BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

REASONS FOR DISPOSITION
IN THE MATTER OF

KELVIN MURRAY KLOSTER

HELD AT: Forensic Psychiatric Hospital
Port Coquitlam, BC
January 16, 2018
Via Closed-Circuit Television

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr. T. Tomita, psychiatrist
A. MacPhail

APPEARANCES:
ACCUSED/PATIENT: Kelvin Murray Kloster
ACCUSED/PATIENT COUNSEL: Michael Ritzker
DIRECTOR AFPS: Dr. W. Widajewicz, D. Meyerhoff
ATTORNEY GENERAL: J. Boccabella

INTRODUCTION AND BACKGROUND

[1] On January 16, 2018, The BCRB convened an annual hearing to review the disposition of Kelvin Murray Kloster, the accused, who is now 58 years of age.

[2] Although we have considered all the evidence on record, for the purpose of these Reasons we only recite that which is necessary to our decision.

[3] On or about April 22, 2016, while in a psychotic state, Mr. Kloster attacked his son, with whom he was living, using both a knife and an axe. The victim suffered injuries to his face and arm. Mr. Kloster was charged with assault with weapon (s.267(a) *CC*), and aggravated assault (s.268(2) *CC*). After the index offence, Mr. Kloster disclosed a recent history of religiously-themed, delusional, psychotic experiences which precipitated the attack on his son whom he intended to kill.

[4] Mr. Kloster raised his son, the victim, from age 6. He has no prior documented history of psychiatric problems or treatment and no history of head injury.

[5] Mr. Kloster has a decades-long history of persistent, frequent (almost daily) and untreated alcohol and marijuana use.

[6] On assessment, Dr. Meldrum assigned diagnoses of Brief Psychotic Disorder, and alcohol and marijuana use (in remission). Testing revealed that Mr. Kloster's functioning was deteriorating due to a dementing process. Neuro-cognitive disorder also formed an aspect of his diagnosis.

[7] With medication, Mr. Kloster's psychosis quickly resolved, within days of the index offence. He was de-certified and monitored by a community mental health team.

[8] Mr. Kloster has prior narcotics and impaired driving convictions.

[9] On December 8, 2016, Mr. Kloster received a verdict of NCRMD on the assault with a weapon charge. He was released into the community subject to bail conditions.

[10] At his initial RB hearing on January 20, 2017, Mr. Kloster was discharged subject to conditions. In imposing its jurisdiction over the accused, the RB took into

consideration Mr. Kloster's significant alcohol, marijuana and more distant history of cocaine use; his recent abstinence; his claimed lack of memory of the details of the index offence, which appeared to correspond in time with the anniversary of his brother's death; his rapid response to treatment and the fact that he was fully co-operative, compliant and remorseful.

EVIDENCE AT HEARING

[11] For this hearing the accused's community case manager provided evidence that Mr. Kloster has remained compliant, sober, has attended all appointments as directed and has demonstrated a very positive response to treatment. His only incident of non-compliance with the Board's conditions was the social consumption of a half bottle of beer last summer. Otherwise, the evidence suggests abstinence.

[12] Mr. Kloster was "deeply affected" and chastened by the index offence. He has insight into his illness and the need to consume medication in order to maintain his mental health and to eliminate risk. He independently consumes his (recently adjusted), daily medication as directed and intends to continue to do so as long as medically advised.

[13] The case manager's evidence confirms that Mr. Kloster has been free of psychotic symptoms since his release from hospital, shortly after his arrest. He has experienced no more flights of religiosity.

[14] Although Mr. Kloster and his son have reconciled, the accused has, for financial reasons, decided to relocate back to Alberta. He has left his job of many years, and sold his mobile home in BC. He was permitted a visit leave to Alberta over the recent Christmas holiday period. He has secured accommodation, has offers of employment, and has connected with, and will be referred to, mental health services there. He has supportive family connections and a general practitioner in Alberta.

[15] Dr. Widajewicz provided evidence confirming that Mr. Kloster's illness remains in remission and that he is stable and asymptomatic. Dr. Widajewicz prefers a diagnosis of bipolar schizoaffective disorder which suggests the need for a more prolonged period of treatment and medication than the previous formulation.

[16] Mr. Kloster has been largely abstinent and has taken steps to become educated about his illness. Dr. Widajewicz believes that Mr. Kloster is insightful and can be

relied upon to remain adherent to treatment. He should continue to consume his medication to reduce the possibility of relapse and to manage his residual risk, given the episodic nature of his illness. Given the context of the illness, continued abstinence is also important.

[17] Dr. Widajewicz considers Mr. Kloster open and disclosive in interviews, though he still has memory gaps about the events (though not the motivation), comprising the index offence. Dr. Widajewicz testified that this is not unusual, especially as the offence occurred in the context of contributing factors of intoxication, impaired cognition, and at an emotionally vulnerable time. Mr. Kloster is genuinely remorseful and motivated to avoid any recurrence of harmful behaviour even if his illness relapses. Their rapport is termed excellent.

[18] As to evidence relating to Mr. Kloster's potential threat to others, Dr. Widajewicz cites the uncharacteristic but highly violent, spontaneous index offence in the context of illness and substance abuse. Mr. Kloster presents with no history of illness or violence. He understands the need to abstain. His vascular dementing condition may have contributed. Mr. Kloster could certainly decompensate if he were to return to alcohol and drug use.

[19] Dr. Widajewicz opines that Mr. Kloster's plan to relocate, including the opportunities for more appropriate employment, informed family support and access to treatment are sound and indeed, preferable to remaining in BC from the perspective of managing risk. Dr. Widajewicz is of the view that Mr. Kloster has taken the necessary steps to mitigate his key risk factors so as to be considered eligible for absolute discharge. He now functions as do other mental health patients in the community who do not have forensic supervision.

[20] Mr. Kloster testified that he has found forensic support and supervision helpful. He reviewed his plans to live and access treatment resources in Alberta. He explained his lapse in consuming some beer last summer. He derives benefits from his medication and intends to continue to use it.

[21] Mr. Kloster's son, the victim, has noted positive changes in his father to the benefit of their relationship. He holds no fear of his parent.

ANALYSIS AND DISPOSITION

[22] The Board's decision making is governed by s.672.54 and s.672.5401 of the *Criminal Code* which provide:

> **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:
>
> > **(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;
> >
> > **(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.
>
> **672.5401** For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public — including any victim of or witness to the offence, or any person under the age of 18 years — resulting from conduct that is criminal in nature but not necessarily violent.

[23] The Board must first determine whether, on the evidence, Mr. Kloster poses a significant threat to public safety as defined in s.672.5401. The Board does not conduct its own assessment of an accused's significant threat to public safety. As must any adjudicative body, the Board can only evaluate the evidence admitted at a hearing to determine whether it meets that threshold.

[24] In ***Calles v. British Columbia (Adult Forensic Psychiatric Services)***, 2016 BCCA 318, the BC Court of Appeal confirmed that:

> A significant threat to public safety is defined in s. 672.5401 of the *Criminal Code* to mean "a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent". The threat posed must be more than speculative

> and be supported by the evidence. It must be significant "both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of grave harm will not suffice", nor will a high risk of trivial harm: Winko, at para. 57. *(para. 15)*

[25] In ***R. v. Carrick***, 2015 ONCA 866, the Court specifically adopted the above formulation from ***Winko*** and added:

> In short, the "significant threat" standard is an onerous one. An NCR accused is not to be detained on the basis of mere speculation. The Board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge (*Par. 17*)

[26] The Review Board is tasked with forming an opinion as to an accused's significant threat in each and every matter before it. More often than not, in the case of an adult accused, professional risk assessment evidence is presented in the HCR.20 v.3 format. It falls to the Board to analyze and assign weight to the factors addressed, among others it considers relevant, in its determination of significant threat, which is a legal rather than a psychiatric concept.

[27] While the nature of Mr. Kloster's illness is such that he may well experience further episodes of psychosis in the future, that does not conflate with the probability of violence. We agree that to the extent possible, Mr. Kloster has taken reasonable steps to reduce that possibility including psychoeducation, adherence to treatment, abstinence, and developing a sound risk management plan to be implemented in a different environment, including more appropriate employment, access to treatment, supportive informed family and friends, abstinence, and an insightful accepting attitude.

[28] In ***Re Almestadi***, the RB said:

> It is however an unusual, indeed rare feature of this case that the accused has arranged to present a sufficiently developed alternative plan for his future care and treatment, which has within it a number of positive 'protective' factors which are simply not available under the status quo.
>
> Is it possible that an accused might satisfy the significant threat threshold under one set of circumstances but be entitled to be absolutely discharged under another plan? In an environment of scarce resources it would be unreasonable and unrealistic to impose

> upon the Director of Forensic Psychiatric Services the sole responsibility to marshall all of the resources an accused needs to ensure public safety: “the notion of danger must not be examined in the abstract outside of the context in which (the accused) will be living.”: **Re Lajoie**, (PQ Court of Appeal #500-10-000600-99, Feb 18, 1994). **This panel agrees that the prediction or determination of significant threat is not absolute but rather must be approached on a pragmatic and contextual basis.** In other words it is not beyond possibility that an accused could, under one treatment plan be considered a significant threat but not under an alternative approach. The Board is entitled indeed it must, following ***Winko***, take into account all protective mechanisms available under alternative plans. Ideally every disposition hearing would routinely involve a comparative analysis of competing care treatment plans. Presumably, virtually any accused might be considered safe given a sufficient, relevant, responsive and available array of supervisory and treatment resources.: paras 19,20. **(emphasis added)**

[29] We are satisfied that with his imminent relocation to Alberta, under the preferred plan for stable employment, support and access to treatment, Mr. Kloster is not a significant threat to public safety. He is entitled in law to be absolutely discharged.

Reasons written by B. Walter in concurrence with Dr. T. Tomita and A. MacPhail.

[[[[[[[[[