COURT OF APPEAL FOR ONTARIO

CITATION: Cousineau (Re), 2021 ONCA 760
DATE: 20211027
DOCKET: C68885

Paciocco, Nordheimer and Thorburn JJ.A.

IN THE MATTER OF: Tyler Cousineau

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Anita Szigeti and Maya Kotob, for the appellant

Dena Bonnet, for the respondent, Attorney General of Ontario

James Thomson and Julia Lefebvre, for the respondent, Person in Charge of Waypoint Centre for Mental Health Care

Heard: October 15, 2021 by video conference

On appeal from the disposition of the Ontario Review Board dated November 10, 2020, with reasons dated November 27, 2020.

Paciocco J.A.:

OVERVIEW

[1] Tyler Cousineau, who suffers from schizophrenia, has a disturbing history of violence linked to his mental illness. He has twice been found not criminally responsible by reasons of mental disorder ("NCRMD") relating to violent offences, most recently on October 15, 2018, with respect to two counts of second-degree murder.

[2] After this most recent NCRMD finding the trial judge accepted the Crown's uncontested application made pursuant to s. 657.64(1) and declared Mr. Cousineau to be a "high-risk accused". This designation limits the dispositions the Ontario Review Board ("Board") can make, effectively requiring Mr. Cousineau's detention in a hospital with only highly restrictive supervised community access. Once a high-risk accused designation is made, it can be removed only by a superior court judge on an application from the Board.

[3] Based on his progress, Mr. Cousineau contends that he is no longer a high-risk accused. To promote an application to the Superior Court to remove his designation Mr. Cousineau asked the Board to order an assessment to determine whether he qualifies as a high-risk accused. On November 10, 2020, the Board declined to order the requested assessment. Mr. Cousineau claims that it erred in doing so. For reasons that follow, I disagree.

MATERIAL FACTS

[4] On April 8, 2011, Mr. Cousineau attempted to force his way into a church, assaulted a custodian and threatened him with a knife while under the delusion that there were “two little girls” inside the church.

[5] On May 3, 2011 he broke into a home looking for a female named “Melissa”. After the occupant denied that Melissa was there, Mr. Cousineau threatened to kill her with an axe he had in his truck. Mr. Cousineau was arrested immediately after this incident and was found to be in possession of a hatchet and a knife.

[6] On July 11, 2011 Mr. Cousineau was found NCRMD relating to both the April 8, 2011 and May 3, 2011 events. Initially, a detention order was made, and then Mr. Cousineau earned a conditional discharge. On April 21, 2015, Mr. Cousineau was absolutely discharged from the Board’s jurisdiction. Although he was refusing at the time to meet face to face with his psychiatrist and was unmedicated, Mr. Cousineau had been displaying insight into his mental illness. He had continued to hear voices but denied he was experiencing command hallucinations. By majority the Board determined that Mr. Cousineau could not be shown to pose a significant threat of serious harm to the community hence the absolute discharge.

[7] Following his absolute discharge, Mr. Cousineau did nothing to address his illness, even as his condition degraded and he was becoming acutely delusional. He attempted to treat his chronic insomnia with cannabis and was socially distant.

His decline was dramatic and tragic. On March 7, 2017, in the throes of psychotic persecutorial delusions, Mr. Cousineau brutally stabbed to death two elderly neighbours who had befriended him. This event led to the second NCRMD finding, a detention order, and the s. 672.64(1) high-risk accused designation that is the subject of this appeal.

[8] Section 672.64(1) authorizes the high-risk accused designation, and s. 672.64(2) establishes the criteria to be considered. These sections provide:

> **672.64 (1)** On application made by the prosecutor before any disposition to discharge an accused absolutely, the court may, at the conclusion of a hearing, find the accused to be a high-risk accused if the accused has been found not criminally responsible on account of mental disorder for a serious personal injury offence, as defined in subsection 672.81(1.3), the accused was 18 years of age or more at the time of the commission of the offence and
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> > **(a)** the court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
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> > **(b)** the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.
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> **(2)** In deciding whether to find that the accused is a high-risk accused, the court shall consider all relevant evidence, including
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> > **(a)** the nature and circumstances of the offence;
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> > **(b)** any pattern of repetitive behaviour of which the offence forms a part;
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> > **(c)** the accused's current mental condition;
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> > **(d)** the past and expected course of the accused's treatment, including the accused's willingness to follow treatment; and

(e) the opinions of experts who have examined the accused.

[9] The trial judge found both alternative bases for the high-risk accused designation set out in s. 672.64(1) to be satisfied. Specifically, he concluded that "Mr. Cousineau is substantially likely to use violence that could endanger the life or safety of another person in the future". This finding was based primarily on Mr. Cousineau's "history of dealing with his mental illness", the double homicide he committed "just two short years after" his release from the previous NCRMD finding, as well as the opinion of Dr. Eayrs, one of his attending psychiatrists. Dr. Eayrs opined, that if Mr. Cousineau stopped taking his medication, he would likely become psychotic again, raising a "very high" risk of future violent behaviour. The trial judge also found that the homicides were "of such a brutal nature to indicate a risk of grave physical harm to another person".

[10] It is not disputed that Mr. Cousineau has done well since the NCRMD finding relating to the double homicide. He appears stable while being treated, his psychotic symptoms have resolved, he has not engaged in threatening or aggressive behaviour, his urine screens have been negative, he has demonstrated some insight into his illness and the need for ongoing psychotic treatment, and he is now capable of making treatment decisions. Mr. Cousineau has also continued to maintain a high level of privilege within the high security unit at Waypoint Centre for Mental Health Care. He accepts that he remains a significant threat to public

safety. However, given his progress Mr. Cousineau does not believe he qualifies as a high-risk accused.

[11] Only a superior court can review a high-risk accused designation, and it is the Board, pursuant to s. 672.84(1), that refers the matter for review. Section 672.84(3) authorizes courts to revoke the designation. These sections provide:

> **672.84 (1)** If a Review Board holds a hearing under section 672.81 or 672.82 in respect of a high-risk accused, it shall, on the basis of any relevant information, including disposition information as defined in subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(c), if it is satisfied that there is not a substantial likelihood that the accused — whether found to be a high-risk accused under paragraph 672.64(1)(a) or (b) — will use violence that could endanger the life or safety of another person, refer the finding for review to the superior court of criminal jurisdiction.
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> …
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> **(3)** If the Review Board refers the finding to the superior court of criminal jurisdiction for review, the court shall, at the conclusion of a hearing, revoke the finding if the court is satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person, in which case the court or the Review Board shall make a disposition under any of paragraphs 672.54(a) to (c).

[12] In February 2020, in an effort to encourage the Board to bring a s. 672.84(1) request for a review, Mr. Cousineau brought an application before the Board asking it to order a psychiatric assessment, pursuant to s. 672.121(c), to determine whether he qualifies as a high-risk accused. Section 672.121(c) provides:

> **672.121** The Review Board that has jurisdiction over an accused found not criminally responsible on account of mental disorder or unfit to stand trial may order an assessment of the mental condition of the accused of its own motion or on application of the prosecutor or the accused, if it has reasonable grounds to believe that such evidence is necessary to
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> **(c)** determine whether to refer to the court for review under subsection 672.84(1) a finding that an accused is a high-risk accused.

[13] The Crown opposed Mr. Cousineau's request for an assessment. It argued that there has been no change in Mr. Cousineau's mental status since the high-risk accused designation was made, and that the medical reports, assessments and hospital reports that exist are sufficient to show that he remains a high-risk accused, making a s. 672.121(c) assessment unnecessary.

[14] The Board dismissed Mr. Cousineau's request for an assessment. Although the Board's analysis was more cryptic than it should have been, the reasons are clear when read as a whole. The Board concluded that it was not reasonable to believe that the requested assessment is necessary because: (1) whether or not he remains a high-risk accused, "there is no prospect in the near future that Mr. Cousineau will be considered for community living or indirectly supervised community privileges"; and (2) even with an assessment that "opines there is no substantial likelihood that he will act violently, thereby endangering the life or safety of another person" a Board would not have grounds pursuant to s. 672.84(1) to

refer Mr. Cousineau to the Superior Court to review his high-risk designation given the substantial evidence to the contrary.

THE ISSUES

[15] Mr. Cousineau argues that the Board committed legal errors and arrived at an unreasonable determination in denying his assessment. Specifically, he argues that:

A. The Board misapplied the test by failing to apply the “reasonable grounds” standard.

B. The Board misapplied the test for an assessment by conflating the “significant threat” test used in determining an appropriate disposition, with the “substantial likelihood” test that s. 672.84(1) requires.

C. The Board decision was unreasonable.

[16] During the oral hearing, counsel for Mr. Cousineau (“appeal counsel”) did not push the first ground of appeal, but this ground of appeal was not formally abandoned. I will therefore address it in these reasons.

[17] During the oral hearing, appeal counsel also asked us for broader guidance on the high-risk accused provisions, which have not previously received treatment by appellate courts. Specifically, she raised three issues, the first two of which she recognized to be collateral.

[18] First, appeal counsel noted that once a high-risk accused designation has been made, s. 672.64(3) does not permit unescorted absence from the “hospital”, but there is uncertainty as to whether “hospital” includes hospital grounds. She urged us to take the opportunity to endorse the view taken by the Ontario Review Board in *Grant (Re)*, [2020] ORBD No. 2518, that a high-risk accused designation does not prevent unescorted absence on hospital grounds. The Crown submits that this court should not make a general ruling on the meaning of “hospital”, pointing out that some hospitals have secure grounds and others do not. It referenced the decision in *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, where the court recognized that a person subject to a disposition made pursuant to s. 672.54 requiring “custody in a hospital” may or may not receive grounds privileges.

[19] I would decline to resolve this issue because, although it has broader practical implications, it is not raised in this appeal. I will say, however, that even if “hospital” is broad enough to include hospital grounds, the court or Board making a disposition is not compelled to include unescorted grounds privileges in the disposition it makes. The limits imposed on available dispositions for high-risk accused pursuant to s. 672.64(3) set out the maximum community privileges that can be provided, not the minimum. If public safety is jeopardized by grounds privileges because grounds are not secure at the facility, confinement to the physical hospital buildings could be ordered pursuant to s. 672.54(c). The point, of

course, is that “hospital” in s. 672.64(3) could be read to include hospital grounds, without jeopardizing public safety.

[20] The second collateral issue appeal counsel raised was whether, by its terms, s. 672.64(c) only permits supervised community visits for medical or therapeutic purposes, as opposed to, for example, legal or compassionate purposes. Once again, I would decline to rule on this issue because it is not before us.

[21] Third, appeal counsel asked us to clarify the “substantial likelihood” standard that requires a Board to refer a high-risk accused designation to a court for review pursuant to s. 672.84(1). The uncertainty she raises does not relate to the level of risk or the nature of the apprehended harm that s. 672.84(1) contemplates. These matters have been carefully and thoroughly canvassed in *R. v. Schoenborn,* 2017 BCSC 1556, 354 C.C.C. (3d) 393. The issue she asks us to clarify relates to the context within which “substantial likelihood” is to be evaluated. Mr. Cousineau argues that different outcomes could be produced by asking whether there is a reasonable likelihood that the accused will use violence: (1) now, in the present circumstances; as opposed to (2) if discharged from Board supervision; as opposed to (3) if the “high-risk accused” designation is removed. Mr. Cousineau favours the last option.

[22] This question must be addressed to resolve this appeal. As will be made evident below, the application of the “substantial likelihood” standard is critical in

determining whether the Board acted reasonably in refusing to order an assessment. This interpretative issue will therefore be considered when addressing the third ground of appeal, relating to whether the Board decision to deny an assessment was reasonable.

[23] One final contextual point relating to the issues before us. Mr. Cousineau urges that when determining these issues, it is important to keep in mind that the Board's inquisitorial responsibility to seek out evidence is heightened given the gatekeeping function the Board plays in determining whether a high-risk accused designation will be reviewed. I will address below Mr. Cousineau's submission that the Board was required, given its inquisitorial function, to seek out an assessment, and I will comment on the Board's conception that the "onus" was on Mr. Cousineau to establish the need for an assessment.

ANALYSIS

A. DID THE BOARD FAIL TO APPLY THE REASONABLE GROUNDS STANDARD?

[24] Mr. Cousineau argues that the Board failed to apply the "reasonable grounds" standard set out in s. 672.121(c). I disagree.

[25] Mr. Cousineau's primary, if not only, submission in this regard is that the Board deviated from this standard by considering whether the "high-risk accused" designation prejudiced "Mr. Cousineau's ability to engage in available therapies or

to be considered for community placement". Mr. Cousineau argues that this was in error, as "[t]he only relevant question is whether the Board can be satisfied that there is not a substantial likelihood that Mr. Cousineau will use violence that could endanger the life or safety of another person."

[26] With respect, Mr. Cousineau appears to have misconceived the relevant inquiry. The "reasonable grounds" test in s. 672.121(c) does not relate directly to whether the accused will use violence that could endanger another. It focuses instead on whether the Board has "reasonable grounds to believe that [an assessment] is necessary to… determine whether to refer to the court for review under subsection 672.84(1) a finding that an accused is a high-risk accused" (emphasis added).

[27] The Board clearly understood this. It referred repeatedly to the "reasonable grounds" standard, focused its analysis on the need for an assessment to determine whether it should request a review of Mr. Cousineau's high-risk accused designation, and concluded that "It is not reasonable in such circumstances to believe that the assessment is necessary."

[28] Specifically, the Board concluded that "even if the requested assessment… opines there is no substantial likelihood that [Mr. Cousineau] will act violently, thereby endangering the life or safety of another person…. there is also substantial evidence to the contrary that the Board hearing [a s. 672.84(1) application] would

also have to weigh…. It is not reasonable in such circumstances to believe that the assessment is necessary."

[29] At first blush, this language appears more dismissive than it is. It is evident, in my view, that the point the Board was attempting to make was that, given the evidence to the contrary, even an assessment that favoured Mr. Cousineau could not reasonably alter its conclusion that there is a substantial likelihood that he will use violence that could endanger the life or safety of another person. Since an assessment could make no difference in deciding whether to request a review, there are no "reasonable grounds" for finding that an assessment is necessary to determine whether to refer the designation to a court for review. Leaving aside for the moment the reasonableness of the Board's conclusion that an assessment could not affect the outcome, this analysis is appropriate and responsive to the relevant inquiry, namely, whether there were "reasonable grounds to believe that [an assessment] is necessary to… determine whether to refer to the court for review under subsection 672.84(1)".

[30] Nor do I accept Mr. Cousineau's submission that the Board departed from this standard when it reasoned:

> Absent evidence, that for example, Mr. Cousineau's engagement in certain therapy, or consideration of community placement is hindered by the high-risk accused designation, there is no need to refer the matter back to Court and the designation carries forward.

[31] When reading this passage, it is important to bear in mind that s. 672.121(c) gives Boards discretion whether to order assessments. The relevant part of the provision bears repeating:

> The Review Board… may order an assessment of the mental condition of the accused… on application of… the accused, if it has reasonable grounds to believe that such evidence is necessary to… determine whether to refer to the court for review under subsection 672.84(1) a finding that an accused is a high-risk accused. [Emphasis added.]

[32] In exercising the discretion that s. 672.121(c) confers it is certainly appropriate for the Board to consider what purpose a review of the high-risk accused designation would serve. If there is no point in requesting a review, there is no point in exercising discretion to order an assessment to help determine whether to request a review.

[33] In my view, this is what the Board was addressing. Had the restrictions associated with a high-risk accused designation been compromising appropriate therapy for Mr. Cousineau, or if they had been impeding consideration of his community placement, assuming the reasonable grounds test could be met, it would have been important to get a review so that appropriate therapy and community placement orders could be implemented. But as the high-risk accused designation was not impeding Mr. Cousineau's appropriate therapy, or compromising consideration of his community placement, requesting a review would serve no purpose, thereby making the assessment pointless for the Board.

[34] Therefore, I am not persuaded that the Board misapplied the “reasonable grounds” test when considering the impact of the high-risk accused designation on Mr. Cousineau. Nor am I convinced that the Board was labouring under the misconception that there must be a finding of prejudice before a review can be requested. The Board was simply exercising its discretion not to order an assessment it considered to be pointless.

B. DID THE BOARD FAIL TO APPLY THE “SUBSTANTIAL LIKELIHOOD” STANDARD?

[35] In arriving at its conclusion that it would find that there was a “substantial likelihood” that Mr. Cousineau “will use violence that could endanger the life or safety of another person”, even in the face of an assessment to the contrary, the Board relied on assessments that were undertaken to determine whether Mr. Cousineau presented a “significant threat”. Mr. Cousineau argues that by doing so the Board erroneously relied on the “significant threat” test, instead of the higher and more demanding “substantial likelihood” test that it was required to use.

[36] I disagree. First, as the Crown points out, the provision that authorizes a Board request for a review, s. 672.84(1), reproduced above in para. 11, specifically directs the Board to consider “any relevant information, including disposition information as defined in subsection 672.51(1)”. Section 672.51(1) defines “disposition information” as including “an assessment report submitted to the court

or Review Board". A Board cannot be found to have misapplied the test set out in a provision by adhering to the direction found in that very provision relating to the information to be consulted.

[37] There is no doubt that assessment reports are to be relied upon, pursuant to s. 672.84(1), because they provide relevant evidence. Although the assessment reports relied upon in this case were focused on whether Mr. Cousineau posed a "significant threat", those assessment reports contained detail about Mr. Cousineau's level of threat that was highly relevant in determining whether he continued to meet the "substantial likelihood" test. Had the Board relied only on the bottom-line conclusions expressed in these assessment reports, Mr. Cousineau would have a point. But that is not what happened. The Board considered the assessment reports as a whole, along with other evidence that is recounted below. I am not satisfied that the Board conflated the relevant standards.

[38] Nor was it improper for the Board to read Dr. Danyluk's assessment as implicit opinion evidence that Mr. Cousineau remained a high-risk accused. Dr. Danyluk's assessment concluded that absent strict supervision and given his poor motivation, "Future problems with Mr. Cousineau's treatment or response to supervision can be anticipated". She expressed the opinion that those problems "will lead to psychotic decompensation and the increased likelihood of serious physical harm to others", a risk she described as "high". Although Dr. Danyluk did not express those conclusions using "substantial likelihood" language, by

implication her opinion supports a finding that there is a “substantial likelihood” that Mr. Cousineau would cause serious harm by violence to others.

C. WAS THE BOARD’S DETERMINATION UNREASONABLE?

[39] Mr. Cousineau argues that the Board’s decision to deny his application for an assessment was unreasonable. In support of that contention he submits that it was unreasonable for the Board to deny his request for a psychiatric assessment after Dr. Danyluk refused to express an opinion on whether Mr. Cousineau qualified as a high-risk accused. He also argued more broadly that it was unreasonable for the Board to deny his request for an assessment without an expert opinion on whether he qualified as a high-risk accused. I will begin by addressing these specific arguments before considering the larger question of whether the Board’s denial of an assessment was unreasonable, given the evidence that was available to the Board.

[40] I do not accept it was unreasonable for the Board to deny Mr. Cousineau’s request for an assessment after Dr. Danyluk, Mr. Cousineau’s attending psychiatrist, declined to offer an opinion about whether Mr. Cousineau qualified as a high-risk accused. The absence of an opinion from Dr. Danyluk is not affirmative evidence that Mr. Cousineau does not qualify as a high-risk accused. Indeed, Dr. Danyluk explained that she could not offer an opinion because she had not been

given prior notice that her opinion on this issue would be sought and had not had time to consider it.

[41] Nor do I accept Mr. Cousineau's broader submission that it was unreasonable for the Board to decide not to request a review without an expert assessment. During oral argument, Mr. Cousineau made clear that he is not arguing that a Board cannot reasonably assess a high-risk accused designation without direct expert evidence as to whether the accused qualifies as a high-risk accused. He is arguing instead that it was unreasonable given the evidence in this case for the Board to refuse to request a review without direct expert evidence as to whether Mr. Cousineau qualifies as a high-risk accused.

[42] To determine whether this is so, it is necessary to address the issue described above and to identify the appropriate context of a "substantial likelihood" inquiry pursuant to s. 672.84(1). Is the Board required to inquire into "the substantial likelihood that the accused… will use violence that could endanger the life or safety of another person": (1) now, in the present circumstances; as opposed to (2) if discharged from Board supervision; as opposed to (3) if the "high-risk accused" designation is removed?

[43] Clearly, the first option – asking whether the accused poses a substantial likelihood of violence "now, in the present circumstances" – is not realistic. The circumstances that apply "now" include the high-risk accused designation coupled

with the mandatory constraints on liberty imposed to secure public safety. The designation and those mandatory constraints are put in place for the very purpose of removing the substantial likelihood that the accused will use violence that could endanger others. Interpreting s. 672.84(1) according to this first option would therefore effectively require the Board to request a review of the designation in every case where there are reasonable grounds to believe that the designation is achieving its purpose.

[44] Mr. Cousineau argues that the latter inquiry is the appropriate one. He argues that if there are reasonable grounds to believe that there would not be a substantial likelihood that he would use violence endangering others if his high-risk accused designation was removed and he was subjected to a less restrictive disposition than the high-risk accused designation requires, then the Board is obliged to request a review of his high-risk accused designation. He argues that the Board decision in *Grant (Re)* supports his position. In that case the Board requested a review of Mr. Grant's high-risk accused designation because there was not a substantial likelihood that he would violently endanger others "when under the jurisdiction of the board": at para. 20.

[45] I do not agree that the "substantial likelihood" inquiry is to be undertaken on the assumption that the restrictions of a disposition order are in place. Instead, the inquiry must be into whether, based on the inherent or endemic risk of violence the accused currently poses, there continues to be a "substantial likelihood" that the

accused will use violence that could endanger the life or safety of another. Put in the terms expressed by Mr. Cousineau, the requisite inquiry is to evaluate whether there would be a substantial likelihood that the accused would use violence that could endanger the lives or safety of others, if discharged from Board supervision.

[46] The starting point in arriving at this conclusion is to recognize that a s. 672.84(1) request for review involves a preliminary evaluation by the Board of the substantial likelihood that the accused will use violence that could endanger others. Significantly, this preliminary evaluation is undertaken for the purpose of determining whether a court should be asked to review its evaluation of the substantial likelihood that the accused will use violence that could endanger others. In effect, the Board's review performs a screening function. It would not make sense if the criteria the Board was to consider during its preliminary screening review differed from the criteria that a court would ultimately apply while conducting a requested review. And quite clearly, a court that is conducting a review is not to do so on the assumption that a disposition order will be in place. Instead, the court is to assess the intrinsic or endemic risk the accused would present if not subject to the restrictions under a disposition order. I say this for three reasons.

[47] First, s. 672.84 provides a mechanism for courts to conduct the "review" of a designation that was made pursuant to s. 672.64. A "review", by its nature, necessarily inquires into whether the original designation remains appropriate.

Naturally, that “review” should be undertaken using the same criteria that were used to make the designation that is being reviewed.[1] The criteria that are applied when an initial designation is made focus exclusively on the inherent or endemic risk posed by the accused as an individual, not on the risk the accused would present if subject to constraints on their liberty. This is evident from the fact that the focus of the inquiry is expressed to be into the risk “the accused” poses. Moreover, although the list of relevant factors provided for in s. 672.64(2) is not exhaustive, each of those factors are relevant only to the intrinsic or endemic risk the accused presents. Specifically, they focus on the accused’s past behaviour and mental health, including “the nature and circumstances of the [index] offence” the accused committed; “any pattern of repetitive behaviour [by the accused] of which the offence forms part”; “the accused’s current medical condition”; “the past and expected course of the accused’s treatment, including the accused’s willingness to follow treatment” and “the opinions of experts who have examined the accused”. None of these factors engage the risk the accused would pose if subject to constraints.

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[1] It should be noted, however, that s. 672.84(3) does restrict the power to revoke a high-risk accused designation to cases where “the court is satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person”. Therefore a court conducting a review of a high-risk designation cannot maintain that designation on the alternative ground that was available pursuant to s. 672.64(b) during the initial high-risk accused designation, namely, that “the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm”.

[48] Second, to require a court to consider the ameliorating effects of a disposition order in evaluating the risk the accused presents is not in keeping with the step-by-step approach set out in s. 672.84(3). That provision contemplates that a court will first determine whether to set aside the high-risk accused designation, and only then will the appropriate disposition be determined. If a court was required to consider the ameliorating effects of a disposition order before that disposition order is even identified, the best the court could do would be to speculate as to what the disposition order could look like. If that speculation proves wrong, a disconnect would be created. A court could revoke a high-risk accused designation on an assumption that never materializes. There is no sense in such a regime.

[49] Third, a high-risk accused designation under s. 672.64 is part of the scheme for identifying the available dispositions. Its role is to determine where on the ladder of available dispositions the accused's case should stand. Specifically, if the accused is found not to present a "significant threat to the safety of the public" the accused is to be absolutely discharged pursuant to s. 672.54(a). If the accused poses a "significant threat to the safety of the public", the accused is to be subject to any disposition available pursuant to s. 672.54(b) and (c), including a conditional discharge or a detention order with conditions. If the accused is not simply a "significant threat to the safety of the public" but also qualifies as a high-risk accused and is designated a high-risk accused by a court pursuant to s. 672.64(1), the accused will be restricted to the disposition restrictions identified in s.

672.64(3). It is sensible and important that each of these inquiries take place employing the same focus, and it is not controversial that the other steps in the disposition eligibility ladder involve an examination of the inherent or endemic risk of violence the accused presents.

[50] I am therefore persuaded that a Board conducting a s. 672.84(1) review, is to examine the risk posed by the accused on the assumption that the accused is not subject to external constraints imposed to reduce that risk. Put otherwise, the Board's assessment is to be undertaken relating to the risk the accused would pose if not under the Board's jurisdiction.

[51] The question remains, given that this is the proper focus, was it reasonable for the Board to deny Mr. Cousineau's request for an assessment on the footing that, even if an assessment was undertaken and proved to be favourable to Mr. Cousineau, that assessment could not, on the evidence as a whole, cause the Board to be satisfied that there is not a substantial likelihood that Mr. Cousineau will use violence that could endanger the life or safety of another person? In my view it was. The existing evidence in support of this finding was formidable.

[52] Specifically, the evidence before the Board was that Mr. Cousineau had used violence on three occasions in the recent past that endangered the life and safety of another person. That last occasion, which happened within two years of Mr. Cousineau showing the kind of progress he was showing at the time of Mr.

Cousineau's application for an assessment, resulted in a brutal double homicide linked to persecutory delusions. The Board was entitled to consider that the improvement in Mr. Cousineau's mental state and insight that had occurred after the double-homicide was achieved within a highly structured environment in which his medication was being monitored. The Board was also entitled to consider that Mr. Cousineau is a poorly motivated patient and an unreliable reporter. The expert opinions that were before the Board included cautions that risk management in a highly structured living environment with significant everyday living support, supervision and assistance with the monitoring of medication compliance is crucial in managing Mr. Cousineau's risk of future violence. As well, the Board was entitled to accept the Crown's position that Mr. Cousineau's mental state had not changed materially since the "high-risk accused" designation. Finally, there was evidence before the Board that even with Mr. Cousineau's progress there were continuing warning signs. Specifically, Mr. Cousineau had stopped receiving injections of his anti-psychotic medication and reduced the dose he received because he did not like the side effects of the medication. He also remained withdrawn, not initiating communication with staff and he has declined to participate in groups. As well, he spends his leisure time sleeping rather than engaging, which is concerning.

[53] The Board's decision is entitled to deference. It was reasonable for the Board to conclude that it would not be satisfied that Mr. Cousineau does not

continue to pose a substantial risk of future violence that could endanger the life or safety of another, solely by a medical assessment, in the face of this evidence.

[54] I will make two final points about the reasonableness of the Board's decision in order to provide future guidance. First, a decision is more likely to be challenged as unreasonable if it is not fully explained, thereby requiring interpretation. Unfortunately, it was necessary to interpret this decision to identify the Board's reasoning and to verify its reasonableness. It is helpful, and appreciated, when Board members fully and clearly explain each material component of their reasoning.

[55] Second, given the Board's conclusion in this case that its position could not have been changed even by an assessment that favoured the accused, there was a heightened risk that its decision would appear to be unreasonably dismissive. In my view that risk could have been reduced had the Board made greater effort to explain its decision to Mr. Cousineau, fully and with sensitivity.

OBSERVATIONS ON THE BOARD'S INQUISITORIAL OBLIGATIONS

[56] Two additional observations are warranted respecting the Board's inquisitorial obligations.

[57] First, the Board was wrong to evaluate Mr. Cousineau's application on the assumption that the onus was on him to establish the basis for a s. 672.121(c) assessment. Proceedings before the Board are not adversarial but are inquisitorial.

This is because of the vulnerability of mentally disordered accused persons, and the fact that the accused is at risk of liberty constraining decisions even though the accused has been found “not responsible” for the crimes they have committed. The Board’s inquisitorial responsibility does not disappear when the Board is evaluating an application brought by an accused person relating to the ultimate disposition that will be imposed. The Board therefore erred in considering whether Mr. Cousineau had met his onus. The Board should simply have asked whether, on the balance of probabilities based on the evidence before it, the need for an assessment had been established.

[58] Having said this, given the Board’s reasons for decision, Mr. Cousineau was not prejudiced by the Board’s misconception of how it should be proceeding. The Board’s decision resulted in a “hard no” on the question of whether an assessment was necessary. That outcome did not turn on who bore the risk of loss in the event of an inability to decide. I would not interfere with the Board decision based on this error.

[59] Second, I do not accept that the proper discharge of the Board’s inquisitorial obligation required the Board to order the assessment. The Board’s inquisitorial obligation relates to the proper discharge of its obligations. As understandable as it may be that Mr. Cousineau wants to get an assessment to help shed what he believes to be an obsolete and stigmatizing designation, having reasonably

concluded that the assessment is not required to discharge its function, the Board was not obliged by its inquisitorial obligation to nonetheless order an assessment.

CONCLUSION

[60] I would dismiss the appeal.

Released: October 27, 2021 “D.M.P.”

“David M. Paciocco J.A.”
“I agree. I.V.B. Nordheimer J.A.”
“I agree. Thorburn J.A.”