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

MARGARET MUILENBURG

HELD AT: **Forensic Psychiatric Hospital**
Port Coquitlam, BC
January 23, 2018

BEFORE:	**CHAIRPERSON:**	**B. Walter**
	MEMBERS:	**Dr. S. Iskander, psychiatrist**
		A. Markwart

APPEARANCES:	**ACCUSED/PATIENT: Margaret Muilenburg**
	ACCUSED/PATIENT COUNSEL: D. Abbey
	DIRECTOR AFPS: Dr. A. Kolchak, C. Horvath
	DIRECTOR'S COUNSEL: D. Lovett, QC
	ATTORNEY GENERAL:

INTRODUCTION AND BACKGROUND

[1] On January 23, 2018, the BCRB convened a mandatory hearing under s.672.81(2.1) of the *Criminal Code* in the matter of Margaret Muilenburg, the accused. Ms. Muilenburg was conditionally discharged at an annual hearing on June 26, 2017, effective July 26, 2017. Her discharge was not implemented. Rather she continued to be detained due to the inadequacy or lack of support services available to maintain her in her family home. Her non-discharge for a period of seven days past the effective date of the order constituted a significant restriction on her liberties and triggered another hearing under s.671.8(2.1), held on October 18, 2017. That hearing again resulted in conditional discharge which erroneously delayed its effective date until November 6, 2017. The decision was based on the absence of evidence of any change in Ms. Muilenburg's mental state or risk so as to justify her ongoing detention: *par 16, Reasons*.

[2] On November 14, 2017, the Director once again filed notice that Ms. Muilenburg was not discharged due to the lack of required in-home support services or an alternative residence. Once again a mandatory hearing under s.672.81(2.1) of the *Code* was triggered and convened on January 23, 2018. At the conclusion of the hearing the Board reserved both its disposition and reasons.

HISTORY OF THE CASE

[3] On May 16, 2004, Ms. Muilenburg was charged with possession of a dangerous weapon, contrary to s. 88(1) of the *Code*. She was reportedly observed chasing a woman while brandishing a knife. When police attended, Ms. Muilenburg allegedly uttered obscenities and refused to comply. She was restrained, transported to Nanaimo Regional General Hospital and admitted. Ms. Muilenburg's behaviour was apparently not uncommon and she was known to have mental health problems.

[4] Ms. Muilenburg's first hospital admission was in 1974. Thus she has a long history of chronic schizophrenia or schizoaffective disorder, from a young age, which has proven refractory to treatment. She also engaged in excessive water intake causing "water intoxication", which carries risk of seizures and delirium.

[5] On admission to FPH for assessment, Ms. Muilenburg was actively psychotic and disorganized and slow to respond to trials of various medications.

[6] When actively ill, Ms. Muilenburg can present as paranoid, disorganized, impulsive, sarcastic and appear violent. She can be at least residually symptomatic even when ostensibly treatment compliant. Her tenure in the community and her treatment was supported by her husband who himself had demonstrated a tendency to be verbally abusive in relation to service providers, and may have his own mental health issues.

[7] On August 17, 2004, Ms. Muilenburg was given a verdict of NCRMD and committed to FPH pending disposition.

[8] Ms. Muilenburg has presented with no drug or alcohol issues and has no record of criminal convictions.

[9] Despite the absence of a documented history of violence, because of Ms. Muilenburg's history of at least threatening comments, her limited response to treatment, and her lack of insight, she was detained at FPH until her discharge, subject to conditions, in July 2005. That discharge was short-lived. Within 3 months, Ms. Muilenburg was re-admitted to FPH under an Enforcement Order in a decompensated state. After a number of months of relative stability, she was once again discharged in June 2006.

[10] Ms. Muilenburg's mental state continued to fluctuate. By January 2007 she was back at FPH in the context of an acute deterioration, including assaultive behaviour toward family members, triggering intervention. Her presentation was summarized by Dr. Meldrum:

> Despite approximately a month in hospital at FPH and almost three weeks prior to that at Nanaimo Regional General Hospital, Margaret continues to be acutely manic and overtly psychotic. She requires an extensive review of her medication and a second opinion to see if there is a novel treatment approach that will result in a substantial improvement to her mental state. Considerable discharge planning will need to occur with Morris and Margaret's daughter, as well as MCFD, to ensure that the risk to Morris, Ena, and anyone else in the family home can be lowered and safely managed. : *Ex. 29.*

[11] At FPH after various unsuccessful treatment attempts, Ms. Muilenburg was initiated on ECT with some initial positive response.

[12] Ms. Muilenburg was again discharged in June 2009, and with three relatively brief re-admissions, was maintained in the community until 2015.

[13] Ms. Muilenburg has remained at FPH since July 2015. Her stay in custody has been prolonged due to a number of barriers to reintegration including:

- her mental, physical and cognitive health including mobility issues and injuries:
- her husband's lack of co-operation with service providers;
- the inadequacy or non-availability of supportive resources in the community;
- her verbal, and at times, physical reactivity;
- her declining independent living skills; and
- the risk of delirium due to water intoxication which might exacerbate paranoia and increase her risk of violence.

[14] Nevertheless, despite Ms. Muilenburg's overall functional decline, she has persisted and her husband has consistently supported her in her desire to return to their home.

[15] Over the course of Ms. Muilenburg's recent hearings, the evidence has not supported her detention for either public safety or clinical reasons: see Ex. 93, paras 6, 7, 16.

EVIDENCE AT JANUARY 23, 2018, MANDATORY HEARING

[16] The events giving rise to this hearing are set out above.

[17] We are entitled to accept some, none or all of the evidence before us. While we have considered all of the evidence on record in this case, we only recite that which is necessary to our decision.

[18] Dr. Kolchak continues to endorse the diagnosis of schizoaffective disorder, including symptoms of psychosis such as hallucinations and delusions, agitation, periodic hostility and aggression. He also highlights medical issues which could be expected to affect Ms. Muilenburg's stability including delirium due to excessive water intake and compromised, declining cognition.

[19] That said, Ms. Muilenburg has remained mentally stable for more than 12 months. She has demonstrated no recent violence or aggression in 10 years. Though asymptomatic and compliant and despite the absence of recent further cognitive decline, Ms. Muilenburg remains disorganized.

[20] Dr. Kolchak continues to be of the view that Ms. Muilenburg requires supports in order to function in the community and to avoid stressors which affect her mental stability. She also has a tendency to present as belligerent which can cause discomfort in caregivers and service providers. She objects to being touched in relation to bathing and hygiene and resorts to foul language. Her conversation tends to derail or tangent and her insight into the effects of her behaviour on others is poor.

[21] Though FPS is working to marshal services to enable her to transition home, Dr. Kolchak believes that Ms. Muilenburg would be better served by placement in a long term care facility but no referral has been made.

[22] Ms. Muilenburg's husband is evidently able to resume care of Ms. Muilenburg after January 25, 2018. The plan is to reintegrate her incrementally starting with day leaves. Her next, second, day leave is scheduled for January 25, and these outings will progress to overnight stays if Mr. Muilenburg is agreeable and able to provide care.

[23] The local health authority and another agency have agreed to re-consider their involvement and the levels of available support are under discussion.

[24] Ms. Muilenburg is more physically stable and stronger than she was two years ago. She is considered at least capable of being physically assaultive to those in her immediate environment when ill, but her husband believes he can manage her.

ANALYSIS AND DISPOSITION

[25] This hearing is convened under s.672.81(2.1), which provides:

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

[26] This section was amended in 2005. It has never been clear what the effect or outcome of a review of the Director's decision to significantly increase restrictions on an accused's liberty is intended to accomplish. In other words, it is manifestly unclear, should the Review Board determine that a decision to restrict liberties was not justified, or even arbitrary or punitive, what remedial action, beyond restoring the accused's "liberty", could possibly ensue.

[27] In this case then, as was the situation at the previous hearing, we find it difficult and unhelpful to make a finding on the issue. Instead we have determined to treat the proceeding as an early review of Ms. Muilenburg's disposition under s.672.81(1) or (2).

[28] We add parenthetically and without intending to be critical, that a lawful disposition must not be thwarted in its implementation by the imposition of successive restrictions on an accused's liberty. When a party has reason to disagree with a disposition, the appropriate remedy is to seek recourse with the BC Court of Appeal and to suspend the disposition under s.672.73 and 672.76(2): See ***Beaudoin***, BCRB 1999 No. 27.

[29] Making or reviewing a disposition is governed by s.672.54 and 672.5401:

> **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
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> > **(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.
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> **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.

[30] 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)*

[31] A finding of significant threat must be based on evidence rather than speculation. There must be a real risk of physical or psychological harm to individuals in the community that is serious, in the sense of going beyond the merely trivial or annoying. The conduct of concern must be criminal in nature. There must be a foreseeable and substantial risk that the accused would, or is likely to commit a serious criminal offence if discharged absolutely. In making these determinations, we must have regard both to the interests of individual liberty as well as to the paramount consideration of public protection.

[32] 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)*

[33] In this case, despite Ms. Muilenburg's long standing, serious and refractory mental illness, she has never, beyond posturing and verbally remonstrating, occasioned serious physical or psychological harm on the evidence before us.

[34] There is certainly no evidence of any conduct which satisfies the definition of significant threat occurring within the past 10 years, despite Ms. Muilenburg's irascible presentation. She is a woman whose conduct, care and residual risk should in all respects be manageable and assumable by the responsive and responsible agencies that are available to the public at large and to the majority of mentally ill individuals in the community. These include police, civil mental health, general health and local in-home support services: See ***LaJoie*** (1994) Q.C.A. She is not a patient who justifies the weighty and coercive oversight of the Criminal Justice system.

[35] Ms. Muilenburg's case is close to that dealt with by the *Ontario Court of Appeal i*n ***Re Pellet*****,** 2017 ONCA 753. In that case, the accused pushed a small child on a street

believing she was receiving telepathic messages from the victim. She had no other history of overt violence and was now 62 years old. She had poor insight, was at risk for non-compliance and incapable of consenting to treatment.

[36] The Court found that the accused's clinician viewed the index offence and that risk of aggressive behaviour due to non-compliance as warranting the Review Board's jurisdiction. However, he failed to measure these incidents or his conceptions against the standard of a risk of serious or psychological harm. The Court said:

> [32] The appellant has benefitted from her time under the Board's supervision. We acknowledge that imposing an absolute discharge may not be in the appellant's best interests. However, this is not relevant to the determination under s.672.54 of the *Code*: see *R.v. Ferguson*, 2010 ONCA 810, 271 O.A.C. 104, para. 45; and *Re Wall*, para. 30. There is a risk that the appellant will cease taking her medication, and that her condition will worsen, perhaps quite quickly. However, the appellant is entitled to be discharged unless she constitutes a significant threat to the safety of the public.
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> [33] The evidence failed to meet the "onerous" standard under s.672.54. The appeal is allowed. The decision of the Board is set aside. In its place, and pursuant to s.672.78(3)(a), we order an absolute discharge.

[37] In this case, while Ms. Muilenburg's interests might continue to be better served by remaining under FPS care, absent a finding of significant threat, the Review Board is not constitutionally permitted to impose its restrictive jurisdiction. We also take comfort in the expectation that, even with the termination of our jurisdiction, the Director will not precipitously withdraw its support until the accused has supportive resources available to her.

[38] Ms. Muilenburg is absolutely discharged.

Reasons written by B. Walter in concurrence with Dr. S. Iskander and A. Markwart.