COURT OF APPEAL FOR ONTARIO

CITATION: Scalabrini (Re), 2021 ONCA 212
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Fairburn A.C.J.O., Miller and Zarnett JJ.A.

IN THE MATTER OF: Jean-Paul Scalabrini

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

Anita Szigeti, for the appellant, Jean-Paul Scalabrini

Nicolas de Montigny, for the respondent, Attorney General of Ontario

Michele Warner, for the respondent, Person in Charge of the Centre for Addiction and Mental Health

Heard: March 4, 2021 by video conference

On appeal from the disposition of the Ontario Review Board, dated April 17, 2020, with reasons dated May 7, 2020.

Fairburn A.C.J.O.:

[1] The appellant was found not criminally responsible on account of mental disorder on June 10, 2013. The index offences, which occurred on March 28, 2013, led to charges of possession of a weapon for a dangerous purpose, robbery, uttering a threat to cause death or bodily harm, and resisting or obstructing a peace

officer. Since the initial disposition, the appellant has been under the jurisdiction of the Ontario Review Board and subject to a detention order.

[2] This is an appeal from the Board's April 17, 2020 disposition requiring the appellant to be detained at the General Forensic Unit of the Centre for Addiction and Mental Health, with privileges up to and including living in the community in accommodation approved by the Person in Charge of CAMH. The appellant maintains that the Board erred by failing to grant an absolute discharge. In the alternative, the appellant argues that the Board erred by failing to grant a conditional discharge.

[3] For the reasons that follow, I would dismiss the appeal.

I. THE DENIAL OF AN ABSOLUTE DISCHARGE

[4] In his factum, the appellant argues that the Board's refusal to grant him an absolute discharge is unreasonable. This argument cannot succeed.

[5] Given the evidence available to the Board, and considering all of the circumstances, the Board came to a reasonable decision, providing reasons that are internally coherent and that properly reflect a rational chain of analysis, one that is "justified in relation to the facts and law": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 DLR (4th) 1, at paras. 85, 99-103. See also: *Fotiou (Re)*, 2020 ONCA 153, at para. 7.

[6] The Board focussed upon the correct legal test for determining whether an absolute discharge was available: whether the appellant continues to present a "significant threat to the safety of the public", meaning that there must be a real risk of physical or psychological harm that goes beyond the merely trivial or annoying: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paras. 57, 62. The Board's reasons for decision demonstrate why that test was met, leading to the reasonable conclusion that an absolute discharge was not available in the circumstances.

[7] In concluding that the appellant remains a significant threat to the safety of the public, the Board had regard to a number of factors.

[8] First, the Board considered the appellant's current diagnoses of schizophrenia, paranoid type, and substance abuse, in remission in a controlled setting.

[9] Second, the Board took into account the index offences, which involved "the violent and aggressive use of weapons". The index offences were committed on March 28, 2013, near an underground bunker the appellant constructed in the woods about 20 kilometres outside of Sudbury, Ontario. Notably, he brandished a knife while approaching two young males in an aggressive manner, eventually placing one in a headlock to choke him. He then pressed an air soft pistol against the same victim's temple and threatened the other victim.

[10] Third, the Board considered the fact that, although the appellant has not caused physical harm to anyone since the index offences, he has been known to act in a “threatening and aggressive manner”.

[11] Fourth, while the appellant is treatment capable and treatment responsive, meaning that his active symptoms are reduced when he is taking his medication, the Board accepted the view of Dr. Wilkie, the appellant’s treating psychiatrist, that the “protective effect [of the medication] does not extend to times when [the appellant] is [consuming] cannabis.” To the contrary, the Board found that the appellant develops psychotic symptoms when he uses cannabis. If he were to go off of his medication and use cannabis all at the same time, Dr. Wilkie testified that he would “most certainly be sicker.”

[12] Fifth, in the year leading up to the April 2020 annual review, the appellant had not complied with the detention order that was imposed on April 9, 2019. The April 9, 2019 detention order provided privileges up to and including living in the community in accommodation approved by the Person in Charge of CAMH. The appellant had not enjoyed good success in complying with that detention order.

[13] Within weeks of the April 9, 2019 disposition, the appellant started “intentionally misrepresenting his sign-out sheet in order to be able to use more privileges”. Eventually, the appellant admitted that he wanted to see if he could “get away with it”. During that time, he also admitted to using cannabis and, on one

occasion, was seen to be visibly intoxicated. He acknowledged that his cannabis use in the past had led to increased psychotic symptoms. Those symptoms included “thought broadcasting and paranoia.”

[14] While the appellant had been discharged to a community living setting in February 2020, it only lasted for a little over a month because he tested positive for cannabis use. The appellant was then readmitted to CAMH on March 10, 2020. On March 27, 2020, just prior to the April 2020 Board hearing, the appellant was returned to the same community setting. As will be seen when the fresh evidence is reviewed later in these reasons, that arrangement did not last long, as the appellant returned to consuming cannabis and was readmitted to CAMH on June 10, 2020.

[15] Ultimately, the Board accepted Dr. Wilkie’s evidence that the appellant remains a significant threat to the safety of the public. Without oversight, the following scenario, as taken from the Hospital Report dated February 20, 2020, and summarized in the Board’s reasons for decision, could occur:

> If [the appellant] is to reoffend, it would most likely occur after substance use, leading to decompensation in his mental state. He would lose further insight into his mental illness and the need for long-term treatment or the need for abstinence. Although there have been major decompensations in his mental state after individual incidents of substance use while in hospital, the team has been able to intervene immediately after a single use, thus preventing any ongoing use and potential for further decline. It is likely that, with continued and sustained use,

> there would be a significant change in his mental state. This would most likely occur with reduced supervision. Those most at risk potentially could include anyone in his immediate vicinity.

[16] The Board's conclusion that the appellant remains a significant threat to the safety of the public is reasonable and supported by the evidence.

II. THE DENIAL OF A CONDITIONAL DISCHARGE

[17] Having found that the appellant remains a significant threat to the safety of the public, the Board tackled head-on the question of what constitutes the necessary and appropriate disposition in this case – meaning the least onerous and least restrictive disposition necessary to protect the public: *Winko*, at para. 47; *Valdez (Re)*, 2018 ONCA 657, at para. 17. The Board rejected the appellant's alternative position that he should be conditionally discharged, instead deciding to leave a detention order in place, one that contained privileges up to and including living in accommodation approved by the Person in Charge of CAMH.

[18] In coming to this conclusion, the Board relied upon Dr. Wilkie's evidence that there were two overarching concerns that pointed toward the continuation of a detention order: (a) the need for CAMH to continue to have the ability to approve accommodation in the community; and (b) the need for CAMH to intervene quickly and early in the event of decompensation. Leaning heavily on these concerns, as expressed by Dr. Wilkie, the Board determined that the necessary and appropriate disposition was a detention order.

[19] The appellant contends that the Board erred in coming to this conclusion. During oral submissions on appeal, the appellant emphasized that he had approved housing in the community at the time that the Board hearing was held and that the Board could have ordered the appellant discharged to live at that approved residence.

[20] As well, the appellant maintains that the Board erroneously thought that a detention order gave the hospital powers for early intervention that exceeded those available under a conditional discharge. While the appellant accepts that readmission to the hospital in the event of decompensation is one such power, he maintains that it is the only one. Therefore, he argues that the Board's reasoning was flawed, as reflected in the following passage from the Board's reasons for decision:

> As stated by Dr. Wilkie, there are many factors to consider in a decision to readmit a person such as [the appellant] to the hospital. As pointed out by Dr. Wilkie, early intervention does not necessarily mean readmission to the hospital. The panel accepts this important distinction. Instead, early intervention by the treatment team would allow them to mitigate the factors behind any apparent decompensation and prevent [the appellant's] decline to reach the point where he is a danger to himself or others as would be required under [the *Mental Health Act*, R.S.O. 1990, c. M.7].

[21] I see no error in the Board's reasoning. The impugned passage set out above must be read in context. It is nothing more than a recognition that, despite the existence of a detention order, and the ability to bring a decompensating

person back to the hospital, “many factors” will be taken into account before readmitting an individual to the hospital. Importantly, mitigation strategies may be invoked to determine whether readmission is necessary. The Board was simply acknowledging that if those other attempts at early intervention strategies fail, a detention order ensures that the appellant need not decompensate to the point where he is a danger to himself or others before steps can be taken to readmit him to the hospital.

[22] The need for CAMH to approve of the appellant’s accommodation and the need to intervene early in the event of decompensation were entirely appropriate factors for consideration in rejecting a conditional discharge: *Jackson (Re)*, 2018 ONCA 560, at para. 7; *Munezero (Re)*, 2017 ONCA 585, at para. 9; *Ontario Shores Centre for Mental Health Sciences v. Boehme,* 2016 ONCA 706, at paras. 9-11.

[23] As for the housing consideration, the Board heard evidence that the appellant’s placement at that time was only intended to be a transitional residence, as it offered a maximum stay period of 11 months. In other words, even if everything had gone perfectly, the community housing where the appellant was staying at the time of the Board’s disposition would not have continued to the next annual review pursuant to s. 672.81(1) of the *Criminal Code.* This created clear concerns about where the appellant would reside after his term at that location had come to an end.

[24] The Board also heard evidence that it was the appellant's treatment team's view that it was "imperative with regard to community risk management" that the hospital remain integrally involved in approving accommodation. In Dr. Wilkie's view, the appellant's preference would likely be to live alone in the community, without any support or supervision, but he has demonstrated that he requires a high degree of support and supervision.

[25] As for the need for early intervention, Dr. Wilkie addressed the fact that it was "critically important" to be able to do so early in a decompensation scenario. In her view, the criteria for intervention under the *Mental Health Act* would be insufficient to manage the real and present risk factors that would arise from the appellant's potential substance abuse. In other words, it would compromise the public to have to wait for the appellant to decline "to the point that the [*Mental Health Act*] would be available" before meaningfully intervening.

[26] It was open to the Board to accept Dr. Wilkie's evidence about the need for timely action should the appellant start to decompensate. It was also open to the Board to conclude, on the evidence available, that the risk posed by cannabis to the appellant's mental condition could not be adequately managed under a conditional discharge. This was particularly true given his history of cannabis use, including use that took place not long before the Board hearing.

[27] In light of all of the evidence in this case, including the appellant's track record in breaching his community privileges by consuming the very drug that causes his psychosis, and on the strength of Dr. Wilkie's evidence, it cannot be said that the Board's decision to impose a detention order was unreasonable.

III. THE INTERSECTION BETWEEN COVID-19 AND A CONDITIONAL DISCHARGE

[28] The appellant raises one final submission as to why it was wrong to impose a detention order: the COVID-19 pandemic.

[29] The Board rejected the appellant's argument that COVID-19 changes the way in which the Board considers a detention order and a conditional discharge. The appellant argued that because of COVID-19, hospitalization at CAMH would be dangerous. He argued before the Board that, during the global pandemic, the hospital should not be in a position to exercise discretion for his readmission and, rather, there should be "some kind of objectively measurable criteria that's a higher threshold for [his] return to hospital." Those criteria were said to be in the *Mental Health Act*.

[30] The appellant put it this way in his closing submissions before the Board:

> [COVID-19] within CAMH changes the analysis in terms of what the necessary and appropriate disposition is from how you would have gone about making that decision about this accused person if we were meeting [before the global pandemic].

> [Given the appellant's] risk profile, … he is only capable of being readmitted to the hospital … when either he is prepared to come in voluntarily, … or when he meets the *Mental Health Act* criteria or serious bodily harm to others, for … the risk … likelihood. So Box A [of the *Mental Health Act*] criteria are mental disorder leading to the likelihood of serious bodily harm to himself, to others, or serious physical impairment of himself. [When COVID-19], which could kill [the appellant], is in the institution on the other side of the equation which is early admission, … it's completely fine and manages [the appellant's] risk to the public effectively if he can only be brought in when he does meet the *Mental Health Act* criteria.

[31] In rejecting that argument, the Board emphasized that there are multiple factors that go into determining whether to have someone such as the appellant readmitted to the hospital. In other words, just because a person can be readmitted to the hospital under a detention order, does not mean that they will be readmitted to the hospital.

[32] The Board also emphasized Dr. Wilkie's acknowledgment that "the COVID-19 factor would certainly be a consideration in any decision made by the treatment team." Notably, Dr. Wilkie was specifically asked whether she agreed that the presence of COVID-19 in an institution is a factor that would have to be weighed in the decision to readmit someone to the hospital, to which Dr. Wilkie replied:

> I would agree that there are many factors that need to be taken into account with regard to this pandemic, both with regard to where people are living in the community and any changes in that, so with regard to readmission. So I think these are all factors that would need to be taken into account with regard to admission to hospital.

[33] Ultimately, the Board concluded that it would be an abrogation of the Board's duty to impose a conditional discharge in these circumstances, as the appellant would have to decompensate to the point where he was, in fact, a risk to himself or to others before the *Mental Health Act* would permit a readmission to CAMH. As the Board said, any such approach would compromise the safety of the public.

[34] The appellant contends that the Board erred by rejecting his submission that the danger of the global pandemic should have dictated a conditional discharge as being the necessary and appropriate disposition. He argues that the appellant's fresh evidence on appeal demonstrates the wisdom of his position before the Board.

[35] The fresh evidence was admitted on consent of the parties. The proffered affidavits are "necessary to admit in the interests of justice" and touch "on the issue of risk to public safety": *Criminal Code*, R.S.C. 1985, c. C-46, s. 672.73(1); *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 71. Notably, the fresh evidence of CAMH demonstrates that, following the disposition that is under review, the appellant again confronted some difficulties in the community. On June 10, 2020, almost two months after the April 17, 2020 disposition under appeal, the appellant had to be readmitted to CAMH. Among other things, that decision was made because of his continued use of cannabis.

[36] Given that he was placed back into the hospital, a restriction of liberty hearing was required pursuant to s. 672.81(2.1) of the *Criminal Code*. That hearing was conducted on July 10, 2020, and the Board found that the restriction was warranted as the least onerous and least restrictive alternative in the circumstances: see *Scalabrini (Re)*, [2020] O.R.B.D. No. 2089. Accordingly, the appellant continued to reside at CAMH up to the time of the present appeal.

[37] Unfortunately, according to the fresh evidence of the appellant and the fresh evidence of the Person in Charge of CAMH, the unit that the appellant has been residing in experienced a COVID-19 outbreak just prior to this appeal being heard. The fresh evidence of the Person in Charge of CAMH suggests that the outbreak would move into a “resolved” status on March 6, 2021, two days after the hearing of this appeal. The appellant did not contract COVID-19, but a number of the patients around him and some staff members had contracted the virus. This created more difficult living circumstances, with less privileges being extended to the appellant than normal.

[38] The fresh evidence also demonstrates that forensic patients at CAMH have been prioritized to receive vaccinations. At the time of the appeal, it was anticipated that patients in the appellant’s unit who consented to receive the vaccination would be able to do so during the week following the hearing of this appeal, after the outbreak status had lifted.

[39] The fresh evidence of the Person in Charge of CAMH also suggests that the appellant has continued to use cannabis while at CAMH, and there is some evidence suggesting the appellant has tampered with his urine samples. Accordingly, substance use remains a concern from a risk management perspective.

[40] On a more positive note, at the time of the appeal, the appellant was considered a “strong candidate” for a transitional rehabilitation housing program, one that has staff on-site 24 hours a day. This was being actively advocated for by CAMH on the appellant’s behalf, and the hope was that it would be resolved soon after the hearing of the appeal. It may be that by the time of the next annual Board hearing, scheduled for April 15, 2021, this housing situation will have been resolved, and the appellant will have been moved from CAMH to the transitional housing.

[41] The appellant argues that his fresh evidence demonstrates that his worst fears, that he would be returned to CAMH and potentially exposed to COVID-19 in a congregate setting, have come true. He maintains that this reality underscores the strength of his position before the Board: that he should have been given a conditional discharge so that it would have been more difficult to readmit him to the hospital.

[42] I am not persuaded by this argument.

[43] The Board is charged with a very specific statutory mandate. At an annual review, that mandate is informed by s. 672.54 of the *Criminal Code*, requiring the Board to consider the safety of the public, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused. Of course, by virtue of statute, the safety of the public is the "paramount consideration": *Criminal Code*, s. 672.54.

[44] To accede to the appellant's submission would mean that, because of the pandemic, the Review Board would have to put aside its clearly articulated and considered view as to how to best manage the appellant's risk to the community, in favour of what the appellant admits is a far less effective risk management tool – the *Mental Health Act*.

[45] The risk of COVID in congregate settings is well known at this stage of the pandemic. Nothing in these reasons should be understood as taking that risk lightly. It is a very serious and sometimes deadly disease that is particularly insidious in group settings. Even so, I do not accept that because of the pandemic, a conditional discharge should be imposed in circumstances where a detention order is called for, only to make it more difficult for the appellant to be returned to the hospital in circumstances where he is decompensating and in need of stabilization. To accede to this submission would be to turn the statutory scheme on its head.

[46] This is not to say that the existence of COVID-19 is entirely irrelevant to whether someone should be taken into the hospital. Dr. Wilkie clearly acknowledged this fact when she said that it was a factor to be taken into account. In my view, that is exactly the time that the factor should be taken into account. Rather than have the Board impose a conditional discharge, where a detention order is called for, it is for the health care professionals to keep COVID-19 in mind at the time that decisions are being made about whether to intervene in the context of decompensation and, if so, how. It may be that in this time of COVID-19, as acknowledged by Dr. Wilkie, the status of the disease may well inform strategies used to address decompensation, some of which fall short of re-hospitalization.

[47] The Board's reasons properly accepted that, while COVID-19 is a factor for the treatment team to take into account when exercising its powers under a detention order, the existence of the global pandemic did not justify a conditional discharge. Indeed, the Board expressed the view that to have accepted that position, it would be required to abrogate its statutory duty. I agree. This was particularly true in this case where the appellant, who was known to deteriorate with drug use, would be required to deteriorate to the point where he was a risk to himself or others, compromising public safety, before consideration could be given to invoking the *Mental Health Act* to require his readmission to CAMH. There is nothing wrong with the Board's conclusion.

IV. DISPOSITION

[48] The appeal is therefore dismissed.

Released: “APRIL 6 2021” “JMF”

“Fairburn A.C.J.O.”
“I agree B.W. Miller J.A.”
“I agree B. Zarnett J.A.”