COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***John v. British Columbia (Adult Forensic Psychiatric Services),*** 2008 BCCA 265

Date: 20080613

Docket: CA035655

Between:

Ted John

Appellant

And

The Director, Adult Forensic Psychiatric Services and Attorney General of British Columbia

Respondents

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Donald
The Honourable Madam Justice Saunders

Oral Reasons for Judgment

D. Mossop, Q.C. — Counsel for the Appellant
D. Nielsen
D.K. Lovett, Q.C. — Counsel for the Respondent, Director, Adult Forensic Psychiatric Services
L.D. Hillaby — Counsel for the Respondent, Attorney General of British Columbia

Place and Date: Vancouver, British Columbia, 13 June 2008

[1] **DONALD, J.A.**: If a Review Board, under Part XX.1 of the ***Criminal Code*** orders an absolute discharge for an NCRMD (not criminally responsible on account of mental disorder) accused, but postpones its effective date to enable the orderly and safe implementation of the disposition, and if, in the meantime, the accused becomes acutely psychotic and unsafe, does the Board have the jurisdiction to make a different disposition? This is the main question before us. I would answer it in the affirmative.

[2] Mr. John also challenges the Board's determination that the safety of the public was imperilled by his decompensation. In my opinion, there is no basis to disturb the finding on safety.

[3] It follows that I would dismiss the appeal.

[4] The appeal is from the custody disposition of the British Columbia Review Board pronounced

28 November 2007, pursuant to section 672.72(1) of the ***Criminal Code***. The Board made the order notwithstanding its order on 14 November 2007, giving Mr. John an absolute discharge effective 30 November 2007.

Background

[5] On 23 April 2003, Mr. John, without warning or provocation, approached two women on a Prince George sidewalk. He grabbed one woman while yelling "blood, blood"; she was pulled from him by her friend. He then knocked the second woman to the ground and kicked her in the face and on the side of the head, causing injury.

[6] Mr. John was found not criminally responsible on account of a mental disorder in Provincial Court on 29 May 2003. The verdict was in relation to two charges arising out of the April incident: one count of assault causing bodily harm and one count of assault.

[7] Mr. John has a 20-year history of schizophrenia, including hospital admissions. He also has a history of alcohol and substance abuse, and was evidently intoxicated at the time of the offence. He is also cognitively impaired and functions at a 'borderline' intelligence level.

[8] Following the Provincial Court verdict, Mr. John was remanded in custody to the Forensic Psychiatric Hospital pending a Board hearing. That hearing was conducted on 10 July 2003 pursuant to ***Criminal Code*** authority, at the conclusion of which the Board made a custodial disposition order and Mr. John was detained at the Forensic Psychiatric Hospital.

[9] After a period of custodial treatment at the Hospital, Mr. John was conditionally discharged in December 2004. He has lived in Prince George since then, under successive disposition orders.

[10] On 14 November 2007, at his annual hearing, Mr. John was given an absolute discharge pursuant to section 672.54 of the ***Criminal Code***. The Board relied on section 672.63 to delay the coming into force of its disposition until 30 November 2007, considering Mr. John's "voiced intention to leave Prince George and travel to Vancouver". It concluded that Mr. John "no longer presents a significant threat to the safety of the public". The decision granting Mr. John absolute discharge was not unanimous. The psychiatrist member dissented on grounds that Mr. John lacked insight into his illness and gave reason to doubt that future compliance with his antipsychotic medication regime would be followed.

[11] The Board said in its reasons of 20 December 2007, "It appears that the order was delayed to allow time for Mr. John to be reconnected with his former caregivers at Strathcona Clinic in Vancouver, thereby avoiding any discontinuity in his care and treatment."

[12] On 21 November 2007, counsel for the Adult Forensic Psychiatric Services wrote to the Board indicating the Director's intention to initiate breach of disposition proceedings against Mr. John and requested an expedited hearing. The letter suggested that Mr. John was "in the early stages of relapse", had allegedly missed two scheduled appointments, and was not taking his medication.

[13] On 26 November 2007, Mr. John appeared before a Justice of the Peace who issued an enforcement order, pursuant to ***Criminal Code*** authority, remanding Mr. John into custody at the Forensic Psychiatric Hospital pending a hearing of the Review Board.

[14] On 28 November 2007, the Board held the hearing at the request of the Director, but over the objection of Mr. John who submitted that the Board no longer had any jurisdiction over him. The Board rejected the jurisdictional challenge and made a custodial disposition order, reviewable by 1 April 2008. The reasons for the decision were released 20 December 2007.

[15] In that decision, the Board reviewed the evidence of Mr. John's relapse:

[45] Further evidence has arisen in the less than two week period following his last hearing which directly relates to Mr. John's identified risk factors:

- Despite Mr. John's apparent compliance with medical direction, and his stated intention to continue to so comply, the evidence indicates, and he admits to, at least some recent non-compliance in October and November.
- Within a period of a few days following his November 14 hearing, Mr. John experienced and demonstrated a very rapid decompensation in his mental state into an acute psychosis which resulted in his hospitalization and certification.
- His acute decompensation was contributed to or exacerbated by (admitted) drug use.
- He had no viable or definitive plans as to where he would be living except to state that he would live in Vancouver, and he has not been reconnected to a Mental Health team.
- Mr. John is approaching his baseline functioning, but if he were once again precipitously left unattended/unsupported, it is probable and foreseeable that he would rapidly decompensate in his mental state leading to behaviour that would pose a significant threat to others.

[46] Without concluding that Mr. John may not once again, relatively quickly, restabilize and qualify for an absolute discharge in the future, recent events and circumstances have conspired to elevate his potential to pose a significant threat to others.

[47] In keeping with his own sense of his needs, the BCRB [British Columbia Review Board] has determined to detain the accused in hospital, albeit for a period of six months rather than a full year, during which Mr. John can be assisted in, once again, assuming his place in the community.

[16] We are told that on 20 March 2008, the Board held a hearing to review the 28 November 2007 custodial disposition and unanimously determined that Mr. John remains a significant threat to public safety and accordingly it made a conditional discharge disposition, reviewable by 20 March 2009.

Discussion

Ground 1 – Jurisdiction

Standard of Review

[17] The ***Criminal Code*** delineates the grounds of appeal as follows:

> 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
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> (*a*) it is unreasonable or cannot be supported by the evidence;
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> (*b*) it is based on a wrong decision on a question of law; or
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> (*c*) there was a miscarriage of justice.

[18] This is a statutory appeal from an administrative tribunal. ***Dunsmuir v. New Brunswick***, 2008 SCC 9, tells us how to determine the appropriate review standards by engaging in a process described as "the standard of review analysis": ***Dunsmuir*** at para. 63. Three factors must be considered together:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
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> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[19] If the case falls into a category for which the review standard has already been decided, the process need not be repeated:

> [57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[20] The Director concedes that the question whether the 14 November 2007 decision to grant an absolute discharge caused the Board to lose jurisdiction is a question of law, and that on established jurisprudence the appropriate standard of review is correctness: ***R. v. Owen***, 2003 SCC 33, [2003] 1 S.C.R. 779 at para. 33, and ***Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)***, 2006 SCC 7, [2006] 1 S.C.R. 326 at paras. 16, 17. The review analysis having previously been done, I consider the point settled and I will proceed on the basis that the review must be on correctness.

Board Ruling

[21] The Board held that it was not *functus officio* on this reasoning:

> [29] Finally, we consider **S.672.63** which specifically contemplates or authorizes the Board to order a delay in the effective date of its disposition:
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> > 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.
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> [30] This provision is frequently applied to enable various plans to be developed and resources to be secured prior to a disposition coming into force. It has, to a lesser extent, been applied in the case of absolute discharge dispositions, for example, to enable a supported transition of an accused's case and treatment to a community health regime. The intent is clearly to allow for the implementation of transitional strategies under supported and supervised circumstances **before** the Board's intended order comes into legal effect.
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> [31] The imposition of a delay in an accused's disposition cannot operate so as to create a vacuum or lacuna in the accused's legal status. Clearly the accused's previous status or disposition must continue in full force and effect until it is replaced by the operation of **S.672.63**. Otherwise, the section would have no utility.

[32] The referenced provisions do more than identify the timelines and the circumstances under which the Board must convene. They also support the notion that the Tribunal's process is a longitudinal one; an ongoing, rolling or incremental review of the accused's entire history and progress within this special stream of the Criminal Justice system, one founded on a broad range of current and historic evidence:

> The court or Review Board may have recourse to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing [*sic*] the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive: ***Winko v BC (FPI), 1999 2 SCR 625 par 62(14)***

[33] Such an understanding also accords and is consistent with the waxing and waning nature of mental illness.

[34] Our analysis of the submissions of the parties, can do no better than to adopt the approach of the Supreme Court of Canada in ***Chandler v. Alberta Association of Architects*, [1989] S.C.J. No. 102**, that is, to examine the statutory framework within which the BCRB operates and then to consider:

(a) whether the BCRB has already made a final decision; and

(b) whether it is therefore functus officio: **par.9**

On our reading we see nothing about or [*sic*] decision which appears to contradict ***Chandler***. The current hearing is convened to review new evidence which has arisen while the accused is under conditional discharge.

[35] Without belabouring the issue of whether or not Parliament intended this Tribunal's absolute discharge decisions to ever be "final" ones, in this case no final decision had yet come into legal effect. The principle of functus officio simply does not apply.

[22] I am in substantial agreement with those remarks.

Positions of the Parties

[23] It is said on Mr. John's behalf that upon making the determination that he no longer posed a significant risk to the safety of the public and was entitled to an absolute discharge, the Board lost jurisdiction over him and, at the time of the impugned order on 28 November 2007, the Board was *functus officio*. It is submitted the Board has no power under the ***Criminal Code*** to review an absolute discharge. Instead, the only avenue available to the Director in acting upon the evidence of a relapse was to appeal to the Court of Appeal. This is said to be an effective remedy because the appeal automatically suspends the absolute discharge. The provisions of the ***Criminal Code*** relevant to this point are:

> 672.72 (1) Any party may appeal against a disposition made by a court or a Review Board, or a placement decision made by a Review Board, to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.
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> * * *
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> 672.75 The filing of a notice of appeal against a disposition made under paragraph 672.54(*a*) [absolute discharge] or section 672.58 suspends the application of the disposition pending the determination of the appeal.

[24] The Director argues for a broad power of review extending even beyond the effective date of an absolute discharge. In the circumstances of the present case, the Director argued that the ***Criminal Code*** provides ample power for the Board to exercise control over Mr. John. Until the effective date of the absolute discharge, Mr. John continued to be subject to the subsisting conditional discharge and hence under the jurisdiction of the Board. Section 672.82(1) provides:

> 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.

[25] Alternatively, the Director argues that the scheme of Part XX.1 will not tolerate a vacuum in the hiatus between the pronouncement of an absolute discharge and the day it takes effect. The dual purposes of the scheme – safety of the public and fair treatment of a mentally disordered person: ***Winko v. British Columbia (Forensic Psychiatric Institute)***, [1999] 2 S.C.R. 625 – would be defeated were the Board to lose jurisdiction on pronouncement. An NCRMD accused must remain the responsibility of the Board until discharged absolutely.

Analysis

[26] Assuming, without deciding, that an absolute discharge brings an end to the Board's jurisdiction over an NCRMD accused, I think the terms of the review power in section 672.82(1) apply to the circumstances of this case. Mr. John's status as of the date of the impugned order was not that of an absolutely discharged accused, but of a conditionally discharged accused. The Board had not yet released control of him because arrangements still had to be made to achieve a satisfactory transition to continuing care in Vancouver. That became impossible when he relapsed. In my respectful opinion, it requires a strained interpretation of the statute to say that, in the unhappy turn of events in this case, the Director's only recourse is to the Court of Appeal. A much more sensible construction of the review power keeps the management of Mr. John's case with the tribunal that has monitored him since 2003.

Ground 2 – Public Safety

[27] Mr. John alleges the Board erred in finding that he was a significant threat to the safety of the public and in finding that the least onerous, least restrictive disposition was a custodial disposition order.

Standard of Review

[28] Mr. John argues this ground on the standard of reasonableness. I agree that this is the appropriate standard. Deciding whether an accused poses a significant threat in making the choice of placement lies within the core of the Board's special expertise. Established authority designates reasonableness *simpliciter* as the correct test. In ***Owen***, Binnie J. wrote:

> [33] The first branch of the test corresponds with what the courts call the standard of review of reasonableness *simpliciter*, i.e., the Court of Appeal should ask itself whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. If the Board's decision is such that it could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene.

[29] ***Dunsmuir***, at paragraph 45, collapsed patent unreasonableness and reasonableness

simpliciter into a single standard now to be known as reasonableness.

Analysis

[30] Mr. John argues that the risk assessment on which the impugned order is based is speculative, citing ***Winko***. He says that there is no pattern of violence in his history apart from the 2003 incidents of assault.

[31] In my respectful opinion, the evidence before the Board on 28 November 2007, summarized above, provides a reasonable basis for the order. As to his history of violence, the Board notes in its reasons

> [44] Despite the absence of a formal record of serious violence beyond the index offence, Mr. John has, in the past, resorted to aggressive behaviours or outbursts (1993).

[32] The evidence supports the view that Mr. John became seriously ill in circumstances likely to repeat themselves if he were left to his own management. I would not interfere with the Board's risk assessment.

Disposition

[33] For the foregoing reasons, I would dismiss the appeal.

[34] **RYAN, J.A.**: I agree.

[35] **SAUNDERS, J.A.**: I agree.

[36] **RYAN, J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Donald"