

COURT OF APPEAL FOR ONTARIO

CITATION: McFarlane (Re), 2022 ONCA 633

DATE: 20220906

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Hoy, Coroza and George JJ.A.

IN THE MATTER OF: O'Dean McFarlane

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

Paul Socka, for the appellant

Elena Middelkamp, for the respondent, Attorney General of Ontario

Julia L. Lefebvre, for the respondent, Person in Charge of St. Joseph's  
Healthcare Hamilton

Heard: August 26, 2022

On appeal against the disposition of the Ontario Review Board dated,  
October 19, 2021.

REASONS FOR DECISION

[1] The appellant, O'Dean McFarlane, appeals the disposition of the Ontario Review Board dated October 19, 2021, transferring him from the Forensic Psychiatry Program of St. Joseph's Healthcare Hamilton (the "Hospital") to the

High Secure Provincial Forensic Programs at Waypoint Centre for Mental Health Care (“Waypoint”).

[2] In its response to the appeal, the Hospital seeks leave to adduce fresh evidence.

### **Brief Background**

[3] The appellant has been under the Board’s jurisdiction since December 13, 2007. He is now 42 years of age. He committed the index offence in July 2005. He approached a woman in an apartment building laundry room and punched her repeatedly in the face, continuing to punch her while on the ground. He stopped and said, “Are you all right? Sorry, I just like to do this sometimes.” The victim had bruising near her left eye but declined medical treatment.

[4] During the nearly 15 years that the appellant has been under the Board’s jurisdiction, he has been the subject of a range of dispositions. His condition has sometimes improved and he has enjoyed periods of community discharges, followed by readmissions based on incidents in the community, further criminal charges, and suspected and actual substance abuse.

[5] During the year preceding the hearing leading to the disposition at issue, the appellant was readmitted to the Hospital after being charged with assault. Following his readmission, he eloped from the Hospital and was involved in a

series of concerning incidents. After an altercation with a co-patient, he was placed in seclusion from September 8 to 20, 2021.

[6] At the time of the October 18, 2021 hearing leading to the disposition at issue, the appellant's diagnosis was unspecified psychotic and schizophrenia spectrum disorder, substance use disorder currently in remission in a controlled environment, and antisocial personality traits.<sup>1</sup>

[7] At the hearing, counsel for the appellant sought a series of alternative dispositions: an absolute discharge, or, if the Board found that the appellant remained a significant threat, a conditional discharge, or, if a detention order were found necessary, a continuation of the appellant's detention on its then-current terms, or, if a transfer were found necessary, a transfer to the Centre for Addiction and Mental Health ("CAMH") or Ontario Shores Center for Mental Health Services ("Ontario Shores"), and not Waypoint.

[8] Two matters were before the Board at the hearing: the early review of the appellant's then-current disposition detaining him at the Hospital, which was requested by the Hospital, and the issue of whether the restriction on the appellant's liberty arising from the Hospital's decisions to place him into seclusion

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<sup>1</sup> The report of the Person in Charge of Waypoint to the Board dated June 3, 2022 included in the fresh evidence opines that the appellant suffers from Bipolar Disorder, Type I, with episodes of psychosis that have been precipitated and exacerbated by substance use, and that he is currently experiencing a prolonged state of mania that is partially treated.

on September 8, 2021, to retain him in seclusion until September 20, 2021, and to place him in mechanical restraints from September 13 to 16, 2021 were the least onerous and least restrictive decisions available to the Hospital.

[9] At the outset of the hearing, counsel for the appellant requested that the early review be adjourned because the Hospital had delivered its report to the appellant late. The Board denied the adjournment and the hearing proceeded on both matters. The Board concluded that the Hospital's restriction of the appellant's liberty was warranted. The Board also concluded that the appellant remained a significant threat to the safety of the public and ordered that he be transferred to Waypoint.

### **Issues on Appeal**

[10] The appellant does not challenge the finding that he poses a significant threat to the safety of the public.

[11] He advances two grounds of appeal. First, he argues that the Board's refusal to grant him an adjournment of the early review of his then-current disposition until November 23, 2021 was unreasonable and denied him a fair hearing. Second, he argues that the Board had an inquisitorial duty to investigate concerns of unconscious racial bias and failed to discharge that duty.

[12] He asks this court to set aside the Board's disposition and order a new hearing, with express guidance to the Board to consider how unconscious biases may influence the Hospital's evidence.

[13] The appellant consented to the matter of his restriction of liberty being heard on October 18, 2021 and does not challenge the Board's finding that the Hospital's restriction of his liberty was warranted.

### **Denial of Adjournment**

[14] When deciding whether to grant or refuse a request for an adjournment, the Board must consider: the interests of the not criminally responsible accused, especially any prejudice to the accused in denying an adjournment; the interests of the hospital; and its own statutory mandate to hold timely hearings. Because a decision to refuse an adjournment is discretionary, it attracts significant deference from an appellate court. However, an appellate court may interfere if the Board errs in principle or exercises its discretion unreasonably. For example, an appellate court may intervene if the Board's denial of an adjournment deprives an accused of a fair hearing and thus is contrary to the interests of justice: *Conway (Re)*, 2016 ONCA 918, at paras. 23, 25.

[15] As noted above, the appellant argues that the court should interfere because the Board exercised its discretion unreasonably and deprived him of a fair hearing. The Hospital's report was delivered late – under a week before the hearing – and,

at the hearing, counsel for the appellant advised the Board that the late delivery of the hospital report “made things very pressured for time in terms of preparation for today.”

[16] The appellant argues that he was prejudiced because he did not have adequate time to prepare his defence against a significant change in his disposition. He says the Board made no reference to the prejudice to him when it denied his adjournment request at the hearing.

[17] He also argues that in considering the reasonableness of the Board’s decision, we should not rely upon the reasons for denying the adjournment articulated in its written reasons for disposition dated November 9, 2021 – which, among other things, indicated that the Board did not see any prejudice to him, a conclusion which he says is in any event unsustainable. He argues that differences between the written reasons and what the Board said at the hearing raise the spectre of results-based reasoning and may reflect an attempt by the Board to shore up its decision at the hearing to deny the adjournment.

[18] We are not persuaded that the Board erred in principle or exercised its discretion unreasonably in denying an adjournment of the early review of the appellant’s disposition. In particular, we are not persuaded that the Board failed to consider the appellant’s interests or that he was denied a fair hearing. Nor do we

discount the Board's subsequent written reasons for the adjournment as results-based reasoning.

[19] The context is important. The interests of the Hospital and the Board's statutory mandate to hold timely hearings favoured denying the adjournment.

[20] In its letter to Waypoint dated September 24, 2021, the Hospital expressed the reasoning underlying the recommendation that the appellant be transferred to and detained at Waypoint. Moreover, in its report to the Board dated October 12, 2021, which the Board would have reviewed in advance of the hearing, the Hospital indicated that the appellant's risk of harm toward others has escalated significantly in recent months and could no longer be managed at the Hospital. The Hospital reported threats to staff and co-patients.

[21] As to the Board's statutory duty to hold timely hearings, the hearing had already been delayed. On August 3, 2021, the Hospital requested an early review of the appellant's disposition because of his elopement from the Hospital on July 7, 2021 and his recent assault charge. Counsel for the appellant did not want to have a hearing until after the court heard his appeal of the appellant's then-current disposition on September 10, 2021, so the hearing was scheduled for September 30, 2021. Then it was postponed to observe the National Day for Truth and Reconciliation.

[22] Moreover, contrary to the appellant's submission, the Board considered his interests.

[23] Significantly, counsel for the appellant agreed to proceed to have the matter of the restriction of the appellant's liberty heard on October 18, 2021. After standing down briefly to consider the adjournment request, the Board ruled that it would proceed with both matters stating, "They are, to some extent they're intertwined".

[24] As we discuss below, the Board's assessment at the time of the hearing of the intertwined nature of the two matters was accurate. Effectively, in making that assessment, the Board considered the appellant's interests. In its reasons for disposition dated November 9, 2021, the Board elaborated on this:

We also note that the events leading to the seclusion and restraints were the last in a series of events that led [the Hospital] to the conclusion that [the appellant] can no longer be safely managed at [the Hospital]. The evidence regarding the restriction of liberty are an integral part leading to the Hospital request for a transfer to Waypoint. We do not see any prejudice to [the appellant] with this panel proceeding not only with the Restriction of Liberty hearing but with the early review of [the appellant's] Disposition.

[25] We reject the appellant's arguments that the Board's written reasons in relation to the adjournment should not be considered because they are an after-the-fact justification. In our view, they simply better articulate what was evident to the Board at the hearing and is implicit from what the Board stated at the hearing.



[26] The Hospital's report dated October 12, 2021 was made with respect to both the restriction of liberty issue and its request for a transfer. While lengthy, most of the report consists of background history and the Hospital's reports in connection with previous review hearings. The portion of the Hospital's report with respect to the hearing scheduled for October 18, 2021, is only 15 pages in length. Only one of the incidents described in the report (that of October 2, 2021, described in a single paragraph) post-dates the period of seclusion considered at the restriction of liberty hearing. The September 29, 2021 update of the psychological risk assessment prepared in November 2020 is provided in a page and a half.

[27] In its report, the Hospital opined that the appellant's "risk of harm to others has significantly increased given the aggressive events from July to the present... The teams are of the opinion that [the appellant's] risk of harm toward others has escalated significantly in recent months and can no longer be managed at this program." Essentially, the same conduct was at issue for both the restriction of liberty and early review hearings and appellant's counsel agreed to proceed with the hearing with respect to the restriction of liberty.

[28] Further, we note that while the Hospital's report was delivered late, the appellant learned about the possibility of a transfer to Waypoint approximately three or four weeks before the hearing.

[29] Prior to the hearing, the appellant's counsel sent notices to CAMH and Ontario Shores, advising them that he intended to seek a transfer to them. He did not receive a response prior to the hearing date. In its written reasons, the Board also noted that even a positive response from CAMH or Ontario Shores would not have made a difference if it accepted that the appellant could not be safely managed at the Hospital. The only hospital with greater security than the Hospital in Ontario is Waypoint. In our view, this would have been evident to the expert Board when considering whether to grant the adjournment request.

[30] Finally, having reviewed the transcript of the combined hearings, it is not clear to us what else counsel for the appellant might have done to advance the appellant's position had an adjournment been granted. We see no prejudice to the appellant.

### **Duty to Inquire**

[31] The appellant is a Black man of what his counsel describes as somewhat sizeable stature. In the Hospital's report, the appellant is described at several points as "intimidating". The appellant argues that the Board should have sought out evidence about whether unconscious racial bias affected hospital staff's perception of him as "intimidating" and thereby influenced the Hospital's request that he be transferred to Waypoint. He says the Board improperly rejected his concern about bias because it concluded that there was no "evidence that supports

the suggestion that an element of bias played any role in the decisions made by the hospital.” The appellant submits that requiring overt evidence of bias ignores the ways in which unconscious bias can subtly influence people.

[32] We reject this argument that the Board’s inquisitorial duty was triggered in these circumstances.

[33] There is no question that the Board has an inquisitorial function in exercising its responsibilities under s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46. And anti-Black racism, including both overt and systemic anti-Black racism, is a reality in Canadian society: *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 1. But the demands arising from the Board’s inquisitorial function must be considered in context, including the record as developed before the Board and the positions of the parties as advanced before the Board: *Trudel (Re)*, 2021 ONCA 720, at para. 12. Here, the Board’s inquisitorial duty was not triggered.

[34] At the hearing, appellant’s counsel probed whether unconscious racial bias might be influencing the hospital staff’s perception of him as “intimidating”. Dr. Nagari, who was the appellant’s most responsible physician from January 2019 until August 3, 2021, was aware of the concept of unconscious bias but did not believe it played a role in the Hospital’s decisions with respect to the appellant.

[35] At the hearing, appellant’s counsel acknowledged in his submissions that all of the appellant’s problems could not be attributed to unconscious bias. Further,

and importantly, counsel did not suggest that the Board make further inquiries regarding the concern he had raised about unconscious bias.

[36] There is no realistic possibility that further material would have affected the Board's decision. The Board's disposition was firmly rooted in the evidence, including of the events culminating in and during the September seclusion. The Hospital's request for a transfer to Waypoint was not based upon staff characterization of the appellant as intimidating, without more. The Hospital's report and the evidence at the hearing objectively detail the concerning nature of the appellant's conduct. For example, on September 13, 2021, the appellant made a gun shape with his hand, pointed it at the various staff members while making curses and threats and violently punched and kicked the seclusion room door and glass window which fractured.

### **Fresh Evidence**

[37] The Hospital sought leave to introduce fresh evidence on appeal relating to events that took place after the Board's hearing on October 18, 2021. That evidence includes excerpts from Waypoint's report dated June 3, 2022, the Board's decision dated July 15, 2022 regarding several seclusions of the appellant at Waypoint, and the Board's reasons for decision dated August 12, 2022 in respect of that decision.

[38] The proposed fresh evidence is credible and reliable, could not have been produced at the Board hearing, and was relevant to the appropriate remedy, if the appeal were allowed. We accordingly admit the fresh evidence but it has no bearing on the appeal.

**Disposition**

[39] For these reasons, the appeal is dismissed.

“Alexandra Hoy J.A.”

“S. Coroza J.A.”

“J. George J.A.”