate. Although the court or Review Board has a wide latitude in determining the appropriate conditions to be imposed, it can only order that psychiatric or other treatment be carried out if the NCR accused consents to that condition, and the court or Review Board considers it to be reasonable and necessary; s. 672.55(1)." (para. 27) (underlining added)": *paras 80, 81*.

[46] The Board also went on to observe that:

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

> "The second change is to the disposition-making provision as it relates to the terms "least onerous and least restrictive"... Bill C-14 proposes to replace those terms with a clearer phrase: "necessary and appropriate in the circumstances." This proposed wording is consistent with how this requirement was described in 1999 Supreme Court of Canada decision *Winko v British Columbia* (*Forensic Psychiatric Institute*), such that "the NCR accused's liberty will be trammeled no more than is necessary to protect the public safety". This amendment is not intended to eliminate the requirement that a disposition be the "least onerous and least restrictive", but rather to make the concept easier to understand.": *para 87*.

[47] On our analysis of the Director's treatment approach in this case, the current disposition is, from the perspective of the paramountcy of public safety, necessary.

[48] Further, considering the other accused-focused criteria in s.672.54, we are prepared to defer to the expertise of the treatment providers who now know Mr. Nelson best and we conclude that the current disposition is also appropriate.: *Winko, par. 61*

[49] We, therefore, decline to order any change to Mr. Nelson's disposition.

[50] We cannot, however, leave matters there.

[51] In *R. v. Bremner*, 2000 BCCA 345, the Court delved into the law governing the use of victim impact evidence and said:

> […] at law, neither vengeance nor revenge has any place in sentencing": *para 9*.

[52] The Court commented on what information is or is not appropriate in the context of victim impact statements or representations:

> […] Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime - an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.
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> I agree with that general statement by Mr. Justice Hill that sentencing hearings are not tripartite proceedings, rather they are a proceeding between society, as represented by the Crown, and a convicted person.
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> In Gabriel, Mr. Justice Hill set out what should be presented to the court when victim impact statements are submitted. I reproduce them here as I think they are extremely useful (at paras. 29-33):
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> > Impact statements should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence". The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment […]: *paras 26, 27*

[53] The Board's process has at times been considered analogous to that of a judge passing sentence: *R. v. Peckham [1994] O.J. No. 1995* at para.25.

[54] In this case, the Board created a unique opportunity for a victim to be heard. The information provided went well beyond a description of the "harm done to, or loss suffered by, the victim arising from the commission of the offence: s.722.

[55] The information we heard leaves us concerned about the safety of the accused who is also a member of the public.

[56] Although we have not seen fit to specifically order Mr. Nelson's relocation, we consider that it is, as yet, early days in his treatment, recovery, re-integration and in the establishment of the necessary therapeutic relationships with his treaters. The plan has only been in place a few months. We are not persuaded that Kamloops is the sole venue where this unique treatment plan could be successfully implemented. Venues such as Nanaimo, Victoria, Williams Lake and others spring to mind.

[57] Alternately, the Director might consider an administrative arrangement whereby Mr. Nelson could return to Strathmore, Alberta, and be supervised by Forensic Services in that province, on behalf of the Director.

[58] Given our concerns for Mr. Nelson's safety in Kamloops, we would be remiss in not recommending that the Director give serious re-consideration to the current arrangement.

[59] Finally, we would observe that the circumstances of the this case raise serious questions about the wisdom underlying s.672.5(5.2), and its potential implications for a broad and inclusive notion of public safety.

Reasons written by B. Walter, in concurrence with Dr. Smith and N. Avison

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