

COURT OF APPEAL FOR ONTARIO

CITATION: *Davies (Re)*, 2022 ONCA 716

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Pepall, Harvison Young and George JJ.A.

IN THE MATTER OF: *Jacqueline Davies*

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

Anita Szigeti, for the appellant

Gavin MacDonald, for the respondent, Attorney General of Ontario

Heard: September 23, 2022

On appeal from the disposition of the Ontario Review Board, dated October 26, 2021, with reasons dated December 1, 2021.

REASONS FOR DECISION

[1] Ms. Davies was found not criminally responsible on account of mental disorder on charges of assault with a weapon and aggravated assault in 2007. She appeals from the October 2021 disposition of the Ontario Review Board (the “Board”) and seeks an absolute discharge, or in the alternative, an amendment to her disposition to allow for the consumption of cannabis. The Board’s disposition

accepted the hospital recommendation that the existing detention order be continued.

[2] For the following reasons, the appeal is allowed in part. While we agree with the Board that Ms. Davies continues to pose a significant threat to the safety of the public, we do not agree that the refusal to grant the cannabis exemption requested was reasonable or justified by the evidentiary record before it.

Background

[3] Ms. Davies was 19 years old at the time of the index offences. She has no prior criminal record. She is now 34.

[4] The hospital report describes the index offence as follows. Ms. Davies had been standing alone in the lobby of an apartment building holding a folding tree saw when a woman and her 11-year-old daughter walked past her on their way out to a parking lot through a rear door. Without provocation, she approached the child from behind and hit her with the saw blade on the back of the head. The mother heard the child's screams and intervened to protect her. She tackled the appellant who continued to fight, striking the mother's face with the saw. The appellant then dropped the saw and fled the scene. Both victims were treated and released from hospital.

[5] Ms. Davies psychiatric history is detailed in the hospital report. In the period before the index offences she had multiple hospital admissions. Her current diagnoses include:

- Schizophrenia;
- Cannabis Use Disorder;
- Alcohol Use Disorder; and
- Borderline Personality Disorder.

[6] From the time of her initial Board hearing until October 2016, she remained subject to a detention order. She was granted a conditional discharge in 2016. At that time, she was living in the community in 24-hour supervised housing. The conditional discharge disposition was continued at her annual hearing in 2017. At the 2018 annual hearing the Board accepted the hospital's recommendation and replaced the conditional discharge with the existing detention order. She has remained in hospital since her readmission on July 9, 2018.

[7] In February 2019 there was a failed attempt to begin reintegrating Ms. Davies into community living in 24-hour supervised housing. On her first overnight pass, she returned to the hospital saying she did not want to stay there. She has since fluctuated between wanting to return there and insisting on independent living. The supervised home held a bed open for her from the time of her readmission to hospital in July 2018 until March 2019 when it advised the hospital that, due to community need, it could no longer do so. At the 2019 annual hearing,

the Board accepted the hospital's recommendation and continued the existing detention order.

[8] In March 2020, Ms. Davies was transferred to another unit and secluded after she assaulted her then psychiatrist Dr. Alatishe on February 24. A Restriction of Liberty hearing was convened as a result and the Board found that the Restriction of Liberties imposed by the Hospital on February 24, 2020 through to March 3, 2020 was necessary and appropriate and the least onerous and least restrictive measure in the circumstances. At the 2020 annual hearing the Board accepted the hospital's recommendation and continued the existing detention order. Of particular note, the Board grappled with and dismissed Ms. Davies' request for a cannabis exemption, finding that "public safety could not be managed with ... [Ms. Davies] anticipated discharge to community living".

[9] Ms. Davies is currently detained at the Forensic Psychiatry Program at St. Joseph's Healthcare Hamilton ("Hospital") with privileges up to and including to live in the community in accommodation approved by the person in charge. At the 2021 annual hearing the Board accepted the hospital's recommendation and continued the existing detention order.

The Decision that the Appellant Posed a Significant Risk to Public Safety

[10] The Board, after having reviewed and considered all the evidence before it, applied the correct test including that the risk of serious physical or psychological harm as a result of the commission of a serious criminal offence must be "more

than speculative”: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at pp. 664-665, 671-72; *Carrick (Re)*, 2015 ONCA 866, 128 O.R. (3d) 209, at para. 17. It is well established that there must be a real, foreseeable risk that is more than speculative and that the consequent physical or psychological harm must be serious and criminal in nature: *R. v. Ferguson*, 2010 ONCA 810, 264 C.C.C. (3d) 451, at para. 8.

[11] In making its decision, the Board looked carefully at the evidence relating to the replacement of the existing detention order with an absolute discharge. In arriving at its decision, the Board considered the appellant’s history of violence, which includes a serious index offence, history of physical violence to staff, history of verbal aggression and threats to assault and kill staff. The Board also properly considered the most recent February 2020 assault on Ms. Davies then psychiatrist, Dr. Alatishe and an incident a week before the hearing. In addition, it addressed Ms. Davies’ fluctuating insight into her illness, her need for treatment, and the treatment staff’s concerns that discharge would see a reduction in medication compliance.

[12] The Board clearly set out its concerns, which were informed substantially by the appellant’s continuing behaviour since the index offence and her abiding variable insight. The disposition properly considered the evidence in the context of the treatment team’s assessment of the risk the appellant might pose on discharge.

In so doing, the Board reasonably arrived at the conclusion that Ms. Davies posed a significant threat to public safety.

The Abstinence Provision

[13] We conclude, however, that the Board's decision to impose an abstinence provision, which prevents Ms. Davies from consuming cannabis, is unreasonable for three reasons.

[14] First, the Board's reasons must be able to withstand a "somewhat probing examination" to determine whether the decision is justifiable, transparent, and intelligible: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 at para. 33. Here the Board's reasons conflated the terms "substances" and "cannabis", without sufficient evidence demonstrating that Ms. Davies cannabis use would pose a significant risk to public safety. In its reasons, the Board discussed the manner in which "substances" more generally increased Ms. Davies risk to public safety. It found that "substances were at play during the index offences and the attack on her then psychiatrist". The Board had no evidence before it that directly linked cannabis to the commission of the index offence. In *Amero (Re)*, [2020] O.R.B.D. No. 2618, the Board amended Mr. Amero's disposition to allow him to consume cannabis due to the tenuous linkage between his cannabis use an increased risk to public safety. It noted that there was "no evidence that consumption of cannabis precipitated the index offence". This was despite its finding that he had a history of opiate, cannabis and alcohol abuse.

[15] Second, the Board's reasons, the hospital report and the evidence before the Board, conflate "a patent risk of psychosis" with a significant threat to public safety. In other words, while cannabis use may create a "patent risk for psychosis" for Ms. Davies, there was insufficient evidence that cannabis use in a controlled hospital environment, with a medicated and compliant patient, such as Ms. Davies, would rise to the level of a significant risk to public safety.

[16] Third, while there are numerous incidents throughout the record where Ms. Davies consumption of cannabis has not been connected with any acts of violence, the Board's reasons do not explain its ultimate conclusion that cannabis use in a controlled and monitored environment would pose a significant risk to public safety.

[17] For these reasons, we conclude that the specific disposition refusing the appellant's request for a cannabis exemption is unsupported by the evidence before it and is therefore unreasonable: *Criminal Code*, s. 672.78(1); *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Vavilov*, at para. 34.

[18] The Board also found that, "[a] resort to substances and a corresponding cessation of medication will cause the risk of harm to the public to increase" (emphasis added). The Board's reasons do not disclose that cannabis, in and of itself or in particular, had the effect of increasing Ms. Davies threat to public safety. Even if taken at its highest, in order for Ms. Davies to pose a significant risk to public safety, two events must occur. The first is a resort to substances, and the second is a cessation of medication. The former requirement is insufficiently

precise and the latter requirement is unsupported by the evidence of Ms. Davies' treating psychiatrist, Dr. Sutton, who testified that she has been largely compliant with her medication regime. It is also incongruent with the evidence that the Hospital could continue to monitor Ms. Davies medication compliance while detained and consuming cannabis.

[19] The Board also heard evidence from Dr. Sutton, who testified that the risks of cannabis or any other substances would outweigh the potential benefit. This opinion was in part based on the fact that "substances" in part fuelled her 2020 attack on her then psychiatrist and that she had been using "substances around that time proximal to [the date of the index offence]" (emphasis added). The record does not disclose that Ms. Davies had been using substances, or more specifically cannabis, around the time of the index offence.

[20] In cross-examination, Dr. Sutton indicated that Ms. Davies "placement in the community [was] not imminently on the horizon". When pressed before the Board on whether the Hospital would have the ability to test, screen, and monitor Ms. Davies' cannabis use and its effects, Dr. Sutton "did not disagree" that they had this ability. He also agreed that in a hospital setting, he could intervene, if the appellant's cannabis use increased her risk of harm. Again, we stop here to note, that other patients in this facility have previously been granted a cannabis consumption exemption by the Board: *Sheikh (Re)*, [2019] O.R.B.D. No. 2484; *Amero (Re)*.

[21] The respondent's arguments do not assist the court on this issue. It cites a 2020 Hospital Report detailing a swab of the appellant's bedroom following her assault on her then treating psychiatrist. The 2020 Report indicated traces of THC, cocaine and methamphetamine in the appellant's bedroom. However, there is no evidence indicating that any of these substances were present in Ms. Davies' system at the time of the attack, or whether cannabis played any role.

[22] The respondent further points to a 2017 and 2019 Hospital Report as evidence of Ms. Davies' cannabis use increasing her risk to public safety, but these Reports include numerous incidents when Ms. Davies consumed cannabis without engaging in seriously harmful behaviour. Ms. Davies was noted by hospital staff as becoming "irritable" and "labile" after consuming cannabis. However, the Board in *Amero (Re)* found that this behaviour failed to rise to the level required to establish an increased risk to public safety:

At present, after consuming cannabis, [Mr. Amero] may act oddly, become verbally aggressive and irritable in the days following [cannabis] use, but, in our view, these traits do not rise to the level of representing a risk to the public or conduct that is criminal in nature. [Emphasis added.]

[23] The evidence linking Ms. Davies cannabis use to an increased risk in public safety was speculative and the Board's decision was not justified based on the evidence before it and the parties' submissions: *Vavilov*, at para. 106. The Board was statutorily required to consider the least onerous and least

restrictive disposition in the specific circumstances of Ms. Davies: *Criminal Code*, s. 672.54; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 19; *Winko*, at pp. 669-70.

[24] We would allow the appeal and refer the matter back to the Board for a rehearing pursuant to s. 672.78(3)(b) of the *Criminal Code* either before or together with Ms. Davies' annual review hearing. At that time, the Board can consider whether a cannabis exemption is an appropriate disposition in light of the evidence before it.

“S.E. Pepall J.A.”

“A. Harvison Young J.A.”

“J. George J.A.”