ONTARIO COURT OF JUSTICE
TORONTO REGION
OLD CITY HALL

B E T W E E N :	)	
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HER MAJESTY THE QUEEN	)	**ANNA MALESZYK,**
	)	**for the Crown**
	)	
— AND —	)	
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	)	
JEFFERY KEARLY	)	**W. ADAM SCHULTZ,**
	)	**for the accused**
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RULING REGARDING SECTION 672.851 OF THE *CRIMINAL CODE*

SCHNEIDER, J.:

The accused has brought an application before the court for a stay of proceedings in respect of one count of sexual assault pursuant to the newly proclaimed provisions of section 672.851 of the *Criminal Code of Canada*.

It is not disputed that Mr. Kearly is presently unfit to stand trial and that he will remain so permanently.

With the proclamation of *Bill* C-10 on May 19, 2005, a number of changes were made to Part XX.1 of the *Criminal Code* (and other legislation). The most significant aspect of the

Bill pertains to the court's new ability to stay proceedings in respect of a permanently unfit accused. This and related provisions came into effect on June 30, 2005, whereas other changes will come in to force on January 6, 2006.

The court is now permitted to hold an inquiry and order a judicial stay of proceedings for an accused found to be unfit to stand trial if the accused is not likely to ever become fit to stand trial, does not constitute a significant threat to the safety of the public, and a stay is in the interests of the proper administration of justice.

Background

Prior to the proclamation of Bill C-10 an unfit accused would remain subject to the jurisdiction of the Review Board indefinitely, so long as they remained unfit to stand trial (unless the Crown failed to show a *prima facie* case within every two years post-verdict: s.672.33). Jurisdiction over the accused was not dangerousness-based (as is the case for accused found to be not criminally responsible on account of mental disorder ("NCR")). Where the 'mental disorder' mediating the unfitness was intellectual disability, brain injury, or some other intractable condition, the accused could remain subject to the jurisdiction of the Review Board forever. This situation was frustrating both for the accused and the Review Board who had no ability to discharge the accused as they might were the accused NCR. Stays, where entered, were the result of the Crown exercising its discretion on an *ad hoc* basis.

The Supreme Court of Canada in *R. v. Demers* (2004), 185 C.C.C. (3d) 257 (S.C.C.) recognized this incongruity and the general proposition that the preventative or protective jurisdiction exercised by the criminal law over an accused extends only to those who present as a significant threat to the safety of the public. The court concluded that consequently, the continued subjection of a permanently unfit accused to the continued jurisdiction of the criminal justice system where there is no evidence that the accused is a significant threat to the safety of the public made the law overbroad and thus ran afoul of the accused's *Charter*

rights. The court held that a stay should be granted to permanently unfit accused who do not constitute a significant threat to the safety of the public in order to prevent their indefinite subjection to criminal proceedings. Accordingly, the matter was sent back to parliament for corrective legislation which now constitutes the substance of section 672.851 of the *Criminal Code*.

Specific Changes to the *Code*:

Assessment Orders

The first significant change permits the Court to Order an assessment of the unfit accused to determine whether a stay should be entered (s.672.11(e)). The Review Board may also order an assessment for this purpose (ie. making a recommendation for a stay to the Court) (s.672.121(a)). A new Form 48.1 has been created for the Review Board whereas the old Form 48 has been amended for the Courts.

Inquiries

The key provisions are contained in the new s.672.851. Referrals back to the Court for a hearing may be initiated by the Review Board if, after conducting a hearing of its own, it is of the view that the accused:

1) remains unfit,
2) is not likely to ever become fit, and
3) does not pose a significant threat to the safety of the public.

Upon receiving such a recommendation from the Review Board, or upon its own motion, the Court ***may*** hold an inquiry to determine whether a stay of proceedings should be ordered. In Mr.Keary's case, the defence and the Crown agree, and I am able to find, that there is sufficient "relevant information" in order for the Court to commence an inquiry and that an inquiry should be held. Of interest is the wording of section 672.851 which permits the Court to commence a hearing

of its own motion yet no provision is included to permit a hearing upon application of any party. I am of the view that if the court is permitted to commence a hearing of its own motion, or one of the Review Board, a necessary inference can be drawn that the court may also commence a hearing upon the application of a party, as was the case in the present matter.

If the Court decides to hold an inquiry it ***shall*** order an assessment of the accused. At the conclusion of an inquiry the Court may order a stay of proceedings if it is satisfied, on the basis of ***clear information***, that the accused:

1) remains unfit,
2) is not likely to ever become fit, and

satisfied that the accused

3) does not pose a significant threat to the safety of the public, and
4) that a stay is in the interests of the proper administration of justice.

Factors to be considered in deciding whether a stay of proceedings is in the interests of the proper administration of justice include:

1) the nature and seriousness of the alleged offence,
2) the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice,
3) the time elapsed since the commission of the alleged offence,
4) whether a *prima facie* case has been proven under s.672.33, and
5) any other relevant factors.

Evidentiary Burden and Onus

A reading of the Supreme Court's decision in *Demers* makes it quite clear that, to the extent possible, a permanently unfit accused who does not constitute a significant threat to the safety of the public should be treated the same as the NCR accused who does not pose a significant threat to the safety of the public. Of course, the NCR accused has obtained a final verdict on the merits after a trial whereas the permanently unfit accused has not been tried. The permanently unfit accused is still presumed to be innocent whereas there has been a finding of guilt in respect of the NCR accused.

At the outset of Mr. Keary's inquiry an issue arose as to who bore the evidentiary burden of establishing the preconditions for a stay regarding 'significant threat' and to what level of proof. To my mind the Supreme Court of Canada's decision in *R. v. Winko* (1999), 135 C.C.C. (3d) 129 (S.C.C.) is most helpful. In that decision, in respect of an NCR accused, the court held as follows:

1) there is to be no presumption that the mentally disordered accused poses a significant threat to the safety of the public,
2) the accused is never in a position of having to disprove dangerousness - the accused is therefore relieved of any legal or evidentiary burden – the accused need do nothing (unless, of course, dangerousness is otherwise established),
3) this tactical incentive to adduce evidence is not properly described as a shifting of the legal or evidentiary burden to the accused,
4) if the court or Review Board is unable to conclude that the accused constitutes a significant threat to the safety of the public, he or she must be absolutely discharged,
5) jurisdiction over the accused cannot be maintained where there is doubt regarding dangerousness, continued jurisdiction requires an affirmative finding of significant threat,
6) the threat posed must be more than speculative in nature; it must be supported by the evidence,

7) the threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm be serious. A miniscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold,
8) the conduct or activity creating the harm must be criminal in nature,
9) finally, it is up to the court or Review Board to ensure that it has sufficient information in order to make the determination.

Assuming, that as much as possible, the permanently unfit accused should be treated the same as the NCR accused it is my view that the above findings should be applicable to the process set out under section 672.851 so far as determining significant threat is concerned. With respect to the standard of proof required in subsection (7) to grant a stay, the court requires "clear information" in respect of the issue of permanent unfitness and must be "satisfied" with respect to 'significant threat' (and the interests of the proper administration of justice). The indicated standard of "clear information" presumably connotes a higher degree of certainty than being "satisfied", while both of these thresholds are presumably higher than the court's 'opinion, on the basis of any relevant information' as set out in subsection (4). "Clear information" should be interpreted as meaning the "latest reliable information" as employed by the Supreme Court of Canada in *R. v. Owen* (2003), 174 C.C.C. (3d) 1 S.C.C. I am of the view that the process set out in section 672.851 is comparable to the process set out in section 672.54(a) and that therefore, as indicated by the Ontario Court of Appeal in *R. v. Peckham,* {1994] O.J. No. 1995, it is one which is not susceptible to a quantifiable standard of proof. The process is one which involves the weighing and balancing of all relevant considerations. The process is inquisitorial in nature.

The Interests of the Proper Administration of Justice

As indicated by the Supreme Court in *Owen,* "interests of justice" takes its meaning from the context in which it is sought to be applied and that in the particular context in which it was used. The "interests of justice" includes not only justice to the NCR detainee, whose

liberty is at stake, but also justice to the public, whose protection is sought to be assured. I am of the view that the same approach should be taken with the similar phrase found in section 672.851(7)(c).

Appendix

The statutory provisions are reproduced below.

Recommendation by Review Board

672.851 (1) The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if

(a) the Review Board has held a hearing under section 672.81 or 672.82 in respect of the accused; and

(b) 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), the review Board is of the opinion that

(i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and

(ii) the accused does not pose a significant threat to the safety of the public.

Notice

(2) If the Review Board makes a recommendation to the court to hold an inquiry, the Review Board shall provide notice to the accused, the prosecutor and any party who, in the opinion of the Review Board, has a substantial interest in protecting the interests of the accused.

Inquiry

(3) As soon as practicable after receiving the recommendation referred to in subsection (1), the court may hold an inquiry to determine whether a stay of proceedings should be ordered.

Court may act on own motion

(4) A court may, of its own motion, conduct an inquiry to determine whether a stay of proceedings should be ordered if the court is of the opinion, on the basis of any relevant information, that

(a) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial; and

(b) the accused does not pose a significant threat to the safety of the public.

Assessment order

(5) If the court holds an inquiry under subsection (3) or (4), it shall order an assessment of the accused.

Application

(6) Section 672.51 applies to an inquiry of the court under this section.

Stay

(7) The court may, on completion of an inquiry under this section, order a stay of proceedings if it is satisfied

(a) on the basis of clear information, that the accused remains unfit to stand trial and is not likely to ever become fit to stand trial;

(b) that the accused does not pose a significant threat to the safety of the public; and

(c) that a stay is in the interests of the proper administration of justice.

Proper administration of justice

(8) In order to determine whether a stay of proceedings is in the interests of the proper administration of justice, the court shall consider any submissions of the prosecutor, the accused and all other parties and the following factors:

(a) the nature and seriousness of the alleged offence;

(b) the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice;

(c) the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under section 672.33 to decide whether sufficient evidence can be adduced to put the accused on trial; and

(d) any other factor that the court considers relevant.

Effect of stay

(9) If a stay of proceedings is ordered by the court, any disposition made in respect of the accused ceases to have effect. If a stay of proceedings is not ordered, the finding of unfit to stand trial and any disposition made in respect of the accused remain in force, until the Review Board holds a disposition hearing and makes a disposition in respect of the accused under section 672.83.

Comment

The new legislation includes at least one serious inconsistency. Subsection 672.851(5) clearly contains a mandatory requirement that the Court holding an inquiry order an 'assessment' of the accused. Subsection 672.11(e), on the other hand, is clear that such an assessment may only be ordered where the Court has 'reasonable grounds to believe that such evidence is necessary'. Where the Court receives a recommendation from the Review Board it will inevitably have the benefit of its record which will typically include an assessment report focused upon the same issue. It may be that the Court is left without 'reasonable grounds', notwithstanding subsection .851(5), to order yet another assessment. In any event, the Court need not order an assessment 'report'. It may be that the process can be greatly abbreviated with an 'oral report' or confirmation of a previously performed assessment.

The Court's holding of an inquiry in response to the Review Board's 'recommendation' would appear to be, with the use of the word 'may', discretionary. It is not at all clear why

the Court would decline to hold such an inquiry where a recommendation was made or, after it had initiated the process, on its own motion.

Justice Richard D. Schneider
Ontario Court of Justice

December 15, 2005