Indexed as:

Beauchamp v. Penetanguishene Mental Health Centre

Between
Alexander Beauchamp, appellant, and
Administrator of the Penetanguishene Mental Health Centre and
the Attorney General of Ontario, respondents

[1999] O.J. No. 3156
Docket No. C31537

Ontario Court of Appeal
Toronto, Ontario
Osborne A.C.J.O., Catzman J.A. and Farley J. (ad hoc)

Heard: June 15, 1999.
Judgment: August 25, 1999.
(17 pp.)

Criminal law — Mental disorder — Assessment order — Dispositions by court or review board — Detention.

Appeal by Beauchamp from a decision to detain him in a medium secure unit of a mental health centre. Beauchamp drove his vehicle at high speeds and deliberately struck other motorists. He did not remain at the scene of any of the collisions. He had no criminal record, no history of violence, and no psychiatric history. He was not under the influence of alcohol or drugs. Following an assessment, Beauchamp was diagnosed with paranoid schizophrenia. He was found not criminally responsible for the various charges that had been brought against him. At a hearing before the Ontario Review Board, the clinical team submitted that Beauchamp required intensive rehabilitative programming with carefully supervised gradual community access, and recommended that he be transferred to a minimum secure unit. The Board concluded that Beauchamp remained a significant threat to public safety, and ordered a transfer to a medium secure unit. The Board ordered that Beauchamp be detained at the Penetanguishene Mental Health Centre until the transfer, and did not attach any date as to when the transfer would take effect. More than six months had passed after the Board's decision without any transfer. Beauchamp appealed the decision to transfer him to a medium secure unit rather than a minimum secure unit, and also appealed the decision not to impose a time limit on the transfer.

HELD: Appeal dismissed. The evidentiary record before the Board extended beyond the recommendation of the clinical staff that Beauchamp be transferred to a minimum secure unit. The Board fully reviewed all of the evidence, and was entitled to reject the recommendation of the clinical team. The Board did not act unreasonably in doing so. Furthermore, it was reasonable for the Board to

conclude that it was not necessary to impose a time limit on the transfer, as reasonable flexibility was required to conduct further tests. Although the decision not to impose a time limit was not an error, the fact that the transfer had not taken place by the time of the hearing of the appeal was clearly inexcusable. A quick transfer was recommended.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 219, 221, 252(1), 267(b), 270(1)(a), 672.47(1), 672.54, 672.78, 672.82.

Appeal from:

On appeal from the disposition of the Ontario Review Board dated November 18, 1998.

Counsel:

Paul D. Stunt and Gracie Romano, for the appellant.
Laurie Lacelle, for the respondent, AG.
Sonal Gandhi, for the respondent, Admin. of Penetang & Whitby.

[Ed. note: A Corrigendum was released by the Court August 27, 1999 and the correction has been made to the text.]

The judgment of the Court was delivered by

¶ 1 **OSBORNE A.C.J.O.**:— The appellant, Alexander Beauchamp, pleaded not guilty to three counts of criminal negligence causing bodily harm (s. 221), four counts of failing to remain at the scene of an accident (s. 252(1)), one count of criminal negligence (s. 219), one count of assault causing bodily harm (s. 267(b)) and two counts of assaulting a peace officer (s. 270(1)(a)). On October 6, 1998, he was found Not Criminally Responsible on account of mental disorder by His Honour Judge Palmer. The trial judge did not make a disposition pursuant to s. 672.47(1) of the Criminal Code. Thus, the appellant appeared before the Ontario Review Board (the "Board") at the Penetanguishene Mental Health Centre ("Penetang") for hearing and disposition pursuant to s. 672.47(1)) on November 12, 1998.

¶ 2 The Board determined that the appellant should be detained in the medium secure unit of the Whitby Mental Health Centre ("Whitby"), subject to certain conditions, and that he be detained at Penetang until the order transferring him to Whitby was effected. It is this Board disposition from which the appellant appeals. His principal submission is that the Board's disposition ordering his transfer to the medium, as opposed to the minimum, secure unit at Whitby is unreasonable, in that it is an order that was not supported by the evidence. The appellant also submits that the Board erred in not imposing a deadline, or timelines, on his transfer to Whitby. He also complains, in the circumstances understandably, that he has not in fact been transferred from Penetang to Whitby. Thus, as the

anniversary date of the Board's order quickly approaches, it is significant that the order has not been brought into effect.

THE FACTS

The Index Offences

¶ 3 The relevant facts are set out in an agreed statement of fact which was filed with the court following the appellant's arraignment and his plea of not guilty. The agreed statement of fact was part of the record before the Board. The facts can be summarized as follows.

¶ 4 On July 5, 1998, the appellant drove his vehicle at a high rate of speed in a northerly direction on Highway 400. He deliberately struck a number of other vehicles, including two motorcycles. He caused damage to the vehicles and injury to some of the drivers and occupants. He did not remain at the scene of any of the multiple driving incidents. He eventually stopped only to close the hood of his car which had come open following one of the series of collisions in which the appellant was intentionally involved. At this time one of the drivers whose car had been struck by the appellant's car approached the appellant and the appellant became involved in a physical altercation with him. This resulted in the driver suffering bodily harm. The appellant then drove in a northerly direction on Highway 400. He was eventually stopped by the O.P.P. following a high-speed chase, arrested and taken into custody. The next day, at the Barrie Jail, he was involved in a physical altercation with two correctional officers. These various incidents led to the charges against the appellant.

¶ 5 At the time of the offence the appellant was 22 years old. He had no criminal record and no history of violence or psychiatric history. He was not under the influence of drugs or alcohol at the time of the index offences.

¶ 6 Following a 30-day assessment, which was ordered by the court, the appellant was diagnosed as suffering from schizophrenia of the paranoid type. His psychiatrist's opinion was that, during the index offences, the appellant was in a psychotic state and was not capable of appreciating the nature and quality of his actions from a moral and legal perspective.

¶ 7 On October 6, 1998, the appellant was found Not Criminally Responsible on three counts of criminal negligence causing bodily harm, four counts of failing to stop at the scene of an accident, two counts of assaulting a police officer, one count of criminal negligence and one count of assault causing bodily harm.

THE BOARD HEARING AND DISPOSITION

¶ 8 At the time of the s. 672.47(1) hearing on November 12, 1998, the Board had before it the report of the administrator of the Mental Health Centre, two reports from Dr. Mantle, a psychiatrist who was responsible for the appellant's care at Penetang, the agreed statement of fact filed in the provincial court

and letters of support for the appellant. In addition, on November 12, 1998, the Board heard viva voce evidence from Dr. Mantle, the Clinical Liaison Officer of the Mental Health Centre and the appellant.

¶ 9 It was common ground that the appellant required further treatment in a hospital setting and that he should not be discharged absolutely or on conditions. It was accepted that the appellant did not need to be detained in a maximum security environment. In the result, the issue before the Board was whether a medium or minimum secure hospital order should be made. The Board also had to consider where the appellant should be detained.

¶ 10 The Mental Health Centre clinical team responsible for the appellant's care in Penetang expressed the opinion that the appellant should be transferred to the locked minimum secure unit at Whitby. Dr. Mantle testified that she had witnessed a steady and gradual improvement in the appellant while he was at Penetang. She said that his needs could be better addressed in the minimum secure setting at Whitby. She did, however, express concern that the appellant had potential for unpredictable, explosive behaviour and that further assessment of him was required. In the hospital administrator's report, dated October 29, 1998, it was noted that the appellant was still unable to appreciate the potentially serious consequences of his behaviour during the index offences and how dangerous his behaviour had been to the well-being of others. Apparently, during clinical interviews the appellant stated in a quite matter of fact manner that he did not consider his driving to be out of the ordinary. He was of the opinion that his actions did not really endanger any one. He continued to think that others on the road intended to harm him.

¶ 11 Dr. Mantle recognized that the appellant had only been receiving active treatment for "a relatively short period of time." She confirmed that the clinical team was concerned about the appellant's past substance abuse. In this regard, the appellant admitted having used cocaine, marijuana and alcohol because they made him feel good. She was, nonetheless, confident that the appellant would not seek drugs in a less secure facility.

¶ 12 Dr. Mantle said that the appellant would require ongoing treatment for his condition on an indefinite basis and that if he stopped taking his medication it was quite likely that there would be a recurrence or a relapse.

¶ 13 In preparation for the hearing, Dr. Mantle spoke to Mrs. McAuley, the intake person at Whitby, about the nature of the programs and services available there. Dr. Mantle concluded that all of the appellant's treatment needs were available at Whitby.

¶ 14 The alternate chairperson of the Board questioned Dr. Mantle about the differences between the treatment available in the minimum and medium secure units at Whitby. Dr. Mantle stated:

> When I asked Mrs. McAuley if much of the same services were available in the medium secure part of the facility, she replied in the affirmative. However, much of our focus here is seeing Mr. Beauchamp receive much of his rehabilitation supervised in the community with a view to eventually having more independent living, and Mrs. McAuley did indicate to me that just by virtue of the fact that the medium security is just that, the opportunity for even staff accompanied access would be less likely than if he were in minimum security. So that was the issue we were somewhat concerned with.

¶ 15 Dr. Mantle also referred to the results of the appellant's EEG test done on July 5, 1998. That test revealed a very mild abnormality. To complete the medical picture, it was recommended that the appellant have a further EEG before he was transferred to Whitby.

¶ 16 The clinical team and hospital administrator were of the view that the appellant required "intensive rehabilitative programming along with carefully and professionally supervised gradual community access." The administrator's report recognized that the recommendation that the appellant be transferred to the minimum secure unit at Whitby was "unusual, particularly in this case given the seriousness of the index offence." The clinical team and hospital administrator nonetheless maintained this minimum security recommendation because it would provide the best opportunity to the appellant to benefit from rehabilitative therapies and to facilitate his reintegration into the community.

¶ 17 The appellant testified that he was no longer "psychotic." He explained that his psychosis had been eliminated by "medication." He pledged that he would take his medication as long as his doctors told him to do so.

¶ 18 The Board stated in its disposition that it had canvassed all of the evidence and reviewed the parties' submissions. Having done so, the Board concluded that the appellant remained a significant threat to the safety of the public and he needed to remain in a hospital environment for an extended period. The Board concluded that the appellant was not totally clear as to what his problem was. It also noted that Dr. Mantle acknowledged that further EEG testing of the appellant was desirable.

¶ 19 I should note that the Board's order that the appellant be transferred to Whitby was significant in that it was recognized that the appellant had benefited, and could continue to benefit, from the support of his family. Whitby is a hospital reasonably close to the appellant's family. Thus, ongoing consistent family visitation could best be effected were the appellant to be detained at Whitby, not some other medium or minimum secure facility.

¶ 20 Presumably, the Board's decision to attach no date by which the appellant was to be transferred to the Whitby medium secure unit was based upon evidence concerning the need for further treatment at Penetang. Although Dr. Mantle had received "verbal approval" from the Whitby with respect to the appellant's transfer there, the Board recognized that it might not be possible to effect an immediate transfer.

THE GROUNDS OF APPEAL

¶ 21 Against that general background the appellant raises the following issues:

i) Did the Board err in finding that the appellant should be detained at Whitby in its medium secure unit rather than at the same hospital in its minimum secure unit?
ii) Did the Board err in not imposing a time limit within which its order was to be implemented?

ANALYSIS

i) Did the Board err in finding that the appellant should be detained in Whitby in its medium secure unit rather than at the same hospital in its minimum secure unit?

¶ 22 The authority of the Board is set out in s. 672.54 of the Criminal Code. It provides:

> 672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, 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.

¶ 23 The appellant's release by an absolute or conditional discharge order was, and is, a non-issue since it was accepted by all concerned that the appellant required continued treatment in a custodial/ hospital setting. The issue here is whether the medium security condition attached to the Board's disposition, as opposed to a minimum security condition, was "appropriate" in the context of the appellant's submission that the medium secure unit condition was unreasonable, that is a condition which was not supported by the evidence.

¶ 24 The authority of the Court of Appeal is set out in s. 672.78. It provides:

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.

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

(a) that paragraphs (1)(a), (b) and (c) do not apply; or
(b) that paragraph (1)(b) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

(a) make any disposition under section 672.54 or any placement decision that the Review Board could have made;
(b) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or
(c) make any other order that justice requires.

¶ 25 Section 678.78(1)(a) provides that the court may allow an appeal against a disposition where it is of the opinion that the disposition is "unreasonable or cannot be supported by the evidence." As Doherty J.A. observed in Peckham v. Attorney General of Ontario et al. (1994), 93 C.C.C. (3d) 443 (Ont. C.A.) this language is the same as appears in s. 686(1)(a)(i) of the Criminal Code in respect of appeals from conviction. In Peckham, Doherty J.A. stated, at p. 454:

> The caselaw developed under s. 686(1)(a)(i) has direct application to s. 672.78(1)(a). That caselaw recognizes that the section empowers an appellate court to review findings of fact made at trial. That power is, however, limited to the reasonableness standard set out in the section. An appellate court may not judge the correctness of findings of fact made at trial or the verdict based on those findings, but can assess only the reasonableness of those findings and the consequent verdict. An appellate court may interfere only where it is satisfied, upon an independent review of the evidence, that a trier of fact, properly instructed and acting reasonably could not have convicted.

¶ 26 The review under s. 672.78(1)(a) is not a review of the correctness of findings made in the disposition. The review is limited to a review of the evidence to determine whether the Board, properly instructed and acting reasonably, could have reached the conclusion it did - in this case that the appellant

be transferred from the maximum secure unit at Penetang to the medium secure unit at Whitby.

¶ 27 In undertaking the reasonableness analysis required by s. 672.78(1)(a), the reviewing court must take into account the Board's expertise and its special advantage in dealing with issues like those that were before the Board here. See Penetanguishene Mental Centre v. Ontario (Attorney General) (1999), 131 C.C.C. (3d) 473, leave to appeal to the Supreme Court of Canada refused, [1999] S.C.C.A. No. 114.

¶ 28 In my view, given the evidence before the Board and its accepted expertise and advantages, I do not think it can be said that the medium security condition attached to the Board's disposition was unreasonable. There is no doubt that the medical (hospital) evidence supported a minimum secure unit, not a medium secure unit, condition. However, the evidentiary record before the Board extended beyond the evidence of the clinical staff and the Hospital.

¶ 29 The Board fully reviewed all of the documentary and oral evidence that was before it. In my opinion, the Board was entitled to reject the recommendation of the clinical team and the hospital administrator on the issue whether the appellant's continuing hospitalization should be in a minimum or medium secure unit. In resolving this issue as it did I do not think the Board acted unreasonably. It was entitled to consider and did consider:

- the nature and circumstances of the index offences which reveal a serious potential for lethal acts by the appellant;
- the short period of treatment that the appellant had undergone while at Penetang;
- the appellant's incomplete understanding of his mental condition and his actions at the time of the index offences;
- the only meaningful difference between the treatment available to the appellant in the medium and minimum secure units at Whitby is the ease with which the appellant would have access to the community;
- the need to protect the public from persons who might be dangerous.

¶ 30 I would, therefore, not give effect to this ground of appeal.

ii) Did the Board err in not imposing a time limit within which its order was to be implemented?

¶ 31 I do not think the Board erred or acted unreasonably in not imposing a time limit for the appellant's transfer to Whitby. Having said that, the failure to effect the transfer before June 15, 1999 when this appeal was argued seems to me to border on the inexcusable. I will return to that issue shortly.

¶ 32 As I have noted, there was some evidence that militated in favour of reasonable flexibility concerning the appellant's transfer due to further EEG testing which the appellant required. This, of course, would not support a lengthy delay in the transfer since the EEG could, if required, be done at Whitby. While there was some contact with the administrators at Whitby the result of which was "a

verbal approval" for the appellant's transfer to the minimum secure unit of that hospital, the evidence was not clear whether this verbal approval also extended to his placement in the medium secure unit. In any case, given the lack of certainty about the date on which the transfer could reasonably be effected, I do not think the Board erred in not imposing a deadline.

¶ 33 There is no statutory requirement that the Board include a date by which a hospital transfer order is to be implemented. For the system to work, orders of the Board must be capable of implementation and the implementation of the Board's orders must be effected within a reasonable time. What the time frame will be will depend on a variety of circumstances.

¶ 34 In this case, I think it was reasonable for the Board to conclude that it was not necessary to impose timelines on the appellant's transfer to a medium secure unit in Whitby.

¶ 35 This, however, does not resolve the appellant's current problem. As I have said, he has not yet been transferred to Whitby at all. This is clearly unacceptable.

¶ 36 The Supreme Court of Canada recently considered the constitutionality of the mental disorder amendments to the Criminal Code in R. v. Winko (1999), 135 C.C.C. (3d) 129 in response to the accused's submission that the Code's provision for the detention of those found Not Criminally Responsible were unconstitutional. The Supreme Court held that the amendments, Part XX.1 of the Criminal Code, did not violate the accused's rights to liberty, security of the person and equality under the Charter [See Note 1 below].

Note 1: The same issue was raised in companion appeals of Bese v. British Columbia (Forensic Psychiatric Institution) (1999), 135 C.C.C. (3d) 212; Orlowski v. British Columbia (Forensic Institution) (1999), 135 C.C.C. (3d) 220 and R. v. LePage (1999), 135 C.C.C. (3d) 205.

¶ 37 McLachlin J. reviewed the policy objectives of the mental disorder amendments. She said, at paras. 21 and 42:

> Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong that individual is diverted into a special stream. Thereafter, the court or a review board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions or unconditionally discharged. The **emphasis** is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.
> ...
> By creating an assessment-treatment alternative for the mentally ill offender to supplant the criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. [Emphasis added.]

¶ 38 I do not think that this court is in a position to order the appellant's immediate transfer since we are unaware of the competing demands to which the medium secure unit at Whitby may be exposed. However, I think that any system that would meet the standards referred to by McLachlin J. in Winko, must in fact operate so that transfer orders, such as the order made here, are implemented within a reasonable time.

¶ 39 Leaving the appellant in a maximum security environment where it is acknowledged he does not belong does not represent treatment that is fair and appropriate. Leaving the appellant where he is, in the face of the Board's transfer order, does not provide a satisfactory alternative to the old system referred to by McLachlin J. when she said:

¶ 40 Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant-Governor, as was once the case.

¶ 41 Counsel for the administrator suggested that the appellant could apply under s. 672.82. It provides:

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

¶ 42 I acknowledge that the appellant could make application under this section and that, as counsel suggested, that application might bring the facilities issue to the forefront. I do not think access to this

section of the Code resolves the appellant's problem. The appellant should not have to apply to the Board to secure the implementation of the Board's transfer order. In any event, a s. 672.82 motion would result in a circular movement, likely not progress. It may well be that, in order to achieve the transfer that the Board has ordered, the appellant will have to bring an application by way of mandamus, outside of Part XX.1 of the Criminal Code. Whatever is done, the appellant's transfer should be effected quickly, I would hope without further intervention of the courts.

¶ 43 For these reasons, I would dismiss the appeal.

QL Update: 990827
cp/e/nc/rsm/mjb/qlbdp/qlbxm