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

The Accused

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
May 23, 2007

REASONS RELEASED: August 20, 2007

BEFORE:	**CHAIRPERSON:**	**B. Walter**
	MEMBERS:	**Dr. G. Laws, psychiatrist**
		N. Avison

APPEARANCES:	**ACCUSED/PATIENT: The Accused**
	ACCUSED/PATIENT COUNSEL: D. Nielsen
	DIR AFPS: D. Lovett, QC
	ATTORNEY GENERAL: L. Hillaby

1.0 INTRODUCTION

[1] On May 23, 2007, the British Columbia Review Board (BCRB) convened an annual hearing to review its disposition in the matter of the accused:
S.672.81 C.C.

[2] This was the accused's 20th appearance before this Tribunal since his June 10, 1987, Supreme Court of BC verdict of Not Guilty by Reason of Insanity (NGRI)[1].

[3] Following presentation of the evidence at this hearing, Ms. Nielsen, counsel for the accused, argued that if the BCRB decided to conditionally discharge the accused (**S.672.54(b)**), his disposition should include express conditions requiring him to remain in BC, to prevent Immigration Authorities (CIC) from removing the accused from Canada and deporting him to Ethiopia/Eritrea while under BCRB jurisdiction: **see par.21 below.**

[4] Both the Attorney General of BC (AGBC) and the Adult Forensic Psychiatric Services Commission (Director) oppose the imposition of such conditions in the BCRB's disposition. Given the complex nature of the issues possibly involving competing legislative schemes, the BCRB requested written submissions and arguments from the parties for its consideration prior to rendering a decision in the matter.

[5] The parties' submissions have now been received and duly considered.

[6] In delivering our decision below, we first deal with the totality of the historic, and new, clinical, psychiatric, and risk assessment evidence (disposition information) tendered. We then address the issues and competing perspectives raised by the written submissions to the extent that their consideration is relevant and necessary to enable the Board to make an appropriate disposition, including conditions, in this matter.

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[1] NGRI was the predecessor verdict to, and was succeeded by, the current Not Criminally Responsible on Account of Mental Disorder (NCRMD) verdict imposed under **Part XX.1 of the *Criminal Code*** after February 1992: **S.C.1991, c.43.**

2.0 FACTUAL BACKGROUND

[7] The parties in general agree with the accused's recitation of the background facts contained at paragraphs 8 to 14 of the accused's submission: **WRITTEN ARGUMENT BY DIANE NIELSEN ON BEHALF OF THE ACCUSED, JUNE 25, 2007 ("Accused Submission")**:

> *8. The accused came to Canada in 1986, on a student visa, to pursue graduate studies at the University of British Columbia. After coming to Canada, the accused began to develop paranoid symptoms of schizophrenia. On January 23, 1987, the accused was charged with second degree murder after an unprovoked stabbing of a colleague, a lab assistant, while he was working at the University of British Columbia. On June 10, 1987, the Supreme Court of British Columbia held a trial and, on September 23, 1987, found the accused "not guilty by reason of insanity" (NGRI) (Exhibit 73,p.1; R. v. Accused [1987] B.C.J. No. 2807) now called "not criminally responsible on account of mental disorder"(NCRMD) (Section 16, Criminal Code of Canada, R.S.c.C-34,s.16;1991,c.43,s.2).*
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> *9. Past Review Board reasons have described his immigration status as being an ongoing stressor as he remains liable to deportation enforcement proceedings. In December 2004, the Review Board found that if the accused was arrested and the deportation enforced, that the process would almost certainly lead to a significant deterioration in his mental state. The accused would be at risk of relapse to paranoia, and to act dangerously in response to his thinking. The risk would be that much greater if he were involuntarily returned to Eritrea and detained or unable to attain appropriate mental health care* (*Exhibit 89,p.4*).
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> *10. The evidence from the written and oral testimony of Dr. Murphy is that the accused can be safely managed on a conditional discharge where medical treatment and supervision is available from Vancouver Adult Forensic Psychiatric Services and from the supported independent living situation available at 2345 Dundas Street in Vancouver. Dr. Murphy advises that the accused, historically becomes destabilized from his baseline mental state with stress, and at other times without any known cause (Exhibit 102, Letter from Dr. Murphy dated April 30, 2007, p.4). Dr. Murphy expects the Adult Forensic Psychiatric Services staff to monitor Mr. Seyoum's mental state and return him to the hospital if he develops paranoid delusions or becomes unduly preoccupied with a particular individual or group of individuals (Exhibit 102, Letter from Dr. Murphy dated April 30, 2007, p.5).*
>
> *11. If the removal process commences, the accused will be exposed to exceptional stressors, and may need to be more closely monitored or returned to the Forensic Psychiatric Hospital for assessment and further treatment. The prospect of being deported has caused the accused significant stress in the past to the point where he expressed suicidal ideations and made a serious suicide attempt (Exhibit 89, Review Board reasons, December 1, 2004, p. 2).*
>
> *12. The accused is uncertain as to his current nationality status. He was born in Eritrea; however, he carries an Ethiopian passport. He believes that if he were returned to Ethiopia he would be deported to Eritrea where he would be without mental health treatment and medications (Exhibit 73,p.6). He may even be arrested or detained in either Ethiopia or Eritrea, which will no doubt cause him significant stress.*
>
> *13. Helen Park, lawyer for the Department of Citizenship and Immigration ("CIC") and Canada Border Services Agency ("CBSA"), has indicated in her letter that the accused is subject to a Deportation Order dated February 6, 1990. the accused originally filed a refugee claim on January 12, 1988, but unfortunately withdrew that claim on March 1, 1991. When he applied to reinstate the refugee claim on April 3, 1992, this claim was denied by the Immigration and Refugee Board on July 21, 1992. Subsequent claims by the accused for reinstatement or permanent residence on humanitarian grounds have all been denied (Exhibit 99, Letter from H. Park to BC Review Board, June 6, 2006).*

14. Ms. Park indicated, in letters dated June 6, 2006 and May 15, 2007, that CIC and CBSA will commence removal arrangements if the accused receives a conditional discharge from the Review Board (Exhibit 99, supra; Exhibit 103 Letter from H. Park to BC Review Board, May 15, 2007).

[8] In addition to familiarizing itself once again with the totality of the voluminous historic evidence and past findings, the Panel is content to accept this history subject to the points emphasized in the Director's and the AGBC's submissions in relation to the issues in dispute. These will be highlighted below. [2.]

[9] With respect to the historic evidence, the BCRB, in the course of its deliberations in particular, noted the following:

- The unpredicted, unprovoked, and ultimately violent index offence which has been commented on repeatedly in Reasons for Disposition: **Ex.3, Admissions of Facts.**

- The accused's diagnosis of persistent, chronic paranoid schizophrenia.

- The positive response of the accused's illness to treatment under close monitoring and supervision.

- The established tendency of the accused's illness to periodic, fluctuating exacerbation and breakthroughs of psychotic symptoms; including suspiciousness, paranoia and irritability, suicidal and homicidal ideations and odd beliefs, despite fastidious supervision and follow up and the accused's compliance with treatment: see, for example, **Ex.87 Assessment of Dr. C. Kerr dated Nov 17, 2004:**

  There is a history of prior supervision failure as in August 2002 the accused did not disclose the onset of psychotic symptoms and he stopped taking his medication, which unfortunately, led to a decompensation in his mental state, precipitating a return from the Cottages to the Forensic Psychiatric Hospital. At that time, the accused was documented as, once again, demonstrating evidence of agitation, anger, grandiosity and paranoia. Fortunately, Mr. Seyoum's mental state returned to normal over several months, once he went back on his medication and he subsequently returned to reside in the Cottages in the early spring of 2003.

[2] For the record, we have briefly familiarized ourselves with the recent history of Ethiopia and efforts to establish an independent Eritrea. In short, we are aware that the (undetermined) border between these two states remains a matter of dispute and even hostility. We will, for present purposes, refer to "Ethiopia/Eritrea".

- The impact of what has been described as his “exquisite sensitivity” to perceived social and environmental stressors, including his immigration status or issues, upon the accused’s fragile mental stability (see for example, **Ex.81**).

- Despite his generally sound insight, the accused’s periodic inability or unwillingness to recognize, and in turn, disclose the onset of such symptoms: see **Ex.87** above.

[10] The Board has consistently determined or found that, in light of the above features, this accused satisfies the “significant threat” threshold elaborated in Winko, which is required to maintain the BCRB’s jurisdiction over the accused:

> *In consideration of the seriousness of the accused’s index offence and his now well established, well documented pattern of cyclical periods of stability and decompensation, as well as our understanding of his rather exquisite sensitivity to social and/or environmental stressors and changes, we are on this occasion, agreed that he could continue to meet the threshold requirement for our jurisdiction.:* **Ex. 85, Reasons for Disposition January 9, 2004.**

and:

> *[21] None of the parties suggested that the accused was eligible for an absolute discharge. Nevertheless, we considered if the evidence supported a finding that the accused continued to constitute a significant threat to the safety of the public. We unanimously concluded that he does pose a significant threat to the safety of the public. We considered a number of factors. We noted that the index offence was one of the most serious crimes in Canadian law and had the most serious of outcomes. The accused continues to suffer from a serious chronic mental illness that fluctuates over time. He is not, because of that illness, always a candid reporter of his mental state. The level of supervision required to safely manage his risk in the community is very high and no such facility is presently available. There appears to be little or no pattern to whom* (sic) *the accused becomes paranoid. He suffered an episode of paranoid conduct as recently as the fall of 2005 that involved him voicing homicidal ideation in relation to a staff member at Coast Cottages.:* **Ex. 100, Reasons for Disposition, June 8, 2006.**

3.0 EVIDENCE SUBMITTED FOR THE CURRENT HEARING

EVIDENCE OF THE “DIRECTOR”

[11] The Director’s evidence, in summary, indicated that:

- In August 2006, the accused reportedly approached the pharmacist with a request to discontinue certain medications due to side-effects such as neck pain.

- In September 2006, the accused asked his treatment team to discontinue or change his medications

- In October 2006, accused was approved for community placement and preparation for discharge.

- In January 2007, the accused began to search for accommodation.

- In March 2007, having secured housing, the accused undertook a 2 week visit leave.

- In April 2007, the accused began to attend upon his outpatient treatment team at the Vancouver Forensic Clinic.

- On April 23, 2007, the accused started a 28-day visit leave

- By May 2007, the accused had settled at his new residence, had connected satisfactorily to, and was doing well under the supervision of, the Vancouver clinic; he was self-administering his oral medications and reporting for his scheduled injections; his diabetes is being monitored by a general practitioner at the Forensic Psychiatric Hospital.

- He did not cling to any unrealistic or stress-inducing academic or career goals which could serve to destabilize him.

- Dr. Murphy opined that if the accused were to cease consuming his medications, he would most certainly decompensate to psychosis, under which circumstances his potential to pose a threat would increase sharply.

EVIDENCE OF THE ACCUSED

[12] The accused told the BCRB:

- That he had been assisted in securing accommodation through Coast Foundation.
- That he works two hours per day as a janitor at Coast Foundation; he also receives a disability pension.
- That he has started writing another book.
- That he sees an MPA worker twice weekly to assist him in accessing/negotiating the broader community and explore leisure activities.
- That he is able to self-administer his oral medications, can tolerate any side-effects and will remain compliant; he trusts Dr. Kerr.
- That the medications he requires to maintain his mental stability are not available in Eritrea and he does not want to return there as there is no access to mental health treatment medications.
- That he has siblings in Eritrea and in Sweden.
- That he aspires to study nursing and learn more about mental health.
- That he said he tends not to disclose symptoms immediately because he initially loses insight and is discouraged from doing so by the prospect of losing programs and liberties which he experiences as punishment.
- That he has a lawyer to represent him regarding immigration issues and proceedings,

4.0 BCRB'S CHOICE OF DISPOSITION

[13] All parties to this proceeding recommended that the accused be discharged conditionally: **S.672.54(b)**.

[14] The process by which the BCRB makes its dispositions is based on a close consideration of the factors articulated in **S.672.54** of the ***Code*** and elaborated in ***Winko v BC*** **[1999] 2 S.C.R. 625 at para. 62:**

> *On this interpretation of Part XX.1 of the* Code*, the duties of a court or Review Board that is charged with interpreting s.675.54 may, for practical purposes, be summarized as follows:*
>
> *10 The court or Review Board must consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused. The court or Review Board is required in each case to answer the question: does the evidence disclose that the NCR accused is a "significant threat to the safety of the public"? …*
>
> *14 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 for the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive. …;*

[15] At sub-paragraph 15, the court concludes that in determining whether the NCR accused presents a significant threat (as defined):

> *"…The court or Review Board must at all times consider the circumstances of the individual NCR before it."*

[16] In approaching the threshold determination whether or not this accused poses a significant threat to public safety, we once again remind ourselves of, and highlight:

- the accused's serious index offence albeit 20 years in the past;
- the accused's established and undisputed illness of chronic paranoid schizophrenia;

- the fragility of the accused's mental state as consistently documented by episodic but predictable periods of decompensation;

- relapse to symptoms of the illness, at times including homicidal ideation: **See Ex. 18; 26; 33; 53; 59; 77; 81; 89; 90; 95;**

- the accused's sensitivity to stressors, including principally, his ruminations regarding his immigration status and the prospect of his deportation, and their identified impact or clinical implications, in terms of periodic bouts of exacerbated symptoms and mental instability: See **Ex.18; 26; 73; 74; 90; also oral evidence given at BCRB mandatory hearing December 16, 1998;**

- that despite his positive response and the benefits to the accused of treatment he is, at times, either unable to recognize or unwilling to initially disclose an exacerbation of his symptoms.

[17] The recent evidence suggests a period of more robust or resilient mental stability and positive functional progress. This has enabled the accused to transition to greater individual and residential independence, partial self-administration of his oral medications, and part-time employment. He has now expressed a willingness to confront his immigration challenges. In our opinion, the accused's preparedness to confront the process in no way suggests that he would be unaffected by the process or a negative outcome.

[18] No party, including the accused, suggests that he is sufficiently recovered or stable so as to attend to his social, functional, and treatment needs entirely independently and without ongoing support, supervision and monitoring. Without such supports, the accused might well isolate himself during an entirely predictable period of future instability, to a point where his symptoms grow sufficiently acute that he could be expected to act on them. The accused continues to require opportunities for treatment provided under an assertive regime of clinical and case management and monitoring.

[19] In our estimation, the accused remains a reasonably foreseeable and significant threat. Our jurisdiction over him remains justified.

[20] Having concluded that the accused remains a significant threat, we once again consider the criteria in **S.672.54** in choosing the appropriate disposition:

> *18 When deciding whether to make an order for a conditional discharge or for detention in a hospital, the court or Review Board must again consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused, and make the order that is the least onerous and least restrictive to the NCR accused.:* ***Winko,*** **supra, par. 62**

[21] Our findings with respect to the evidence outlined above, in particular a somewhat more sustained period of stability and absence of psychosis; his ability to reside independently albeit with support; his ability and willingness to self-administer some, and to otherwise to comply with, prescribed medications; his engagement in community programming and employment and his newly forged therapeutic connection to an outpatient treatment team, suggest that the accused, and in particular his risk to others, can be managed and maintained under the legally less onerous and less restrictive regime of discharge subject to appropriate conditions: **S.672.54(b)**.

5.0 BCRB'S CONSIDERATION OF DISPOSITION CONDITIONS INCLUDING THOSE RELATED TO MR. SEYOUM'S IMMIGRATION ISSUES

[22] In addition to the evidence already summarized at paragraphs 9-12 above, the clinical evidence that is particularly relevant to this aspect of our deliberations includes the following references:

- **Ex. 1**: Dr. Murphy indicates that by Spring of 1992 the accused's mental state began to deteriorate under the threat of deportation to the point where the accused threatened suicide; anti-anxiolitic medication was not effective **(Jul 1992)**.

- **Ex. 4:** As of October 1992, accused remained anxious about his immigration status **(Oct 1992)**

- **Ex. 18:** Nov 1992, the BCRB observes that accused's hope for a successful appeal of his deportation order is contributing to accused's improved mental condition **(Nov 1992)**.

- **Ex. 19:** With his IRB application turned down, accused becomes depressed and suicidal **(May 1993)**.

- **Ex. 20:** Dr. Murphy comments about the lack of psychiatric treatment and services in Ethiopia **(May 1993)**.

- **Ex. 23:** Dr. Murphy observes accused's immigration status is a constant stressor, at times inducing episodes of psychosis **(Oct 1993)**.

- **Ex. 24**: Accused's liberties are restricted due to suicidal ideation and paranoia following adverse news from immigration authorities **(Mar 1993)**

- **Ex. 28**: Accused's description of treatment of mentally ill persons in his homeland **(Sep 1994)**.

- **Ex. 31 and 32:** Accused overdosed on medications on receiving bad news from his immigration lawyers; required constant observation **(Oct 1994)**.

- **Ex. 42:** Evidence that accused would rather die than return to his country in disgrace and to the lack of treatments and medication available there. Accused believes if he were ill and in his country he would be dead by now **(Oct 1995)**.

- **Ex. 49:** Accused asserts that his prescribed medications are not available in Eritrea **(1995)**.

- **Ex. 55:** Accused overdoses and discloses homicidal ideas toward his family should he be returned to Eritrea **(Sep 1998)**.

- **Ex. 60:** Accused's account of his history asserts medication is not available in Eritrea **(Sep 1999)**.

- **Ex. 72:** Dr. Murphy states accused is highly apprehensive due to possible deportation if conditionally discharged **(Nov 2001)**.

- **Ex. 74:** Accused depressed, anxious, has insomnia, and says he would kill himself if he receives bad news; i.e., about deportation matters **(Jan 2002)**.

- **Ex. 77:** Significant deterioration due to deportation issue **(Jan 2002)**.

- **Ex. 78:** Accused's brother reported that there is one psychiatrist for 3.5 million people in Eritrea and medication is not available (**Dec 2002)**.

- **Ex. 87:** Dr. Kerr opines that his key potential destabilizing factor is the accused's immigration situation. He is on injectible medication because he is not entirely capable of fully self-medicating compliantly **(Nov 2004)**.

[23] Although the facts are generally not in dispute, we consider as well that CIC has indicated, and we assume, that if the accused is conditionally discharged, it and CBSA will commence removal arrangements: **Ex. 99.**

[24] We are further told that under the ***IRPA***, the accused cannot be removed until he has been provided with an opportunity to apply for protection, pursuant to the Pre-removal Risk Assessment Application process **(S.112**). If the accused is conditionally discharged he is subject to arrest and detention for purposes of enforcement of the removal order: **Ex. 99.** Such an application would be determined within 60 to 90 days. If the accused is deemed a "protected person" he will be able to remain in Canada. If not, he will be deported

[25] The accused cannot be removed without an Eritrean passport and travel documents which are being sought. According to counsel for CIC, the accused has been interviewed (May 21, 2007) for the purpose of commencing removal arrangements, by having him apply for Eritrean travel documents: **Ex. 103**.

[26] As conditions of his disposition, the accused seeks the inclusion of express clauses to prevent Canadian Immigration Authorities (CIC) from removing him to Ethiopia/ Eritrea, including such highly specific provisions as:

> *THAT he reside at #205 – 2345 Dundas Street, Vancouver, in the Province of British Columbia, and not change his residence without prior approval of the Director, and prior notice to the Review Board;*
>
> *THAT he not leave the Province of British Columbia under any circumstance;*
>
> *THAT he not be removed from the Province of British Columbia by anyone, including a Federal Official, without the prior approval of the Review Board;*
>
> *THAT he return to and remain at the Forensic Psychiatric Hospital if he is directed to report for removal by any Federal Official;*
>
> *THAT if he is detained by Federal Officials for removal in any Correctional Institution that the Attorney General immediately transfer him to the Forensic Psychiatric Hospital for assessment and treatment;*
>
> *THAT he present himself before the Review Board when required and no later than 12 months from the date of this order.*
>
> : **Accused Submission, Par. 7**

[27] In summary, Mr. Seyoum's arguments for the inclusion of such conditions include:

1. That as the BCRB has the authority to determine questions of law, it may consider, and apply legislation beyond **Part XX.1 of the *Criminal Code*.**

2. That the ***Perez v. Canada*** **(Min. of C & I), [2005] FCJ No. 1601 (*Perez*)** decision, specifically paragraphs 18 and 19 thereof, provides that the Review Board can impose express conditions which serve to prohibit an accused's deportation.

3. That the Review Board has the jurisdiction, in its orders, to bind entities other than the accused: ***Mazzei v. BC (AFPS)*** **[2006] SCC7, par. 20, (*Mazzei*).**

4. That to the extent the parties (and the BCRB) agree that the accused ought to remain under the Review Board's jurisdiction under **S.672.57(b)**, allowing his deportation to Ethiopia/Eritrea would be to refute its proper jurisdiction or mandate.

5. That, unless it determines the accused is no longer a significant threat so as to entitle him to be absolutely discharged, the Review Board must (in discharging its mandate under **S.672.54**, as elaborated in ***Winko,*** supra), consider evidence that the accused will be deported, the impact of his removal on the accused's mental condition, and the implications of the loss of his opportunities for treatment and risk management in Ethiopia/Eritrea.

[28] Although it resorts to a somewhat unfortunate description of the issue as a request for terms "specifically intended to thwart", "to obstruct" or to "undermine" the accused's removal, the AGBC agrees with the Director AFPS that it would be INappropriate and that the Review Board lacks jurisdiction to impose such conditions: **AGBC Submission; Dir, AFPS Submission.** Specifically the AGBC submits that the ***Criminal Code*** does not provide the Review Board with jurisdiction intended to ursurp (sic) an order made under the ***Immigration and Refugee Protection Act*****: RSC 2001, c.27, (*IRPA*)**.

[29] The accused begins his argument in support of the requested conditions by citing the considerations set forth in **S.672.54** as the fundamental criteria imposed on the Board's decision making. To a greater or lesser degree, the other parties share this perspective:

> *The only issue for the Review Board is what disposition order should issue given the medical and other evidence and the Review Board's responsibilities under S.672.54 of the* Criminal Code*.:* **Dir, AFPS Submission, page 11.**

[30] Our analysis and ultimately our decision, begins and ends with our application of these factors to the evidence in this case. The process by which this analysis unfolds has

already been demonstrated earlier in these reasons in our determination of the appropriate disposition: **Part 4.0 supra.**

[31] We again remind ourselves that ***Winko*** requires us to apply these considerations to the broad range of evidence which has been adduced over time with respect to the "specific situation" of, including the community services and supports available to, the accused before us: ***Winko*****, supra, paras. 61, 62.**

FINDINGS

[32] The totality of the historic and current evidence in addition to the items specifically highlighted at **par.22 (supra)**, amply supports the following additional findings:

- That the accused's potential significant threat to public safety is directly affected by his mental state/stability;

- That the accused's immigration status or the threat of his deportation has been the key and consistent source of destabilizing stress;

- That the accused continues to require close monitoring, treatment, and clinical supervision to manage his mental illness and his potential threat to others;

- That there is no evidence of the availability of any form of mental health treatment or even any regime of supervision or oversight of the accused in Ethiopia/Eritrea.

ANALYSIS AND CONCLUSIONS

[33] Despite Mr. Seyoum's current stability, and his admirable fortitude and apparent willingness to confront his immigration issues, there is, on the basis of the historic evidence, no reasonable doubt in our minds that the process which is likely to unfold prior, leading up to, and including his actual removal, will trigger a significant destabilization in the accused's mental state. Under such a decompensation, his stability/resolve can be

expected to give way to symptoms of acute paranoia, serious suicidal ideation or attempt(s), and homicidal thinking. Dr. Murphy has given evidence to this effect in the past: **see also Ex. 87 (Dr. Kerr), supra.**

[34] We acknowledge that the Director emphasizes the accused's right to launch an application for protection: ***IRPA*, S.112**. With respect, given our findings regarding Mr. Seyoum's mental fragility, this right is of little consequence since, in our view, he will most certainly decompensate, and his potential risk to the safety of others will escalate, under the stress of this process. It is, moreover, not at all clear that the authorities and decision makers who will be determining Mr. Seyoum's fate have any experience or expertise in terms of the accused's mental illness, his treatment needs, or the potential consequences for both the accused and the general public.

[35] In addition, although the Review Board has not undertaken independent research into the matter, such evidence as is on record suggests that neither Ethiopia nor Eritrea offer a system of appropriate supervision or psychiatric treatment services. In our assessment, the accused would present at a significantly elevated level of threat in either Canada or Ethiopia/Eritrea under the predicted scenario.

[36] The accused introduces into argument the ***International Transfer of Offenders Act*** (***ITOA***), (**SC 2004, c.21**), in support of the position that the Review Board may consider and apply legislation beyond its constitutive statute. To the extent that the ***ITOA*** has provisions of specific application to the Review Board, the argument is a truism of little consequence.

[37] There is no evidence that the ***ITOA*** is in play in the current proceedings. Nevertheless, a reading of the ***Act*** yields some interesting insights or observations:

- The ***Act's*** purpose statement supports the general notion that there may be benefits to reintegrating an offender into his or her own national, cultural community or grouping, a notion that is routinely considered by the BCRB: **S.3.**

- We have no evidence of the existence of any treaty or administrative arrangement between Canada and Ethiopia/Eritrea: ***ITAO* Ss. 7,31,32**;

- The consent of the offender is presumptively required to a transfer under the ***ITOA*: S.8(1)**. Given Mr. Seyoum's opposition to removal, it is unlikely that this mechanism will be invoked in the foreseeable future;

- The transfer of an NCR accused, detained or **released on conditions**, is conditional upon the recommendation of the Review Board. This provision acknowledges the primacy of the Review Board's expertise and jurisdiction, and further it suggests that Parliament has chosen to **delegate the primary role in the process of initiating the transfer of a foreign NCR to the Review Board**: ***ITOA* S.32(2)** (emphasis added).

- The section of specific application to the Review Board's recommendation to transfer an NCR accused imports the following familiar criteria:

  - *the best interests of the person*
  - *their* (sic) *mental condition*
  - *the likelihood of their* (sic) *reintegration*
  - *their*(sic) *treatment and other needs; and*
  - *the need to protect society from dangerous persons*: ***ITOA* S.32(3)**

[38] Although this statute is not invoked, or operative in Mr. Seyoum's case, and although no judicial interpretation in relation to this provision has been brought to our attention, it does suggest, considering the ***Act's*** subject matter, that considerations of reintegration, opportunities for treatment and, importantly, public protection, are concepts or concerns which extend beyond the boundaries of Canada.

[39] One is also left with the interesting question of whether the ***ITOA*** represents a legislative balancing of interests between Canada's immigration laws and those animating **Part XX.1** of the ***Criminal Code.*** The AGBC appears to have suggested this at par.18 of its submissions, but we need not consider this issue further in determining the matter presently before us.

[40] All parties urge the Board to consider the impact of the Ontario Court of Appeal decision of ***R. v. Miller*** **[2003] O.J. No.3455 (*Miller*).** The Ontario Review Board (ORB) fashioned a disposition that intended to allow an NCR accused, who was subject to a deportation order, and who presumptively remained a significant threat to public safety (so as to disqualify him from being absolutely discharged), to be transferred to a maximum security facility in Jamaica. We note also that in ***Miller*** the accused wanted to be transferred to Jamaica.

[41] In our view, the principle which appears to have been gleaned from ***Miller*** by numerous parties, including the Director and AGBC, that an NCR's immigration status is an irrelevant or improper factor for consideration by the Review Board in the course of determining an appropriate disposition under **S.672.54**, represents a vast oversimplification and, indeed, a misinterpretation of the Decision: **see, for example, *Sandhu*, (2006) BCRB No.117.**

[42] The sole principle (if any) to be distilled from ***Miller*** is this:

> *It is clear that there is no legislative mandate for the Board to **implement** a deportation order just because the order exists…:* **par.35 (emphasis added)**

[43] In our view, there is some considerable difference between the Board using its **S.672.54** authority to **implement** a deportation order and ignoring, or dismissing a deportation order and its potential clinical and risk assessment implications, as irrelevant to its deliberations. It would be irresponsible of the Board, if not negligent, were it to carry out its function under **S.672.54**, while actually ignoring expert evidence of the clinical and threat assessment implications of the prospect of deportation for this particular accused; those are the very criteria which **S.672.54** imposes upon us.

[44] The Court in ***Miller*** (as noted by the Director at page 10 of its submission), frames the issue succinctly:

> *"…the issue is not what authority the Government of Canada may or may not have to deport an accused"… "but what use the Board is to make of the (deportation) order when determining its disposition with respect to an accused pursuant to the criteria set out in S.675.54":* ***Miller*** **(supra), par.34**

[45] Without determining the ultimate jurisdictional issue, the Court concluded that the ORB's decision was unreasonable to the extent that it considered the deportation order a factor that gave it the authority to make an order that would transfer the accused into custodial circumstances in Jamaica: **par.38**. Specifically, the Court considered the ORB's order unreasonable and reversible as there was no evidence of the existence of an effective treatment or supervisory regime, in particular one that would address the accused's danger to the Jamaican public: ***Miller*****, supra, paras.30, 31; see also par.25.** A reading of ***Miller*** would suggest that the accused, in that case, had significantly more in the way of connections and support in Jamaica than the accused has in Ethiopia/Eritrea: **par.26**.

[46] In her argument, counsel for the Director articulates the point we emphasized in launching into our discussion of this issue:

> *The only issue for the Review Board is what disposition order should issue, given the medical and other evidence and the Review Board's responsibilities under section 672.54 of the* Criminal Code*.*

[47] However, she (in our view fairly) acknowledges that:

> ***In exercising this mandate it is appropriate for the Board to consider the impact of the prospect of deportation order on the mental condition of the accused (and any corresponding increase of risk to public safety) as the*** Criminal Code *directs the Board to consider his mental state in making an appropriate disposition (i.e. custodial, conditional or absolute). It should not be considered for any other purpose, such as defeating the clear intention of the* **IRPA*:*** **Dir, Submission Page 11(emphasis added).**

[48] Candidly, we fail to understand the distinction between being able to consider the impact of the prospect of deportation on the accused's mental condition, but not its actual implementation.

[49] Under the circumstances, considering our findings that either the proposed protection proceedings, or his actual deportation, will mentally decompensate the accused;

that his decompensation, in either Canada or Ethiopia/Eritrea, will dramatically escalate his (already found) significant threat to others, and that there is no known regime of effective supervision or treatment available to the accused in Ethiopia/Eritrea (indeed, there is no evidence the accused will be transferred to any oversight in Ethiopia/Eritrea), we conclude that to effectively relinquish our jurisdiction over the accused by indirectly acceding to or ignoring his deportation, would amount to an explicit refutation or abdication of our jurisdiction and mandate: **see *Miller* (supra) par.33.**

[50] The Board cannot meaningfully exercise its jurisdiction over the accused while he is abroad and beyond its reach. Nevertheless, the Board is asked by AGBC and the Director to curtail its jurisdiction. To accede to the position of AGBC and the Director would be to tacitly order the accused to be de facto discharged absolutely. In our interpretation, this would replicate the reversible error for which the ORB was criticized in ***Miller***; that is, abandoning jurisdiction over an accused considered a significant threat. To do so, would, in our view, violate ***Winko***:

> *"… If it (the Review Board) concludes that the NCR does represent such threat, then it must order the least restrictive of the two remaining alternatives…"* **par.55**

[51] Confining ourselves, then, to the evidence relevant to the mandate established by our constitutive legislation, and having considered the jurisprudence as well as the ***ITOA*****,** we conclude that the conditions at issue flow directly from an appropriate and meaningful adherence to the express words of **S.672.54**: the accused's mental conditions, his "other needs" and his dangerousness. On the strength of the evidence in this case, we are simply not permitted, directly or indirectly, to relinquish our jurisdiction over the accused. We arrive at this conclusion, without any intention whatsoever to, in the words of the Director, "*defeat the clear intention of the **IRPA***". We are simply exercising the jurisdiction and mandate Parliament has chosen to bestow upon us, which will, as we acknowledge below, have a collateral impact on the implementation of the ***IRPA*** in this unique case.

[52] We would further emphasize our view, notwithstanding CIC's operational practice, that a conditionally discharged NCR accused remains, by definition, of concern,

as a “significant threat”, and therefore, subject to the ongoing jurisdiction of the Criminal Justice system, and this Tribunal: ***IRPA S.112****.*

[53] Although we have adopted and reiterate our position that we need not look beyond our enabling statute in deciding this case, we do not think it is particularly controversial that we also take into consideration ***Perez*** (supra)***:* see *Tranchemontagne v. Ontario*** **[2006] SCC 14.** We are aware of no subsequent judicial consideration of ***Perez*****.** Simply put, it clearly states that a deportation order will only be overridden by express language in a disposition of the Review Board:

> *“18 The first factor takes a narrow interpretation of s.50(a) of the IRPA, and examines the conditions which would, according to the applicant, be violated by the enforcement of the removal order.* ***In the applicant’s case, there is no express provision, in the Review Board’s conditions, stating that he can not be deported on a valid removal order issued by CIC.*** *The conditions imposed by the Review Board include requirements that the Applicant remain under the supervision of the same Director, that he reside in a British Columbia location approved by the Director and not change residence without the Director’s permission, that he regularly report to the Adult Forensic Psychiatric Clinic, that he return to the hospital whenever the Director is of the opinion that he needs re-assessment, and that he present himself to the Review Board upon request.* ***None of the listed conditions directly prohibit the enforcement of a valid deportation order on a person who is inadmissible to Canada.*** *As the wording of s.50(a) must be interpreted narrowly, there would be no direct contravention of the conditions if the valid deportation order were to be enforced.*
>
> *19* ***In my opinion, the conditions imposed by the Review Board would not be directly contravened by the enforcement of a valid removal order. For the direct contravention principle to apply, express language prohibiting the deportation of an inadmissible person from Canada would have to be used by a decision maker in a judicial proceeding.”*** **(Emphasis added)**

[54] We do not lightly or purposefully seek to defeat or confront another legitimate statutory regime. We regret that our duty under the ***Criminal Code*** may collaterally have this effect. Having said that, we recognize, and ***Perez*** makes it abundantly clear, that the law is not unfamiliar with operational conflict between administrative decision makers: **see also *British Columbia Telephone Co. v. Shaw Cable Systems (BC)* Ltd., [1995] 2 SCR 739, where the SCC confronted the issue of compliance with conflicting tribunal decisions.**

[55] In that regard, it is important to point out that while the Court properly emphasized in ***Perez*** the important policy objects behind the ***IRPA***, and a desire to avoid their

frustration, there are equally important policy objects underlying **Part XX.1** of the **Criminal Code** which should not be ignored or frustrated, and which, arguably, distinguish some of the historical jurisprudence cited in ***Perez*** involving individuals on probation or on conditional sentences.

DISPOSITION CONDITIONS

[56] Having determined on the evidence the inappropriateness of ceding/ abdicating our pre-existing jurisdiction over this accused, we have decided that we must take steps to continue or assert that jurisdiction in the form of express language as identified in ***Perez*** (supra).

[57] Accordingly, our disposition in this case is 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 at #208 – 2345 Dundas Street, Vancouver, in the Province of British Columbia 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 including the Forensic Psychiatric Hospital, at least once every 2 weeks, for purposes of assessment, counseling, 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 acquire, possess or use any firearm, explosive or offensive weapon;**

6. **THAT he not attend in the geographic area of the Point Grey Campus, University of British Columbia unless accompanied by a person designated by the Director;**

7. **THAT the accused not be detained or removed from the Province of British Columbia by any authority without prior notice to, and a hearing of, the British Columbia Review Board;**

8. **THAT he keep the peace and be of good behaviour; and**

9. THAT he present himself before the Review Board when required.

[58] From a humane perspective we would urge CIC to refrain from pursing any further steps in the process, for the time being, due to the potential adverse effects on Mr. Seyoum's mental health.

[[[[[[[[[

Reasons by B. Walter and Dr. G. Laws and Mr. N. Avison concurring

BW/jl