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

AMENDED REASONS FOR DISPOSITION
IN THE MATTER OF

NICHOLAS GREGORY LEESON

HELD AT: **Best Western Hotel**
Terrace, BC
17 July 2008

BEFORE:
CHAIRPERSON: **B. Long**
MEMBERS: **Dr. R. Stevenson, psychiatrist**
L. Chow

APPEARANCES:
ACCUSED/PATIENT: Nicholas Gregory Leeson
ACCUSED/PATIENT COUNSEL: A. Roth
DIRECTOR AFPS: Ms. Jensen Dr. M. Riley (by telephone)
ATTORNEY GENERAL: R. Kis

*** Page 6, paragraph 21 "Regrettably the Board was not satisfied that he would not." (the second "not" is removed)**

[1] On July 17, 2008, the BC Review Board held an annual disposition review in the matter of Nicholas Leeson. At the conclusion of the hearing the Board informed the parties of its decision to make a conditional discharge reviewable in nine months. The Board did not inform the parties of the specific terms of the order, as it wanted to further consider the exact wording of the conditions. However the Board did communicate its intention in general terms to permit the accused to return to his home in Greenville as well as potentially add a new condition governing the testing for prohibited substances.

[2] Mr. Leeson is under Board jurisdiction as a consequence of an NCR verdict of February 22, 2000 on two counts of assault. The index offences were committed on February 3, 1999 when the accused, without provocation, attacked his brother in the family home. He subsequently assaulted his sister after she intervened to defend her brother.

[3] Mr. Leeson's personal and forensic histories have been reviewed exhaustively in the course of the 13 previous disposition reviews that have been held since the NCR verdict, and need not again be repeated in any detail. In summary the accused is 30-year-old man with schizophrenia and substance abuse disorders. He is of First Nations ancestry from the Nass Valley. He was likely born with some degree of mental impairment as a result of his mother's heavy use of alcohol while she was pregnant. He sustained a head injury at age 2. He abused a variety of substances from an early age including inhalants. The combination of these insults has left the accused with an IQ of somewhere in the 60s. He has a history of assaultive behaviour towards his family that predated the index offences.

[4] Mr. Leeson was initially detained in custody at FPH following the NCR verdicts. He continued to exhibit significant aggression while in hospital. His return to the community was hampered by the absence of suitable resources that could offer the significant degree of support that was necessary to make his risk assumable in community. Eventually a tertiary care facility located in Terrace by the name of Seven Sisters was identified as a possible placement, and the accused has resided there since about September 2005. Although he has done well in this setting, Mr. Leeson has never wavered from his strongly held desire to return to his home in Greenville, in the Nass Valley, which is about an hour and a half away from Terrace. This has not been possible because of the absence of equivalent resources in that community. Thus to some degree the accused's reintegration

into the community has not been completed, in the sense that that he would not remain at Seven Sisters unless compelled to do so under Review Board jurisdiction. These circumstances have contributed to the Board's prior decisions to maintain jurisdiction over the accused, as the evidence has consistently established that the accused's threat would be unacceptably high should he return to live in Greenville.

[5] In preparation for this hearing the Board was provided with reports from the accused's treatment team composed of his psychiatrist, Dr. Riley, and case manager, Ms. Jensen. The Board heard additional oral evidence from Dr. Riley and Ms. Jensen, who were connected to the hearing by conference call, Mr. Leeson and Karen Leeson, the accused's mother.

[6] The treatment team reports that the accused has had another good year in the community. He has continued to reside at Seven Sisters. His psychiatric care is provided by non-forensic medical staff associated with Seven Sisters. His mental state has been stable. He has not acted aggressively or otherwise inappropriately. He has exhibited an improved degree of concentration and behaviour.

[7] Mr. Leeson spends his days involved in activities associated with the structured programming of this facility. The accused's care is supplemented by some limited additional services provided by Community Living British Columbia. Regrettably such services are relatively minimal in part because of unionized contractual disputes between the various care providers.

[8] The accused has been able to spend increasing time over the last year with his family in Greenville. This has consisted of approximately two weekends every month and about seven to ten day periods every four to six weeks. Although there is much less supervision in this community, neither the accused nor the community have experienced any noteworthy problems. Dr. Riley observed that some of the accused's progress of the last year may be related to the increased time he has been allowed with his family.

[9] The only negative evidence flows from a report from Seven Sisters staff that in March 2008 the accused was found with an empty aerosol shaving cream can. Mr. Leeson presented as unsettled, angry and swearing, suggesting to staff that the accused had consumed some of the inhalant. The accused denied any ingestion of the aerosol. Given the accused's presentation, history of inhalant abuse, and pattern of consistent denial, Seven Sisters staff considered the incident highly suspicious.

[10] Mr. Leeson's desire to return to live with his family in Greenville has not changed. The treatment team has continued to oppose such a move, based upon absence of resources in Greenville and the unwillingness of the accused's family to have him live at home permanently. Ms. Jensen's report and oral evidence specifically addressed this latter obstacle. Her evidence was that she had recently spoken with Karen Leeson who told her that the family was not prepared to have the accused live at home full-time.

[11] Aside from suspected inhalant use, the accused has been abstinent from all other substances for a significant period of time. As a result the last panel deleted the substance use prohibitions from the accused's order and raised the threshold for testing for illegal substances from at the discretion of the Director to reasonable grounds. The Board's reasons for making these changes is found at paragraph 15 of the reasons for disposition of August 13, 2007, as follows:

> "We decided to eliminate the substance prohibition conditions, as well as relax the testing condition, based on evidence that the accused has not shown any inclination to use substances, aside from occasional suspicions about inhalant use, for a number of years. We further found that it would be useful to test Mr. Leeson without those specific prohibitions with an eye to the future to see whether he could demonstrate abstinence without a Board order. However we concluded that the treatment team should have the ability to test the accused for the presence of substances in the event his mental state should deteriorate. The treatment team needs to be able to assess the accused's mental health as well determine why the accused's mental state might be declining. As a result test the testing clause remained in the order, although the Director was required to first have reasonable grounds to suspect that the accused had used a substance."

[12] The Board was therefore astonished to learn that despite the changes in the order, the Director had submitted the accused to urine testing every two weeks. Dr. Riley's explanation was that this was standard clinical procedure for individuals like the accused with established histories of significant substance abuse. When the requirement to have reasonable grounds was brought to Dr. Riley's attention, he replied that the tests were "voluntary", noting that the accused could have chosen to not submit to testing. When next asked if the accused was informed of his right to refuse, Dr. Riley replied that he had not told the accused. Ms. Jensen was asked if she had informed the accused and her answer was the same as Dr. Riley's. Indeed there was not the remotest suggestion in any of the evidence that any member of the treatment team had informed the accused of his right to

refuse or that the accused was otherwise aware that he was not obligated to submit to such testing. All of the urine tests were negative.

[13] The Board had an opportunity to hear from Mr. Leeson. He said that no one had told him that he could refuse the urine tests that had been conducted over the last year. He also said that he had not been informed that he was not required to take medication. He said that he did not think he had schizophrenia and that his medication did not really have any effect upon him. He said that if he had the choice, he might stop taking his medication for a couple of days and then see how he felt. He said that he liked living at Seven Sisters. He added that it was a nice place and he was kept busy. He initially said he did not know whether he would choose to move home, but later it became apparent that that was his preference. He said that if he was absolutely discharged, "lots of things would be different" but was unable to offer any examples.

[14] Finally, the Board had the advantage of hearing from Karen Leeson. She said that she had noticed an enormous change in her son's behaviour over the years he had been at Seven Sisters. She reported that the accused's many visits to the family home had gone well and that he had behaved appropriately. She said that as a result the family was ready to have the accused move home permanently, at least on a trial basis. She said that there would have to be strict conditions such as unconditional compliance with recommended medication. She wondered whether Seven Sisters would remain available for respite. She thought that the move should be initially tried while the accused was still subject to the protections and safeguards afforded by Board jurisdiction. Mrs. Leeson specifically denied that she had told Ms. Jensen that the family was not prepared to have the accused come home. She said that when she spoke with Ms. Jensen, the interview was conducted in a hurried manner.

[15] The Director, represented by Dr. Riley and Ms. Jensen, submitted that the accused remained a significant threat to public safety but that his risk was manageable in the community under conditional discharge. In the Director's submission the accused's risk to behave violently had not altered appreciably. Absent forensic support and supervision, the accused would be unlikely to remain at Seven Sisters and would return to Greenville. In the absence of a comparable level of supervision, he would be at high risk to become noncompliant with treatment and/or relapse to substance abuse. This would leave him at real and foreseeable risk to act violently, as has in the past. The Director was not opposed

to altering the terms of the conditional discharge to permit the accused a trial move to Greenville.

[16] The Crown, represented by Ms. Kis, supported the Director's position.

[17] Mr. Leeson, represented by Mr. Roth, sought an absolute discharge. Mr. Roth stressed that the index offences had occurred many years ago and that the accused's behaviour over the last several years, and in particular the last year, had been good. He observed that all the accused's regular urine screens had been negative. He submitted that the accused was ready for absolute discharge.

[18] The Board must make the least onerous and restrictive disposition compatible with the accused's circumstances in accordance with the provisions of s.672.54 of the *Criminal Code*. Unless the Board positively concludes that the accused is a significant threat to public safety, it must make an absolute discharge.

[19] Dr. Riley's most recent risk assessment is found at page 3 of his report of June 17, 2008 at Exhibit 63, and provides as follows:

> "In the absence of a legal order there would be no way of requiring Mr. Leeson to remain at Seven Sisters, maintain treatment with antipsychotic medication or engage with contracted services through CLBC, including residential support. The residual symptoms of Mr. Leeson's mental illness are associated with very limited insight into the nature of his disorder and disability, as well as his need for treatment and other forms of support. If left to his own devices it is my opinion that Mr. Leeson would likely make poor choices with respect to his own health and well being, and that this would very likely lead to him coming into conflict with others."

[20] Dr. Riley affirmed this opinion in his oral evidence. He repeated that if the accused was left to his own devices, his limited cognitive capacity in combination with the residual symptoms of his illness rendered the prospect of future compliance with treatment and abstinence from substances unlikely. In such circumstances the symptoms of the accused's illness would return and he would be likely to behave violently.

[21] Although the accused has maintained commendable stability in the community, especially over the last year, his limited cognitive capacity, perhaps in combination with negative symptoms of his illness, leaves him with little, if any, insight into his circumstances. Despite the accused's absence of insight, the fundamental issue is whether he can be persuaded to make responsible decisions and accept appropriate care without

compulsory forensic supervision. Regrettably the Board was not satisfied that he would. Although Mr. Leeson is an affable and friendly individual, we have concluded that his significantly compromised mental state leaves him unable to exercise appropriate decisions for his well-being. Furthermore the uncertainty over where the accused would choose to live underscores the potential for real problems. Mrs. Leeson's evidence was clear that while the family was supportive and willing to try to have the accused move home, they would like to do so with the forensic support, assistance and safeguards. Considering all of the evidence, the Board concludes that absent a further period of compulsory supervision the accused would be at unacceptable risk to not follow appropriate advice, relapse to symptomatic illness, and thereby become a significant threat. He is therefore not entitled to an absolute discharge.

[22] In next choosing the least onerous and restrictive disposition, the Board had little hesitation in concluding that the accused's risk remained manageable under conditional discharge. The more difficult decision was whether the accused should be allowed to move back to Greenville. We begin by observing that we were impressed with the demeanour and obvious sincerity of Mrs. Leeson. We found her evidence straightforward and without pretence. We concluded that the conflict in evidence between Mrs. Leeson and Ms. Jensen likely was caused by communication difficulties, and perhaps worsened by a hurried conversation as described by Mrs. Leeson.

[23] After careful reflection, the Board was persuaded that the time had at last come to permit the accused to move home to Greenville. The evidence shows that the accused has spent increasing time in that community without undue difficulty. Mrs. Leeson's evidence was unequivocal that the family was prepared to try to have the accused move home. Mr. Leeson has not behaved violently for some time. He has remained abstinent from substances, with the exception of suspected inhalant use. Although this was of some concern, it was not sufficient to justify keeping the accused at Seven Sisters. The Board accordingly amended the order to permit the accused the option of moving to Greenville, should that be his choice.

[24] The Board considered it necessary to delay the effective date of this condition in order to provide the treatment team with a reasonable period to make the arrangements for this unexpected development as well as allow the Leeson family some time to plan for this transition with the treatment team. The decision to move home may have major implications for the accused's long-term care, as it may precipitate the loss of his bed at

Seven Sisters. The kind of respite that Mrs. Leeson mentioned may not be available. Such a decision should not be made quickly or without significant reflection. The Board therefore delayed the effective date of this condition to permit this process to unfold.

[25] We now return to the evidence regarding substance use testing. The last panel's reasons for changing the conditions governing substance use were clear and unambiguous. It is evident that the spirit and content of the last order were not followed. The accused is subject to the general direction and supervision of the Director. The members of the treatment team stand in a position of authority vis-à-vis the accused. Failure to comply with the Director's direction and supervision may have serious consequences, including the potential for involuntary return to the secure setting of FPH. The Director admitted that the accused was never informed of his right to refuse. Mr. Leeson said that he did not know that he had a right to refuse the tests. He has an IQ in the 60s. Dr. Riley's suggestion in the face of this evidence that the testing was "voluntary" was utterly without merit and we reject that explanation without qualification or further discussion.

[26] The jurisprudence regarding the power of the state to search for and seize bodily substances stresses the invasive aspect of such conduct. As stated by the Supreme Court of Canada in *R. v. Shoker,* [2006] 2 S.C.R. 399 at paragraph 23:

> "The seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements."

[27] Although the B.C. Court of Appeal in *Mazzei v. Director of Adult Forensic Services and Attorney General of British Columbia,* 2006 BCCA 321, at paragraph 58, acknowledged that urine testing conducted under Review Board authorization was less intrusive than other types of bodily searches such as blood testing, the Director's failure to comply with the last order was nonetheless serious. The Board considers the conduct of the Director to be a marked departure of what would be expected in the circumstances.

[28] Moreover the failure to inform the accused of his right to refuse would have likely rendered the admissibility of any results questionable. As stated in *R. v. Lewis (1998)*, 122 C.C.C. (3d) 481 (Ont. C.A.):

> "It is well established that a person cannot give an effective consent to a search unless the person is aware of their right to refuse to consent to that

> search: R. v. Wills (1992), 7 O.R. (3d) 337 at p. 354, 9 C.R.R. (2d) 360 at pp. 376-77, 12 C.R. (4th) 58 at p. 78 (C.A.); R. v. Borden, [1994] S.C.R. 145 at p. 162, 24 C.R.R. (2d) 51 at p. 61, 33 C.R. (4th) 147 at p. 158; R. v. Blackstock, Ont. C.A., September 4, 1997 [reported (1997), 10 C.R. (5th) 385, 30 M.V.R. (3d) 165]. If the police do not tell a person of the right to refuse to give a consent to a search, the police run the very real risk that any apparent consent given will be found to be no consent at all for the purposes of s. 8: R. v. Wills, supra, at p. 353 O.R., p. 376 C.R.R., p. 77 C.R."

[29] When the Board informed the parties of its intended order at the conclusion of the hearing, it mentioned that it was considering a condition that would require the Director to inform the accused of his right to refuse any demand made by the Director that was not made pursuant to this order. These comments were made in reaction to the evidence of the hearing. However upon further reflection the Board was satisfied that the Director's conduct was likely not a deliberate violation of the order. We strongly suspect that the order was not carefully reviewed or considered. We have concluded that the highly critical comments made by the Board in the course of the hearing in combination with these reasons will be sufficient to impress upon the Director the importance of adhering to the specific conditions of the order. In any event the Board expects that should this not be the case, Mr. Leeson's counsel or advocate will forthwith bring this to the Board's attention prior to the next scheduled review.

[30] Lastly, the Board made the order reviewable in nine months on the assumption that the accused would choose to live with his family in Greenville. The Board considered that time to be a reasonable period for evaluation. In the event the move proves successful, this will allow the accused to reappear before the Board to seek absolute discharge.

Reserved reasons prepared by B. Long with Dr. R. Stevenson and L. Chow concurring.

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