

# COURT OF APPEAL FOR ONTARIO

CITATION: Roberts (Re), 2021 ONCA 869

DATE: 20211208

DOCKET: C68888 & C69217

Strathy C.J.O., Hourigan and Paciocco JJ.A.

IN THE MATTER OF: Mark Sheldon Roberts

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

Anita Szigeti and Maya Kotob, for the appellant

Manasvin Goswami, for the respondent, Attorney General for Ontario

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

Heard: November 26, 2021

On appeal from the disposition of the Ontario Review Board, dated September 24, 2020, with reasons dated October 22, 2020, and the disposition dated February 17, 2021, with reasons dated March 8, 2021.

REASONS FOR DECISION

## A. INTRODUCTION

[1] There are two appeals before the court. The initial appeal (C68888) is from a 2020 disposition order that Mr. Roberts be detained with privileges including community living. Mr. Roberts submits that this order was unreasonable. He is unrepresented on this appeal and has not had the assistance of *amicus*.

[2] While he was living in the community pursuant to the 2020 disposition order, the Centre for Addiction and Mental Health (“CAMH”) revoked Mr. Roberts’ community living privileges and detained him in the hospital. The most recent appeal (C69217) arises from a hearing of the Ontario Review Board (the “Board”) on January 27, 2021, pursuant to s. 672.81(2.1) of the *Criminal Code*, R.S.C., 1985, c. C-46, relating to CAMH’s decision to significantly increase the restrictions on Mr. Roberts’ liberty.

[3] The issue raised in this most recent appeal by *amicus* on behalf of Mr. Roberts concerns a recent change in dispositions made by some panels of the Board to simply require that the accused be detained at the “Forensic Service” of a forensic psychiatric institution, rather than describing the security level of the unit (“general” or “secure”) in which the accused is to be detained, which was the former practice of the Board.

[4] This new practice apparently flows from requests by the institutions themselves. Some institutions, like CAMH, request a general detention order to

the Forensic Service, while others have “de-designated” their facilities by ceasing the previous practice of identifying each forensic unit by its security level.

[5] In this case, the Board implemented the institution’s requested change without explaining its reasons for doing so, and without specifying the conditions or restrictions applicable to Mr. Roberts’ detention.

[6] In light of the fresh evidence adduced by the institution, which we will admit, we are satisfied that the current restrictions on Mr. Roberts’ liberty are appropriate, and that they will be reviewed by the Board at a restriction of liberty hearing and his annual hearing, both of which are pending.

[7] Nevertheless, as explained below, we express our concern that while the practice of “de-designation” of Ontario forensic psychiatric facilities may well have sound clinical and risk management justifications (which we have not explored and upon which we come to no conclusion), this does not absolve the Board of the responsibility to arrive at a disposition that is the least onerous and least restrictive to the accused. That may require the Board to give some specificity to the package of conditions that will apply to the accused, including the structure of the forensic unit and the security applicable to the accused’s detention. These are matters that will require a full record and submissions.

[8] We also address below the initial appeal (C68888) brought by Mr. Roberts without the assistance of *amicus*.

## **B. BACKGROUND**

[9] On June 26, 2014, Mr. Roberts was found not criminally responsible on account of mental disorder on a charge of criminal harassment on multiple occasions in 2012-2013 in relation to his landlord's daughter. He has been diagnosed with schizophrenia, cannabis use disorder (in sustained remission as of August 2020), and personality disorder with paranoid and obsessive-compulsive traits.

[10] On August 19, 2019, the Board issued a disposition, ordering Mr. Roberts to be detained at the General Forensic Unit of CAMH. His privileges included residing in the community in accommodation approved by the person in charge.

[11] At Mr. Roberts' annual hearing in 2020, which resulted in the Board's disposition of September 24, 2020 (the "2020 Disposition"), the Board found that he continued to represent a significant threat to the safety of the public. The Board accepted the opinion of Mr. Roberts' treatment team that a conditional discharge would not adequately protect the public and continued his detention order without change.

[12] Mr. Roberts was thus ordered detained at the General Forensic Unit of CAMH. The person in charge of CAMH was to create a program for Mr. Roberts' detention and rehabilitation, with discretion to, among other things, permit him to live in the community in accommodation approved by the person in charge.

[13] The 2020 Disposition is the subject of Mr. Roberts' appeal in C68888.

[14] Prior to the events that served as the basis for the February 17, 2021 disposition (the "2021 Disposition"), Mr. Roberts was living in the community, pursuant to the 2020 Disposition. In October 2020, Mr. Roberts began harassing a victim who worked at a Metro grocery store. On multiple occasions, Mr. Roberts visited or called the grocery store to contact the victim. He was charged on December 5, 2020 with harassment by repeated communication, harassment by repeated following, and entering premises where entry is prohibited. He was admitted to CAMH on December 10, 2020. When asked at the hospital what he would do if given passes by CAMH, Mr. Roberts replied that he would go back to Metro to buy groceries. He continued to leave phone messages for the victim.

[15] These events, and the hospital's conclusion that public safety required a significant increase in restrictions, triggered a "restriction of liberty" hearing pursuant to s. 672.81(2.1) of the *Criminal Code* to review the hospital's decision.

[16] The question before the Board was whether the hospital was justified in significantly increasing the restrictions on Mr. Roberts' liberty. Counsel for the hospital argued that the decision to readmit Mr. Roberts was warranted, and that the restrictions remained the least onerous and least restrictive option available. Counsel for the Attorney General recommended that the Board add three conditions to the disposition: that Mr. Roberts not be within 500 meters of the victim

or any place he knows her to work, live, go to school, frequent or happen to be; that Mr. Roberts not be within 500 meters of the Metro store where the victim worked; and that Mr. Roberts not contact the victim either directly or indirectly. Counsel for Mr. Roberts opposed the position of the hospital that Mr. Roberts be detained at the Forensic Service at CAMH.

[17] The Board agreed with Mr. Roberts' readmission to the hospital. The Board accepted the position of the Crown that the three conditions should be added to the disposition and held that Mr. Roberts' ongoing restriction remained the least onerous and least restrictive disposition in his case.

[18] In its disposition, the Board articulated conditions that largely mirrored those contained in the 2020 Disposition. One notable difference is that the Board in its 2021 Disposition ordered that Mr. Roberts be detained at the Forensic Service at CAMH (as opposed to the General Forensic Unit).

[19] As noted above, the 2021 Disposition is the subject of the appeal in C69217.

[20] Both CAMH and the Attorney General brought motions to introduce fresh evidence in C69217. In brief, CAMH's fresh evidence indicates that on March 10, 2021, Mr. Roberts was transferred from a General Forensic Unit to a Secure Forensic Unit at CAMH, where he has remained continuously up to the present. CAMH's position is that Mr. Roberts continues to require the structure and staffing support of a Secure Forensic Unit. CAMH reported this increase in Mr. Roberts'

restrictions to the Board on March 18, 2021. A restriction of liberty hearing to review this increase in restrictions was scheduled to be heard on April 7, 2021 and discussions about scheduling are continuing to this date, as set out in the fresh evidence. It appears that part of the challenge is attributable to Mr. Roberts' request that the review take place in person. A pre-hearing conference had been scheduled for December 1, 2021 to determine whether in-person Board hearings are expected to resume and, if so, to discuss hearing dates.

[21] The Attorney General's motion to adduce fresh evidence addresses an issue raised by Mr. Roberts to the effect that the 2021 Disposition was unreasonable because the conditions imposed duplicate the conditions of his bail. The fresh evidence indicates that Mr. Roberts is no longer bound by those bail conditions because the criminal charges against him were withdrawn in exchange for his entering into a peace bond. That peace bond does not include the same terms as the 2021 Disposition.

## **C. ISSUES AND ANALYSIS**

### **(1) The Appeal in C68888**

[22] Mr. Roberts appeals the 2020 Disposition, which continued the 2019 detention order.

[23] In his factum on appeal, counsel for the Attorney General submits that Mr. Roberts's appeal is moot, because it has been superseded by the subsequent

2021 Disposition: see *Halat (Re)*, 2020 ONCA 143, at para. 2; *Jaffrey (Re)*, 2020 ONCA 113, at para. 1; *Casey (Re)*, 2019 ONCA 861, at para. 1.

[24] Arrangements were made for Mr. Roberts to attend in person to argue his appeal, to participate remotely by video conference or to participate by teleconference. He declined to do so, for reasons that are not apparent. In the circumstances, the appeal in C68888 is adjourned to be spoken to in status court.

## **(2) The Appeal in C69217**

[25] Through *amicus*, Mr. Roberts appeals the 2021 Disposition, which ordered that he be detained at the Forensic Service at CAMH, as opposed to the General Forensic Unit. In light of the fresh evidence, which we admit, we maintain the 2021 Disposition and dismiss the appeal.

[26] The hospital's request to de-designate the disposition order and the Board's approach to that request are important issues that would have to be determined on a full evidentiary record. Regardless, the Board was required to examine the nature of the restrictions on Mr. Roberts' liberty that would prevail in the Forensic Service and to determine with some precision the restrictions that should apply. Without doing so, it would be impossible for the Board to determine that his restrictions were the "least onerous and least restrictive" disposition.

[27] As *amicus* points out in her very helpful factum, in some cases, the Board has required the hospital to describe the structure and security of each unit on



which the accused may be ordered to be detained and the Board will then identify the unit by name or location as the one in which the accused is to be detained: see *Fotiou (Re)*, [2019] O.R.B.D. No. 1235 and *Fotiou (Re)*, [2019] O.R.B.D. No. 1234; *Menard (Re)*, [2019] O.R.B.D. No. 2703, at paras. 19-21 and *Menard (Re)*, [2019] O.R.B.D. No. 2702; *Remmer (Re)*, [2019] O.R.B.D. No. 2596, at paras. 28-29; *Pampano (Re)*, [2019] O.R.B.D. No. 2574, at paras. 10, 26 and 34; *Tran (Re)*, [2021] O.R.B.D. No. 415, at paras. 36-43 and 45-50; *Sawyers (Re)*, [2021] O.R.B.D. No. 150, at paras. 36, 39 and 43; *Kent (Re)*, [2021] O.R.B.D. No. 1842, at paras. 4, 26 and 31; *Ramos (Re)*, [2021] O.R.B.D. No. 1929, at paras. 28, 30 and 31.

[28] The issue of de-designation should be addressed either at the restriction of liberty hearing or at Mr. Roberts' next annual hearing.

[29] We do not give effect to Mr. Roberts' submission that the 2021 Disposition was unreasonable because he was already bound by bail terms, making the "no contact" provisions of the disposition unnecessary. The fresh evidence filed by the Attorney General establishes that Mr. Roberts is no longer bound by the bail conditions, because the charges against him were withdrawn in exchange for entering into a peace bond. That bond does not include all the relevant terms of the Board's disposition. In any event, there is no reason why Mr. Roberts cannot be bound by different conditions, in different proceedings and for different purposes.

[30] We therefore maintain the current disposition and dismiss the appeal.

“G.R. Strathy C.J.O.”

“C.W. Hourigan J.A.”

“David M. Paciocco J.A.”