COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Evers v. British Columbia (Adult Forensic Psychiatric Services),* 2009 BCCA 560

Date: 20091209
Docket: CA036705

In the Matter of Edith Noreen Evers

Between:

Edith Noreen Evers

Appellant

And

The Director of Adult Forensic Psychiatric Services

Respondent

And

Director of Public Prosecutions

Respondent

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

On appeal from the British Columbia Review Board, October 30, 2008 and February 2, 2009

Counsel for the Appellant: K. Love
C. Dauvergne

Counsel for the Respondent, The Director, Adult Forensic Psychiatric Services: D.K. Lovett, Q.C.

Counsel for the Respondent, Director of Public Prosecutions	D. McWhinnie
Place and Date of Hearing:	Vancouver, British Columbia October 19, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 9, 2009

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] This appeal raises four issues. First, should the Court decline to decide the appeals because they are moot? Second, did the British Columbia Review Board established under s. 672.38(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "Review Board"), err by proceeding with a first disposition hearing in the accused person's absence? Third, can the Review Board detain an accused person who poses no significant threat to public safety to allow treatment to be administered against their will? Fourth, what is the Review Board's jurisdiction to make disposition orders after it has formed the opinion that the accused is fit to stand trial?

[2] Because numerous sections of the *Criminal Code* are referred to in these reasons, I attach, for ease of reference, the various sections as Appendix A.

BACKGROUND

[3] The appellant, Noreen Evers, was charged by indictment on 30 July 2007 with production of a controlled substance (cannabis) and possession of a controlled substance (marijuana) contrary to ss. 7(1) and 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[4] There were numerous appearances set between 13 August 2007 and 26 June 2008 to fix a date for trial which appear to have been adjourned due to Ms. Evers' ill health.

[5] On 26 June 2008, the Supreme Court appointed counsel to act on behalf of Ms. Evers pursuant to

s. 672.24(1) of the *Criminal Code*. The Supreme Court also ordered that Ms. Evers attend an out-of-custody assessment as to whether she was unfit to stand trial pursuant to s. 672.11(a) of the *Criminal Code*.

[6] On 8 August 2008, Dr. Deanne Breitman, a psychiatrist with the Nanaimo Regional Clinic, Forensic Psychiatric Services Commission, prepared a report as to Ms. Evers' fitness to stand trial after interviewing Ms. Evers and reviewing her medical records. Dr. Breitman diagnosed Ms. Evers as having a paranoid delusional disorder and cannabis abuse in remission based on Ms. Evers' report that she was compliant with court prohibitions on her use of cannabis. As to Ms. Evers' fitness to stand trial, Dr. Breitman stated:

> Although Ms. Evers was able to provide a basic factual knowledge of the roles of the key courtroom players, the meaning of the oath, possible pleas, and possible outcomes, the likelihood that she would be able to participate effectively in her own defense is poor in my psychiatric opinion.
>
> ... Although she is able to provide an acceptable definition of the roles of various court room players, she continues to believe that she will be assigned a crown prosecutor, specifically Mr. Paul Riley, as her legal counsel, despite arguments to the contrary. Ms. Evers would therefore likely be unable to communicate with counsel rationally or make critical decisions on counsel's advice, due to her mental disorder, would likely be unable to take the stand to testify if necessary and would therefore likely be incapable of conducting her own defense. It is therefore my psychiatric opinion that Ms. Evers is unfit to stand trial.

[7] Dr. Breitman's recommendations included:

> Ms. Evers is currently not certifiable under the Mental Health Act. There is no evidence to suggest that, if Ms. Evers were to remain in the community she would become fit to stand trial. She lacks any insight into the presence of a mental disorder and has refused any treatment with psychiatric medications. ... Unfortunately, delusional disorders are sometimes difficult to treat, particularly when they are long standing. It is therefore difficult to say with certainty that treatment would render Ms. Evers fit to stand trial, however, given that she has demonstrated some response to treatment in the past there is a good likelihood that treatment with antipsychotic medications will make Ms. Evers fit to stand trial. As stated, without treatment, she is likely to remain unfit to stand trial. The risk of harm to Ms. Evers from this treatment, in my opinion, is not disproportionate to the benefit anticipated to be derived from it. Therefore, if Ms. Evers is found unfit to stand trial I would respectfully suggest a treatment order for a period of 60 days with Ms. Evers to be detained in custody at the Forensic Psychiatric Hospital.

[8] On 19 September 2008, a judge of the Supreme Court found Ms. Evers unfit to stand trial. The court deferred disposition to the Review Board to hold a hearing and make a disposition as soon as practicable but not later than within 45 days. Ms. Evers was released on recognizance of bail which continued in effect until the Review Board made a disposition.

[9] On 24 September 2008, Barry Long, an alternate chairperson of the Review Board, ordered, pursuant

to s. 672.121(b)(i) of the *Criminal Code*, an assessment of Ms. Evers' mental condition, fitness to stand trial and attendant risk of the accused to be conducted and submitted in writing before 17 October 2008 by Forensic Psychiatric Services. The order was in force until 3 November 2008 on the conditions that Ms. Evers report as directed for assessment and appear before the Review Board as directed.

[10] Ms. Evers did not attend for assessment.

[11] In anticipation of a hearing date subsequently scheduled for 30 October 2008, Dr. Breitman provided a further report dated 16 October 2008 in response to the Review Board's assessment order. Ms. Evers did not attend the assessment scheduled for 7 October 2008. Among Dr. Breitman's findings, several are relevant to this appeal:

> 2. Fitness to Stand Trial – Unfortunately Ms. Evers could not be reassessed for fitness to stand trial since being found Unfit to Stand Trial at the Supreme Court of British Columbia at Courtenay on September 19, 2008. There is no reason to suspect that there has been any significant change in her mental state that would change the fitness assessment. Based on the most recent fitness assessment, Ms. Evers was able to provide a basic factual understanding of roles of the key court room players, meaning of the oath, possible pleas, and possible outcomes. It is my psychiatric opinion, however, that she is impaired with regards to her understanding of the nature and purpose of the court room process and her charges in that she is unable to separate her current charges from her previous charges and believes that by facing these charges she will somehow be changing the world, striking down the Controlled Drugs and Substances Act and affecting the Federal Accountabilities Act. ... During the last interview, she was quite difficult to direct and disorganized in her thinking such that she would have some difficulty communicating with counsel rationally and making critical decisions on counsel's advice. As well she would have difficulty taking the stand to testify if necessary. It is therefore my psychiatric opinion that Ms. Evers is Unfit to Stand Trial.
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> 3. Risk Assessment – Given that based on current available information there is no significant history of previous violence, Ms. Evers has few historical risk variables predicting future violence. …
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> Ms. Evers is clearly in a situation where she is suffering from significant stress and perceives that she is being persecuted and mistreated, is acutely unwell psychiatrically, has no insight into her mental disorder and has negative attitudes perpetuated by her delusional beliefs. If Ms. Evers was an individual with a history of violence or aggressive behaviors, there would be significant risk that she would act out at a time such as this. There is, however, no evidence available that she has acted out in a violent manner, even under stress and perceived persecution, although there is of course some risk given her current situation as described. …
>
> 4. Recommendations – Ms. Evers remains non certifiable under the Mental Health Act. There also remains no evidence to suggest that, if Ms. Evers was to remain in the community, she would become fit to stand trial. She is unlikely to accept any treatment with psychiatric medications in the community. Given Ms. Evers' current risk assessment, I would respectfully recommend a conditional discharge.
>
> [Emphasis added.]

[12] On 30 October 2008, the Review Board held an initial disposition hearing (the "first hearing") under s. 672.47 of the *Criminal Code*. Ms. Evers failed to appear. A process server had made 14 unsuccessful attempts to serve notice of the disposition hearing at her residence.

[13] The Review Board proceeded in Ms. Evers' absence and concluded on the available evidence that Ms. Evers was unfit to stand trial. In doing so, the Review Board relied on what it referred to as the "presumptive verdict of unfitness" under s. 672.32(2) of the *Criminal Code* which provides:

> 672.32(2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities.

[14] The Review Board made a custodial disposition under s. 672.54(c) of the *Criminal Code* to be reviewed by 1 March 2009. Section 672.54(c) provides:

> 672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
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> ...
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

[15] In making the custodial order, the Review Board concluded:

> [19] The Review Board considered all of the historic evidence, as well as the submissions of the parties. Speaking to the issue of fitness to stand trial we are of course aware that once an accused has been given a verdict of unfit to stand trial s. 672.32 raises a presumption that must be overcome on evidence that satisfies the civil standard of a balance of probabilities. We have no such evidence before us, not having had an opportunity to actually interact with the accused and having no recent psychiatric evidence. Therefore, the verdict stands un-contradicted, Ms. Evers continues to remain unfit to stand trial as of the date of this hearing.
>
> [20] We then move to the issue of disposition as we are required to do within 45 days of verdict under s. [672.47(1)]. We take into account that the accused has failed to comply with our assessment order and that she has failed to attend her first hearing, notwithstanding the extraordinary efforts that were made to serve her with notice thereof. We have no prospect that she will in any reasonably foreseeable time return to fitness to stand trial especially as she is not in receipt of any psychiatric treatment. We reluctantly conclude that the only way that the Board has of advancing this matter is to ensure that Ms. Evers is further assessed and that she receives some form of treatment, albeit of an involuntary nature. We therefore determined to impose a disposition of custody, requiring the accused to be detained at the Forensic Psychiatric Hospital. Our disposition will be backed by a warrant of committal which will

> authorize law enforcement authorities to apprehend Ms. Evers and to transport her to the Forensic Psychiatric Hospital for treatment.

[16] Two days later, on 1 November, Ms. Evers was arrested and transported to the Forensic Psychiatric Hospital in Port Coquitlam, British Columbia.

[17] Ms. Evers filed a Notice of Appeal against the Director of Adult Forensic Services (the "Director") on 19 December 2008.

[18] Ms. Evers was scheduled for review on 2 February 2009. In anticipation of the review, Dr. L. Meldrum, a psychiatrist with the Forensic Psychiatric Hospital, delivered a report on 15 January 2009 to Dr. J. Brink, the clinical director of the Forensic Psychiatric Hospital. The report detailed Ms. Evers' treatment and response, summarizing Ms. Evers' conditions as follows:

> [18] In summary, many of the findings that underpinned Dr. Breitman's opinion that Ms. Evers was unfit and was accepted by His Honor in September of 2008 continues to be very much in evidence. However, Ms. Evers has recently started to show some signs of responding to medication and it is possible by the time of her appearance at a Review Board on February 2, 2009 she may have responded to the point where the Review Board may consider that she is now better able to communicate with counsel and participate meaningfully in he[r] own defense.

[19] On 2 February 2009, the Review Board held a second disposition hearing. Section 672.48 of the *Criminal Code* governs initial and subsequent hearings conducted by the Review Board relating to persons who are subject to a court verdict of unfit to stand trial. It provides, in part:

> 672.48 (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.
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> (2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

[20] At the 2 February hearing, the Review Board unanimously found that Ms. Evers was fit to stand trial. However, there was disagreement with respect to her continued detention. The majority held:

> [37] Having found the accused fit, the Review Board is of course required to impose one of two dispositional alternatives under Section 672.54 of the *Criminal Code*; that is, a disposition of detention or of discharge subject to conditions, bearing in mind the public safety issues and the admonition to impose the least onerous and least restrictive alternative. Irrespective of that analysis, the Review Board also has the option under Section 672.49(1) of the *Criminal Code* to detain an accused if there are reasonable grounds to believe she would become unfit to stand trial if released.
>
> [38] This is actually Ms. Evers' first in-person hearing. The majority of the Board were of the view that

> there is evidence to believe, including Ms. Evers' own protestations against medication, that if she were discharged and if she were noncompliant in the face of her persistent stressors, she would become unfit to stand trial in short order. The majority therefore determined to impose a disposition of custody notwithstanding the absence of any findings of significant threat in order to safeguard her stability, and so that Ms. Evers may be able to confront her charges and put these matters behind her in reasonably short order.

[21] The chairperson, in dissent, held:

> [39] CHAIRPERSON: I was persuaded that the benefits that she has obtained from her medication to date will sustain for another month. To the extent she has stable accommodation in the community where she has resided for close to 20 years and, to the extent that she does not pose anything amounting to a threat to the safety of others, Ms. Evers could, in my view, be released pending her return to court for trial of the issue. I remind myself that the underlying social policy objectives and entire approach of the drafting of Part XX.1 of the *Code* posits a presumption against detention. Neither the index offences nor the accused's clinical status are in my view sufficiently compelling evidence to rebut that presumption.

[22] Thus, although found fit to stand trial at the time of the hearing, the Review Board ordered that Ms. Evers be detained in custody because the majority considered there to be reasonable grounds to believe she would become unfit if released pending her return to court.

[23] Ms. Evers filed an addendum to her Notice of Appeal on 6 February 2009.

[24] On 6 July 2009, a judge of the Supreme Court found Ms. Evers fit to stand trial and released her on recognizance of bail. We were advised that the trial of the charges against Ms. Evers commenced in October 2009 and was adjourned to a date in December 2009.

ISSUES ON APPEAL

[25] The issues on appeal are most conveniently defined as follows:

(1) Should the Court decline to decide the appeals because they have become moot?

(2) Did the Review Board err in proceeding with the first disposition hearing in the absence of Ms. Evers?

(3) Did the Review Board err in law in detaining Ms. Evers in custody for reasons other than public safety following the first disposition hearing? and

(4) Did the Review Board err in law and act without jurisdiction in detaining Ms. Evers in

custody following the second disposition hearing?

DISCUSSION

Mootness

[26] Pursuant to s. 672.63 of the *Criminal Code*, the Review Board's dispositions remain in effect until replaced by a subsequent disposition by the Review Board. In her factum, Ms. Evers submitted that the second disposition order was made without jurisdiction and that the first disposition order (that she was unfit to stand trial) governed until she was returned to court and the court made a new order. Between the filing of her appeal factum on 1 June 2009 and the hearing of the appeal on 19 October 2009, the Supreme Court ordered on 6 July 2009 that Ms. Evers was fit to stand trial.

[27] The appeal is thus factually moot. Ms. Evers submits that the Court should nevertheless exercise its discretion to decide the appeal based on the factors to be considered in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-363. The factors are whether:

(a) there is an appropriate adversarial context;

(b) the case is an appropriate use of judicial resources; and

(c) the court would be acting within its proper adjudicative role and not intruding on the legislative branch.

[28] The Director of Public Prosecutions agrees with Ms. Evers that although factually moot, the issues raised on the appeal are likely to recur and are, by their nature, evasive of appellate review.

[29] At the hearing of the appeals, counsel for the Director, Adult Forensic Psychiatric Services (the "Director") agreed with Ms. Evers that the Review Board had erred and the Director took no position on the outcome of the appeals. Counsel for the Director noted that the Director had not sought a custodial order and in fact recommended a conditional discharge upon the second disposition hearing. The Director appeared as a party before the Review Board and the Review Board declined to do what the Director considered to be appropriate. The Director thus submits that there is an insufficient adversarial context within which to decide the issues on appeal.

[30] The Review Board has notice of the appeal from the clerk of the Court of Appeal. Pursuant to

s. 672.74(2) of the *Criminal Code*, the Review Board is required to transmit to the Court the record before the Review Board.

[31] The Review Board has not appeared in the appeals. It appears from the authorities provided by counsel that Review Boards rarely intervene in cases of this kind.

[32] The Director agrees that the question of whether the Review Board acted unreasonably by making a custodial disposition to facilitate Ms. Evers' return to fitness is an important one. However, the Director submits that the question is unlikely to arise in future in respect of other unfit accused persons given the unique circumstances which underlie the Review Board's reasoning.

[33] The Director agrees with Ms. Evers that the question of whether the Review Board has the jurisdiction to make a "fit but fragile" order in other than an initial disposition is an important question, the resolution of which would guide the Review Board in future proceedings.

[34] The Director suggested that a number of factors might militate against the Court deciding the moot appeals, including Ms. Evers' failure to comply with the assessment order, her evasion of service of the Review Board's hearing notice, her failure to attend the first hearing, and her failure to seek an early hearing before the Review Board to review its disposition. While those factors might, in other circumstances, lead a court to refuse to hear a moot appeal, I am not persuaded that they should do so in this case. The substantive issues raised by Ms. Evers are worthy of consideration. If they are not considered in this case, they are likely to evade review in future.

[35] Accordingly, I would decide the appeals notwithstanding that they are factually moot.

Standard of Review

[36] Before addressing the substantive issues, I note that the parties do not disagree as to the appropriate standard of review.

[37] Section 672.78(1)(a) to (c) of the *Criminal Code* provides three grounds of appeal from disposition decisions: (a) the decision is unreasonable or cannot be supported by the evidence; (b) the decision is based on a wrong decision on a question of law; or (c) there was a miscarriage of justice: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 799; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[38] The standard of review under s. 672.78(1)(a) corresponds to the reasonableness standard of review (*Khosa* at para. 31). The standard of review for questions of law under s. 672.78(1)(b) is correctness (*Khosa* at para. 32).

Proceeding with the First Disposition Hearing in the Absence of Ms. Evers

[39] Section 672.5 of the *Criminal Code* governs hearings by a court or Review Board to make or review a disposition.

[40] Section 672.5(9) provides that "the accused has the right to be present during the whole of the hearing", subject to s. 672.5(10) which allows the court or chairperson of the Review Board to permit the accused to be absent or cause the accused to be removed for the whole or part of the hearing.

[41] The parties on appeal all seem to agree that the Review Board proceeded in Ms. Evers' absence because of the time constraints imposed in the *Criminal Code*. The Supreme Court found Ms. Evers to be unfit to stand trial on 19 September 2008. The appropriate disposition was referred to the Review Board under s. 672.45(1.1) and 672.47 of the *Criminal Code*. The Review Board was required under s. 672.47(1) to "as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition". The initial disposition in the instant case proceeded on 30 October 2008, 41 days after the court order.

[42] Ms. Evers acknowledges her non-appearance but submits that the Review Board failed to consider issuing a warrant under s. 672.85 of the *Criminal Code* to compel her attendance, or adjourning the hearing for up to 30 days under s. 672.5(13.1) "for the purpose of ensuring that relevant information is available to permit it to make or review a disposition or for any other sufficient reason".

[43] At the time of the first hearing on 30 October 2008, the Review Board had available to it the 8 August 2008 report from Dr. Breitman and the further report of 16 October 2008, which was made without Dr. Breitman having been able to further assess Ms. Evers due to her failure to appear for assessment.

[44] The Review Board was confronted with a difficult case. Ms. Evers had been found by the Supreme Court to be unfit to stand trial. At that time, the court was aware of Dr. Breitman's opinion that Ms. Evers was acutely unwell, lacked insight, and was unlikely to become fit without treatment. She was released into the community on bail pending the disposition hearing without a condition that she attend the nearest forensic

psychiatric services out-patient clinic as directed by the Review Board.

[45] In these circumstances, it might be said that it was understandable that the Review Board made the initial disposition order, concerned as it was that Ms. Evers was acutely psychiatrically ill and needed further assessment and treatment.

[46] However, Ms. Evers submits that the Review Board failed to recognize its inquisitorial mandate as described in *R. v. LePage* (2006), 214 C.C.C. (3d) 105, 217 O.A.C. 82, as an error of law in the context of persons not criminally responsible by reason of mental disorder:

> 25 There is nothing in the record to indicate that the Board adverted to the inquisitorial nature of its process. In the particular facts of this case it was an error of law for the Board to fail to recognize its inquisitorial role and to consider making further inquiries. Consequently, the resulting disposition was "based on a wrong decision on a question of law" and appellate intervention is appropriate under s. 672.78 (1)(b). Had the Board's reasons explained why it decided not to make further inquiry in this case, the court would have to show deference to that decision. It and the resulting disposition would have been reviewable on a reasonableness standard under s. 672.78(1)(a).

[47] There is in the instant case, as in *LePage*, nothing to indicate that the Review Board adverted to the inquisitorial nature of its process. Further, there is no indication that the Review Board considered issuing a warrant to compel Ms. Evers' attendance. She was apprehended within two days of the disposition order. If the warrant had been issued prior to the disposition order, the Review Board could presumably have undertaken the hearing with Ms. Evers' presence before the expiry of the 45 day period mandated by s. 672.47 (1).

[48] In addition, the Review Board had available to it the power to adjourn the hearing for a period not exceeding 30 days under s. 672.5(13.1), "if necessary for the purpose of ensuring that relevant information is available to permit it to make or review a disposition order or for any other sufficient reason."

[49] It is significant that at the first disposition hearing, the evidence before the Review Board was incomplete and somewhat stale. The affidavit of the process server who had attempted to serve Ms. Evers with the notice of the hearing stated:

> (c) That on October 20, 2008 at approximately 10:30 P.M. I received a telephone call from Mrs. Evers. She advised me that she was told by her boarder Brandon Coleman that I had been at her house with some documents. She asked what the documents were and I advised her. She stated that she already received a copy of the Notice of Hearing in the mail but that if I had to deliver a copy to her she stated that she was giving me authorization to leave a copy with her boarder Brandon Coleman and he would sign for her. I advised her that my instructions were to personally serve the document to her.

> She stated that she would fax me an authorization to deliver the document to anyone on the property. She also advised that she was just on her way out and that she would be away for a few days. A few minutes later I received a fax from Mrs. Evers, copy of which is attached and marked as Exhibit "A".

[50] The Review Board decided to proceed in Ms. Evers' absence:

> [15] On the basis of that document [the affidavit of the process server] and the parties' submissions, the Review Board saw fit to proceed with the hearing in Ms. Evers absence because there were some grounds to believe that the accused, having failed to comply with her assessment order and failing to attend for her hearing, may be acting wilfully. Clearly there are public policy and administration of justice reasons to render this accused fit to stand trial so that these matters can be dealt with in the proper forum and put behind her.

[51] The Review Board was also aware that Ms. Evers' assigned counsel had not been able to contact her or take instructions.

[52] The principal evidence before the Review Board was Dr. Brietman's report that was based on information gathered for her report of 8 August 2008. Dr. Breitman stated that she had not seen Ms. Evers since the court proceedings in September and had difficulty obtaining historical information. Most significantly, Dr. Brietman stated:

> DR. BREITMAN: As far as her disposition, I have unfortunately been unable to obtain much personal history on Ms. Evers but I have no evidence that there's been any history of violence. So, as far as risk goes, I can't really recommend that she be brought into hospital based on her risk to the community. ...
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> ...
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> DR. BREITMAN: Unfortunately, I'm unable to recommend based on – as I said, based on her violence unable to recommend bringing her into hospital to make her fit and I don't believe that being in the community, though she would be likely to take any medications and there would likely – would be any change in her fitness to stand trial. She is unlikely to take any medications in the community, is unlikely to follow up with any psychiatric care or attend any appointments at the clinic. So clearly following her up in the community would be challenging and unlikely to be successful in any way in the community.

[53] In the face of the absence of current information as to Ms. Evers' psychiatric condition, in her absence, and without her counsel having an opportunity to obtain instructions, the Review Board decided to proceed to make a disposition order notwithstanding the evidence that Ms. Evers did not pose a risk to the community.

[54] At the hearing of these appeals, counsel for the Director candidly agreed that there was no reason for the Review Board not to issue a warrant or adjourn the hearing.

[55] In my opinion, given that Ms. Evers' liberty interest was at stake, the Review Board erred in proceeding with the hearing and imposing a custodial order without considering those options. It is impossible to say that the outcome would have been the same had Ms. Evers been arrested and appeared and had her counsel had an opportunity to take instructions and make informed submissions to the Review Board.

[56] The Review Board was evidently most concerned as to Ms. Evers' ill health and the apparent need to treat her. However, those concerns needed to be balanced with Ms. Evers' right to be present at the hearing and to make submissions regarding her mental state, treatment and custodial status. The execution of a warrant for her arrest and a short adjournment of the hearing would have afforded her the opportunity to be heard.

Failure to Consider Public Safety

[57] The Review Board emphasized that Ms. Evers' failure to attend the hearing was potentially attributable to her mental condition or a wilful refusal to comply with the legal process. However, the Review Board ultimately decided to proceed "irrespective of information with regard to any significant threat", described as "less relevant in this sort of proceeding".

[58] In making its disposition order, the Review Board was required to apply s. 672.54 of the *Criminal Code*:

> 672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
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> (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

[59] This Court, in *British Columbia (Forensic Psychiatric Institute) v. Johnson* (1995), 66 B.C. A.C. 34, described the scheme of the mental disorder provisions of the *Criminal Code* and the principal

object of achieving maximum protection of public safety with minimum interference with the accused's liberty, at para. 50:

> 50 It is apparent from the scheme of Part XX.1 as a whole that the paramount duty of the Review Board is to craft disposition orders which achieve an appropriate balance between the liberty interests of an accused, who has been found either unfit to stand trial or not criminally responsible by reason of mental disorder, and the public safety interests of the community as a whole. It is also clear that, in enacting Part XX.1, Parliament anticipated that striking an appropriate balance would, in some cases, require that conditional discharge orders be made with respect to accused persons who could not be ruled out as posing a significant risk to public safety. In such cases, the Review Board is charged with the responsibility of crafting conditions which are relevant to the special and differing needs of each accused person. The principal object of those conditions is to achieve the maximum protection for the public safety with a minimum degree of interference with the accused's liberty, and not simply to enhance the accused's treatment, although in many cases, and this is one of them, the two considerations will be inextricably linked.

[60] The Review Board was required to consider Ms. Evers' mental condition at the date of the hearing and make an order that was the least onerous and least restrictive in all of the circumstances. Those circumstances included evidence that Ms. Evers was not a risk to the community. Instead, the chairperson held that:

> ... irrespective of information with regard to any significant threat, which is less relevant in this sort of proceeding, we are prepared to on, I suppose, a social policy kind of motivation and on the belief that it does her nor the justice system any good that this current sort of limbo status continue, and in consideration of the admonition that we are to impose a disposition within 45 days of verdict, we are going to at this point take the unusual step of making an order in the accused's absence and the order will be one of detention.

[61] It is apparent from those remarks and a reading of the transcript of the proceedings as a whole that the Review Board was more concerned with Ms. Evers' risk of non-compliance with medical treatment than with the principal objective of balancing the maximum protection of public safety with the minimum degree of interference with Ms. Evers' liberty.

[62] With respect, I consider that in so doing the Review Board failed to have due regard to the principal objective of the *Criminal Code* provisions and fell thus into reversible error.

[63] Ms. Evers also submits that the Review Board erred in imposing treatment on her.

[64] The Review Board's first hearing was held pursuant to s. 672.47 to make a disposition following the court's finding that Ms. Evers was unfit to stand trial. Pursuant to s. 672.48, it was required to determine if Ms. Evers was fit to stand trial at the time of the hearing. Those sections read:

> 672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.
>
> (2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.
>
> (3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall, not later than ninety days after the disposition was made, hold a hearing and make a disposition in respect of the accused.
>
> 672.48 (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.
>
> (2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.
>
> (3) The chairperson of a Review Board may, with the consent of the accused and the person in charge of the hospital where an accused is being detained, order that the accused be sent back to court for trial of the issue of whether the accused is unfit to stand trial, where the chairperson is of the opinion that
>
> (a) the accused is fit to stand trial; and
>
> (b) the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period.

[65] The Review Board found Ms. Evers to be unfit to stand trial at the time of the hearing. The dispositions available were to order the accused discharged, subject to conditions, or order detention in custody or in hospital, subject to conditions.

[66] The Review Board elected to impose a disposition of detention in custody subject to conditions, one of which was that Ms. Evers "be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services."

[67] There is no dispute that Ms. Evers was subjected to custody in order to be involuntarily treated.

[68] The power to direct treatment is contained in s. 672.58 of the *Criminal Code* which provides:

> 672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified. [Emphasis

added.]

[69] The section makes clear that if a court has not made a disposition, then only a court, not a Review Board, may direct treatment of an accused.

[70] Section 672.55 specifically provides that treatment is not a condition that can be imposed under s. 672.54 unless the accused consents and the court or Review Board considers the condition to be reasonable and necessary, in the interests of the accused. See also *Mazzei v. British Columbia (Director of Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326.

[71] Ms. Evers clearly did not consent to treatment. As noted, treatment was not an option otherwise available to the Review Board under s. 672.58.

[72] I would therefore set aside the first disposition hearing order that imposed a four-month period of custody and attendant treatment as an error of law.

Did the Review Board Err in Detaining Ms. Evers under s. 672.49(1) of the ***Criminal Code*** following the Second Disposition Hearing?

[73] Following the second disposition hearing held on 2 February 2009, the Review Board determined that Ms. Evers was fit to stand trial but detained her pursuant to s. 672.49(1) of the *Criminal Code*, known as the "fit but fragile" provision. That section enables the Review Board to detain an accused if it has reasonable grounds to believe that the accused would become unfit to stand trial if released.

[74] At the hearing of these appeals, all parties agreed that, on its face, s. 672.49(1) is restricted to dispositions made pursuant to s. 672.47 (the section under which Ms. Evers was first detained following the court's deferral of disposition and finding that she was unfit to stand trial).

[75] Section 672.49(1) reads:

> 672.49 (1) In a disposition made pursuant to section 672.47 the Review Board or chairperson may require the accused to continue to be detained in a hospital until the court determines whether the accused is fit to stand trial, if the Review Board or chairperson has reasonable grounds to believe that the accused would become unfit to stand trial if released.

[76] However, the second hearing was a review of the first disposition order and was not held pursuant to s. 672.47. In consequence, the Review Board had, in my opinion, no jurisdiction to detain Ms. Evers under s. 672.49.

[77] At the second disposition hearing, the Review Board determined that Ms. Evers was fit to stand trial. Section 672.48(1) reads:

> 672.48 (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.

[78] Having made the finding of Ms. Evers' fitness to stand trial, in my opinion the Review Board's only option was to order her to be sent back to court to try the issue, pursuant to s. 672.48(2):

> 672.48(2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

[79] Sections 672.81 and 672.82 provide for the mandatory and discretionary review of dispositions by the Review Board. Section 672.83(1) sets out the Review Board's powers on a review of a disposition. It reads:

> 672.83 (1) At a hearing held pursuant to section 672.81 or 672.82, the Review Board shall, except where a determination is made under subsection 672.48(1) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

This section precludes the Review Board from making a further disposition in circumstances where it has found the accused fit to stand trial. See *Re Larocque*, [2008] B.C.R.B.D. No. 25, at para. 16.

[80] It is plain that the only order available to the Review Board at the second hearing that found Ms. Evers fit to stand trial was to order that she be returned to court. In my opinion, the Review Board acted without jurisdiction in further detaining Ms. Evers.

[81] It follows that I would set aside the second disposition order.

[82] In summary, I would allow the appeals from both orders.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Mr. Justice Tysoe"

APPENDIX A

Criminal Code, R.S.C. 1985, c. C-46

672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

(a) whether the accused is unfit to stand trial; ...

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

...

(b) make a disposition under section 672.54 in one of the following circumstances:

(i) no assessment report on the mental condition of the accused is available, ...

672.24 (1) Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel.

672.32 (2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities.

672.38 (1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

672.45 (1.1) If the court does not hold a hearing under subsection (1), it shall send without delay, following the verdict, in original or copied form, any transcript of the court proceedings in respect of the accused, any other document or information related to the proceedings, and all exhibits filed with it, to the Review Board that has jurisdiction in respect of the matter, if the transcript, document, information or exhibits are in its possession.

672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a

disposition.

(2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.

(3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall, not later than ninety days after the disposition was made, hold a hearing and make a disposition in respect of the accused.

672.48 (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.

(2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

(3) The chairperson of a Review Board may, with the consent of the accused and the person in charge of the hospital where an accused is being detained, order that the accused be sent back to court for trial of the issue of whether the accused is unfit to stand trial, where the chairperson is of the opinion that

(a) the accused is fit to stand trial; and

(b) the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period.

672.49 (1) In a disposition made pursuant to section 672.47 the Review Board or chairperson may require the accused to continue to be detained in a hospital until the court determines whether the accused is fit to stand trial, if the Review Board or chairperson has reasonable grounds to believe that the accused would become unfit to stand trial if released.

672.5 (9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

(10) The court or the chairperson of the Review Board may

(a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper; or

(b) cause the accused to be removed and barred from re-entry for the whole or any part of the hearing

(i) where the accused interrupts the hearing so that to continue in the presence of the accused would not be feasible,

(ii) on being satisfied that failure to do so would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused, or

(iii) in order to hear, in the absence of the accused, evidence, oral or written submissions, or the cross-examination of any witness concerning whether grounds exist for removing the accused pursuant to subparagraph (ii).

...

(13.1) The Review Board may adjourn the hearing for a period not exceeding thirty days if necessary for the purpose of ensuring that relevant information is available to permit it to make or review a disposition or for any other sufficient reason.

672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

672.55 (1) No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused.

672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified.

672.63 A disposition shall come into force on the day on which it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the Review Board holds a hearing to review the disposition and makes another disposition.

672.74 (1) The clerk of the court of appeal, on receiving notice of an appeal against a disposition or placement decision, shall notify the court or Review Board that made the disposition.

(2) On receipt of notification under subsection (1), the court or Review Board shall transmit to the court of appeal, before the time that the appeal is to be heard or within any time that the court of appeal or a judge of that court may direct,

(a) a copy of the disposition or placement decision;

(b) all exhibits filed with the court or Review Board or a copy of them; and

(c) all other material in its possession respecting the hearing.

672.78 (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(a) it is unreasonable or cannot be supported by the evidence;

(b) it is based on a wrong decision on a question of law; or

(c) there was a miscarriage of justice.

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).

(1.1) Despite subsection (1), the Review Board may extend the time for holding a hearing to a maximum of twenty-four months after the making or reviewing of a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.

(1.2) Despite subsection (1), at the conclusion of a hearing under this section the Review Board may, after making a disposition, extend the time for holding a subsequent hearing under this section to a maximum of twenty-four months if

(a) the accused has been found not criminally responsible for a serious personal injury offence;

(b) the accused is subject to a disposition made under paragraph 672.54(c); and

(c) the Review Board is satisfied on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a), that the condition of the accused is not likely to improve and that detention remains necessary for the period of the extension.

...

(1.4) If the Review Board extends the time for holding a hearing under subsection (1.2), it shall provide notice of the extension to the accused, the prosecutor and the person in charge of the hospital where the accused is detained.

(1.5) A decision by the Review Board to extend the time for holding a hearing under subsection (1.2) is deemed to be a disposition for the purpose of sections 672.72 to 672.78.

(2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend requests the review.

(2.1) The Review Board shall hold a hearing to review a decision to significantly increase the restrictions on the liberty of the accused, as soon as practicable after receiving the notice referred to in subsection 672.56(2).

(3) Where an accused is detained in custody pursuant to a disposition made under paragraph 672.54(c) and a sentence of imprisonment is subsequently imposed on the accused in respect of another offence, the Review Board shall hold a hearing to review the disposition as soon as is practicable after receiving notice of that sentence.

672.82 (1) A Review Board may hold a hearing to review any of its dispositions at any time, of its own motion or at the request of the accused or any other party.

(1.1) Where a Review Board holds a hearing under subsection (1) of its own motion, it shall provide notice to the prosecutor, the accused and any other party.

(2) Where a party requests a review of a disposition under this section, the party is deemed to abandon any appeal against the disposition taken under section 672.72.

672.83 (1) At a hearing held pursuant to section 672.81 or 672.82, the Review Board shall, except where a determination is made under subsection 672.48(1) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

672.85 For the purpose of bringing the accused in respect of whom a hearing is to be held before the Review Board, including in circumstances in which the accused did not attend a previous hearing in contravention of a summons or warrant, the chairperson

> (a) shall order the person having custody of the accused to bring the accused to the hearing at the time and place fixed for it; or
>
> (b) may, if the accused is not in custody, issue a summons or warrant to compel the accused to appear at the hearing at the time and place fixed for it.