

**IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE
R.S.C. 1985 c. C-46, as amended 1991, c. 43**

AND

THE BRITISH COLUMBIA REVIEW BOARD

**IN THE MATTER OF THE
DISPOSITION HEARING OF**

RICHARD PETERSON

REASONS FOR DISPOSITION

**HELD AT: Environmental Appeal Board Office
Victoria, BC
12 October 2004**

**BEFORE: CHAIRPERSON: B. Long
MEMBERS: Dr. G. Laws, Psychiatrist
 N. Avison
 H. Landerkin/Observer**

**APPEARANCES: ACCUSED/PATIENT: Richard Peterson
ACCUSED/PATIENT COUNSEL: C. Tollefson
HOSPITAL/CLINIC: H. Vollert, Dr. R. Miller
ATTORNEY GENERAL: J. Dunlap**

1 Introduction

2 On October 12, 2004, the Review Board conducted an annual disposition
3 review in the matter of Mr. Richard Peterson. At the conclusion of the hearing the
4 Board made a conditional discharge on the same terms as the order under review.
5 The Reasons were reserved.

6 Index Offences

7 On September 18, 1999, the manager of Mr. Peterson's apartment building
8 heard a fire alarm in the complex. He entered the lobby and saw the accused. Mr.
9 Peterson denied setting the alarm. However, he had an intercom receiver in his
10 hand, which he then threw at the glass front door causing it to shatter. The
11 manager attempted to restrain Mr. Peterson. In the ensuing scuffle the accused
12 entered the manager's apartment, attacked him and smashed items in the suite.
13 The manager subdued and held him until the police arrived. On arrest the accused
14 told the police that he should have taken a hammer to the manager and killed him.
15 Mr. Peterson was found not criminally responsible by reason of mental disorder on
16 May 7, 2001 on charges of mischief under \$5,000 and uttering a threat to cause
17 death or bodily harm.

18 Evidence

19 The disposition information consists of 20 exhibits and includes new reports
20 from the forensic treatment team, composed of Dr. Miller, the accused's
21 psychiatrist, and Mr. Vollert, nurse and case manager. The reports were
22 supplemented by oral evidence from these witnesses.

23 Accused's Background

1 Mr. Peterson is 58 years of age. He appears to have a lengthy history of
2 mental illness and resistance to treatment. The disposition information does not
3 contain a complete history of the accused, as he has steadfastly refused to
4 disclose much about himself and has not consented to allow the Director to obtain
5 information or records about him from other agencies or institutions. There is a
6 limited history in Dr. Lohrasbe's psychiatric assessment of May 1, 2001, exhibit 3,
7 which was prepared for Court prior to the NCR verdict, which we found useful.

8 Dr. Lohrasbe wrote that he initially met the accused in January 1992 on his
9 first contact with Adult Forensic Psychiatric Services. Although he was
10 uncooperative on interview, he disclosed that he had a psychiatric admission to
11 hospital in Alberta in 1980 under a court ordered disposition. Dr. Lohrasbe found
12 the accused paranoid, angry and grandiose. He was able to persuade him to
13 accept medication, which resulted in his psychotic symptoms subsiding. However
14 the accused abruptly refused to accept any further medication or treatment in July
15 1992.

16 The next reported psychiatric contact was in December 1992 when the
17 police took the accused to hospital. The attending psychiatrist described the
18 accused as angry and paranoid. He was given antipsychotic medication and
19 discharged a week later, after most of his psychotic features had declined. The
20 accused again refused treatment within a matter of weeks.

21 There is no further information about the accused until the index offences
22 occurred in September 1999, following which he was admitted to hospital and
23 certified under the Mental Health Act. He eloped about a week later although

1 apprehended the following month. He was discharged from hospital in early
2 December 1999, but did not return for outpatient treatment.

3 Mr. Peterson's next contact with the Forensic Psychiatric Clinic was in
4 January 2001 after referral from his bail supervisor. He was certified and admitted
5 to hospital where he remained until February 2001 when he was discharged to the
6 community under the extended leave provisions of the Mental Health Act.

7 Mr. Peterson currently lives at an apartment in Victoria at Johnson Manor,
8 which is a supported facility geared towards the needs of the mentally ill. He leads
9 a somewhat solitary existence. He remains closed with the treatment team, and
10 resistant to treatment. He steadfastly maintains that he has no mental illness and
11 that he obtains no benefit whatsoever from medication. He has told Mr. Vollert that
12 he is tired of the whole process of assessment, monitoring, supervision and
13 treatment. If he had the choice he would not wish to be followed by any sort of
14 mental health team. The treatment team has responded by reducing the amount of
15 contact and supervision with the accused, and that seems to have improved the
16 therapeutic relationship, such as it is.

17 Mr. Peterson has a criminal record, which is reproduced at the last page of
18 Exhibit 2. He has four convictions for assault and two convictions for assault
19 causing bodily harm between 1969 and 1998. Mr. Peterson was also convicted of
20 a number of property and weapons offences. He has been sentenced to periods of
21 incarceration as high as three years. Efforts were made following the last
22 disposition review to obtain details about the last assault conviction in 1998.
23 However, we learned that no further information is available, as the records with
24 respect to that incident have been destroyed.

1 Mr. Peterson received a custodial disposition at his first disposition review on
2 June 15, 2001. He was conditionally discharged at the next hearing in November
3 2001, and has since resided in the community on conditional discharge.

4 Positions of the Parties

5 The Director, represented by Dr. Miller and Mr. Vollert, sought a further
6 conditional discharge on the same terms as the existing order. In the Director's
7 submission the accused would probably cease to take his medication if not under
8 Board jurisdiction, as he has consistently maintained that he has no mental illness
9 and medication provides no benefit to him. He would then likely relapse to
10 psychosis, resulting in a return to aggressive and violent behaviour that would
11 place the public at unacceptable risk.

12 Mr. Dunlap, on behalf of the Crown, agreed with the Director's submission.

13 Ms. Tollefson, Mr. Peterson's counsel, asked the Board to make an absolute
14 discharge. Ms. Tollefson submitted that there were major gaps in the accused's
15 history and the available evidence was insufficient to establish significant threat.
16 She reminded the Board that it must avoid any presumption of dangerousness
17 linked solely to illness. She noted that Mr. Peterson has a longstanding desire to
18 be left alone. She concluded that the evidence demonstrated that this could be
19 done without undue risk to the public.

20 In view of Ms. Tollefson's position, the Board sought to question Mr.
21 Peterson. Ms. Tollefson submitted that the accused was not a compellable witness
22 and did not wish to give evidence. We did not agree, and ruled that he was
23 compellable. We advised Mr. Peterson that while we were prepared to accept his
24 decision to remain silent, he risked that we might draw an adverse inference. We

1 then adjourned for a few minutes in order to permit Mr. Peterson to reconsider his
2 position and discuss the matter with Ms. Tollefson. On resumption, Ms. Tollefson
3 advised the Board that Mr. Peterson would not agree to give evidence.

4 Analysis

5 i. Significant Threat

6 The Board must determine whether the accused is a significant threat to
7 public safety in accordance with s. 672.54 of the *Criminal Code*. We must make
8 the least onerous and restrictive disposition compatible with the accused's
9 circumstances while taking into account four factors. They are the need to protect
10 the public from dangerous persons, the mental condition of the accused, the
11 reintegration of the accused into society, as well as the other needs of the accused.
12 Unless the Board can positively find that the accused is a significant threat to the
13 safety of the public, the least onerous and restrictive disposition must be an
14 absolute discharge.

15 Mr. Peterson's history, which we acknowledge is sparse and incomplete,
16 demonstrates a pattern of cyclical illness. The accused experiences mental
17 deterioration, involuntary hospital treatment, improvement in mental state,
18 discharge from hospital, noncompliance with medication and treatment, and
19 subsequent relapse to psychosis. Mr. Peterson has remained consistently
20 forthright that he does not believe he has a mental illness or benefits from
21 medication. We concluded that if he received an absolute discharge, he would
22 likely discontinue all treatment including medication, resulting in relapse to illness.

23 We note that Mr. Peterson has a considerable history of violence. He has
24 six prior convictions for assault. We recognize that there is a 20-year gap in

1 assault convictions between 1972 and 1992. However, the accused was convicted
2 of theft in 1977 and impaired driving and refusing to provide a breath sample in
3 1981. While the latter conviction does not involve violence, the courts have
4 repeatedly stressed the enormous danger to the public brought about by impaired
5 operation of motor vehicles. Although the most serious assaults ended in 1972,
6 the accused was convicted of assault in 1992 and again in 1998, about 18 months
7 before the index offences. The last panel thought it would be helpful to have
8 further information about that incident. The Crown apparently no longer has its file.
9 The Victoria Police Department advised the Board that its records with respect to
10 this incident had been destroyed.

11 Ms. Tollefson submitted that the absence of further offending behaviour
12 since the index offences demonstrates that the accused can stay out of trouble.
13 We found that the probable reason that Mr. Peterson has done better in recent
14 years was because of mandated treatment while subject to Board jurisdiction.
15 Although the accused has the right to refuse medication while on conditional
16 discharge, he has for some reason remained compliant. Perhaps it is because of
17 the coercive nature of his conditional discharge, which leaves him liable to
18 involuntary return to FPH upon deterioration in mental state. We concluded that
19 the net effect of enforced supervision and treatment has significantly assisted the
20 accused, against his will, in obtaining mental stability and avoiding further conflict
21 with the law.

22 Dr. Miller has treated the accused since he first returned to Victoria on visit
23 leave from FPH in September 2001 and is familiar with the accused. His risk

1 assessment is succinctly stated at the concluding paragraph of his report of August
2 20, 2004 at Exhibit 19:

3 Mr. Peterson does however appear to have a significant history of
4 psychosis and violence. Without medication it would be my opinion
5 that there would be significantly increased risk that Mr. Peterson
6 would again become psychotic and that his aggressivity would also
7 increase. Given Mr. Peterson's honest and forthright disclosure of his
8 perspective, it would be my opinion that without supervision under a
9 conditional discharge, Mr. Peterson's risk would escalate, and thus I
10 would recommend a continuation of the conditional discharge.

11
12 Dr. Miller was questioned thoroughly, and did not waver in his opinion. The
13 Board is entitled to rely upon those experts most familiar with the accused¹, and we
14 accept Dr. Miller's assessment, which we found was fully supported by the
15 evidence. On this evidence alone we would have concluded that the accused is a
16 significant threat to public safety.

17 ii. Compellable Accused

18 The Board has previously held that an accused is a compellable witness at a
19 disposition review. In *Bidner*² the Board concluded that:

20 21 ... To the extent that an accused individual before the Board has
21 been given a verdict of NCRMD, he or she is he subject of a special
22 stream of the justice system, having been found neither guilty nor
23 acquitted on the index offence (Winko, paragraph 30). The charges
24 which resulted from the accused's actions at the index offence, and
25 which form the basis of his or her NCRMD verdict have, by virtue of
26 that verdict, been finally disposed of. An NCRMD accused appearing
27 before the Board is no longer "charged with an offence". Therefore,
28 the protection against compellability contained in s. 11(c) of the
29 Charter of Rights do not apply.

30 22 Proceedings of the Review Board are not prosecutions or
31 prosecutorial but are rather inquisitorial in nature (Winko). They are
32 not in any respect to be viewed as adversarial or "against the accused
33 person in respect of an offence" (s. 11(c) of the Charter.) The focus of
34 our inquiry is not culpability but to render a sensitive and individualized

¹ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625
² [2001] B.C.R.B.D. No. 44

1 assessment of the accused's risk and to address his or her treatment
2 needs. The possibility that a disposition may involve a degree of
3 restraint or even detention does not, per se, make a Review Board
4 proceeding one which is taken "against" the individual, as McLachlin
5 SCJ in *Winko* points out. The circumstances of the index offence,
6 while they may be relevant, form but one consideration in the Board's
7 overall examination and assessment: *Winko*.

8 23 In making that examination or assessment, clearly the accused
9 is a critical source of information that is relevant and central to our
10 statutory mandate to assess risk and make an individualized
11 disposition. Again quoting *Winko*, it is part of the Board's inquisitorial
12 burden to use its powers to compel evidence, to gather and review all
13 relevant evidence on both sides of the case: *Winko*, paragraph 54 and
14 55. Clearly, information from, and about, the accused is central to this
15 function. This mandate or task is of sufficient legitimacy, importance
16 and interest to society that it overrides or abridges any interest of the
17 accused to remain silent.

18 Several other Board decisions³ have reached the same conclusion. Absent
19 new authority to the contrary, we repeat that the accused is a compellable witness
20 at a disposition review.

21 iii. Adverse inference

22 We next considered the possible consequences for refusing to give
23 evidence. Although the accused is theoretically subject to contempt proceedings,
24 we concluded that such a remedy was wholly inappropriate to the informal nature
25 of Board hearings. Contempt proceedings are cumbersome, highly disruptive to
26 the hearing process, and may result in unfair and disproportionate consequences
27 for an accused whose mental condition may play a role in the decision to not give
28 evidence. The possibility of adverse inference represents a far more practical
29 consequence.

³ *Brighton (Re)*, [1999] B.C.R.B.D. No. 2; *Ottie (Re)*, [2000] B.C.R.B.D. No. 369; *Zabotel (Re)*, [2003] B.C.R.B.D. No. 45

1 Wigmore⁴ explains the principle of adverse inference in the following
2 passage, which has been cited with approval in a number of cases⁵:

3
4 ... The failure to bring before the tribunal some circumstance,
5 document, or witness, when either the party himself or his
6 opponent claims that the facts would thereby be elucidated, serves
7 to indicate, as the most natural inference, that the party fears to do
8 so, and this fear is some evidence that the circumstance or
9 document or witness, if brought, would have exposed facts
10 unfavourable to the party. These inferences, to be sure, cannot
11 fairly be made except upon certain conditions; and they are also
12 open always to explanation by circumstances which make some
13 other hypothesis a more natural one than the party's fear of
14 exposure. But the propriety of such an inference in general is not
15 doubted.
16

17 The Supreme Court of Canada in *R. v. Jolivet*⁶, recently endorsed the
18 adverse inference rule, observing that:

19 25 The general rule developed in civil cases respecting adverse
20 inferences from failure to tender a witness goes back at least to
21 *Blatch v. Archer* (1774), 1 Cowp. 63 at p. 65, 98 E.R. 969 at pp.
22 969-70, where, Lord Mansfield stated: It is certainly a maxim that
23 all evidence is to be weighed according to the proof which it was in
24 the power of one side to have produced, and in the power of the
25 other to have contradicted.

26 ...

27 28 One must also be precise about the exact nature of the
28 "adverse inference" sought to be drawn. In J. Sopinka, S.N.
29 Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd
30 ed. 1999), at p. 297, para. 6.321, it is pointed out that the failure to
31 call evidence may, depending on the circumstances, amount "to an
32 implied admission that the evidence of the absent witness would
33 be contrary to the party's case, or at least would not support it" ...
34

⁴ Wigmore on Evidence, 3d Ed., Vol. II, p.162

⁵ *McTavish v. MacGillivray*, [1997] B.C.J. No. 1719, at paragraph 17

⁶ [2000] 1 S.C.R. 751, at paragraph 24

1 The court specifically acknowledged that the rule applied in criminal
2 proceedings⁷.

3 The inference can only be drawn if the evidence, without regard to the
4 accused, establishes a *prima facie* case. As stated in *Cranewood Financial Corp.*
5 *v. Norisawa*⁸:

6 It is well established that an adverse inference may be drawn
7 against a party who fails to call a material witness. ... The law also
8 establishes that such an inference is appropriate only on certain
9 conditions: an adverse inference is not permissible unless a *prima*
10 *facie* case has been established ...

11 The inference is different from failing to disprove facts established by other
12 evidence. That is the tactical burden⁹ that arises in any legal proceeding, which
13 any party must bear if it is to succeed in advancing its position. The adverse
14 inference constitutes additional or make-weight¹⁰ evidence that is added to the
15 evidentiary scales weighing risk.
16

17 From the foregoing principles we summarize:

- 18 1. The adverse inference cannot arise unless the evidence, without regard to
19 the accused's failure to give evidence, establishes a *prima facie* case for
20 significant threat;
- 21 2. The failure to give evidence may be explained and does not necessarily
22 lead to an inference; and
- 23 3. The inference constitutes separate and additional evidence.

24
25 Applying these principles to this matter we find that the evidence readily
26 establishes a *prima facie* case of significant threat. Mr. Peterson's refusal to give
27 evidence deprives the Board from inquiring into a number of relevant matters,

⁷ *Ibid*, at paragraph 26

⁸ [2001] B.C.J. No. 1566, at paragraph 127

⁹ *Winko, supra*, at paragraph 53

1 which could reasonably be expected to affect our assessment of risk. For
2 example: why does the accused currently take medication; what is his perspective
3 of the circumstances leading to the index offences; what were the details and
4 circumstances of his last assault conviction; and so on. There was no explanation
5 offered for his refusal to give evidence, other than he did not wish to do so. We find
6 that the natural and logical inference from his refusal is that his answers could
7 undermine his pursuit of an absolute discharge. That inference constitutes
8 additional evidence that reinforces our assessment that he remains a significant
9 threat.

10 Disposition

11 Having determined that the accused should remain subject to Board
12 jurisdiction, we next turned to making the least onerous and restrictive disposition.
13 Both the Director and the Crown recommended an order on the same terms as the
14 order under review. We had little hesitation in agreeing that the current order
15 remained appropriate. Despite Mr. Peterson's reclusiveness and absence of
16 cooperation, he has had a much better year. He is able to live in the community at
17 Johnson Manor without difficulty or further conflict with the law. Indeed, the
18 evidence supports that his mental state is improving. The treatment team has
19 responded to the accused's desire to be left alone by reducing the amount of
20 contact and supervision. We therefore concluded that a conditional discharge with

¹⁰ see dissenting reasons of Lamer C.J., although not on this point, in *R. v. Noble*,
[1997] 1 S.C.R.

- 1 the same terms as the last order remained the least onerous and restrictive
- 2 disposition.

Reserved reasons prepared by Barry L. Long
with concurrence of the panel members
November 26, 2004