Case Name:

McDonnell v. Edgar

Between
Robert McDonnell, the person in charge of Providence
Continuing Care Centre, Mental Health Services,
Appellant, and
Philip Andrew Edgar, Respondent, and
Her Majesty the Queen, Respondent

[2006] O.J. No. 4923
Docket: C44833

Ontario Court of Appeal
Toronto, Ontario
J.M. Simmons, R.P. Armstrong and P.S. Rouleau JJ.A.

Heard: July 24, 2006.
Judgment: December 12, 2006.
(60 paras.)

Administrative law — Boards and tribunals — Appeal by McDonnell, the person in charge of Providence Continuing Care Centre, Mental Health Services, from a decision of the Ontario Review Board granting the respondent, Edgar, an absolute discharge — Respondent had been found not guilty in 1983 of second-degree murder by reason of insanity — Appeal allowed — The appellant's fresh evidence application was allowed — The evidence concerning the respondent's treatment following the Board's disposition could reasonably have affected the Board's decision.

Criminal law — Offences — Offences against person and reputation — Murder — Second degree — Appeal by McDonnell, the person in charge of Providence Continuing Care Centre, Mental Health Services, from a decision of the Ontario Review Board granting the respondent, Edgar, an absolute discharge — Respondent had been found not guilty of second-degree murder in 1983 by reason of insanity — Appeal allowed — The appellant's fresh evidence application was allowed — The evidence concerning the respondent's treatment following the Board's disposition could reasonably have affected the Board's decision.

Appeal by McDonnell, the person in charge of Providence Continuing Care Centre, Mental Health Services, from a decision of the Ontario Review Board granting the respondent, Edgar, an absolute discharge. In 1983, the respondent was found not guilty of second-degree murder by reason of insanity. In October 2005, the Board granted the respondent an absolute discharge based on findings that "at best [Mr. Edgar poses] a small or miniscule risk of great harm of a criminal nature to the public" and "there

was no evidence of a high risk of trivial harm." The appellant contended that the Board's finding that the respondent no longer posed a significant threat to the public was unreasonable. Further, the appellant contended that the Board gave insufficient reasons for its finding and that the Board failed to discharge its duty to inquire into all relevant evidence. The appellant also sought to adduce fresh evidence on appeal.

HELD: Appeal allowed. The Board's disposition was set aside and the matter was referred back to the Board for rehearing. The appellant's fresh evidence in the form of an affidavit from Dr. Chan concerning the respondent's treatment following the Board's disposition could reasonably have affected the Board's decision. In his affidavit, Dr. Chan stated that after the Board's disposition the respondent advised a member of the hospital's outpatient nursing staff that he no longer wanted to meet with Dr. Chan. The appellant submitted that Dr. Chan's opinion that the respondent would continue to see him was significant relative to the Board's decision and that evidence of the respondent's willingness to pursue psychiatric follow-up after an absolute discharge was important to evaluating the respondent's level of risk. Fresh evidence concerning events that post-dated the disposition order could be admitted where the evidence was "trustworthy and touche[d] on the issue of risk to public safety." Dr. Chan's affidavit clearly met those criteria.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 672.73(1)

Appeal From:

On appeal from the disposition of the Ontario Review Board dated October 19, 2005.

Counsel:

Janice Blackburn for the appellant Robert McDonnell

Michael Davies for the respondent Andrew Edgar

Nadia Thomas for the respondent Crown

The judgment of the Court was delivered by

¶ 1 **J.M. SIMMONS and P.S. ROULEAU JJ.A.**:— In 1983, Philip Andrew Edgar was found not guilty of second-degree murder by reason of insanity. On October 19, 2005, the Ontario Review Board granted Mr. Edgar an absolute discharge based on findings that "at best [Mr. Edgar poses] a small or

miniscule risk of great harm of a criminal nature to the public" and "there is no evidence of a high risk of trivial harm."

¶ 2 Robert McDonnell, the person in charge of Providence Continuing Care Centre, Mental Health Services, appeals from the Board's disposition. In essence, the appellant contends that the Board's finding that Mr. Edgar no longer poses a significant threat to the public is unreasonable. In addition, the appellant contends that the Board gave insufficient reasons for its finding and that the Board failed to discharge its duty to inquire into all relevant evidence. Further, the appellant seeks to introduce fresh evidence on appeal.

¶ 3 The Attorney-General for Ontario supports the appellant's position.

¶ 4 For the reasons that follow, we would allow the appeal.

Background

¶ 5 On August 9, 1983, Mr. Edgar bludgeoned a female friend to death and, after he killed her, mutilated her body in a sexually sadistic way. Specifically, following the victim's death, Mr. Edgar tore a hole in her body between her vagina and anus and inserted a hammer into the hole he had created.

¶ 6 On December 20, 1983, Mr. Edgar was found not guilty of second-degree murder by reason of insanity. At the time, he had no prior criminal convictions and no history of psychiatric illness. Subsequent to the finding, Mr. Edgar has been diagnosed as suffering from dysthymia, personality disorder-mixed and sexual sadism.

¶ 7 Since the murder, Mr. Edgar has been in no trouble. Moreover, during the eleven-year period preceding the Board's most recent disposition, he lived in the community subject to hospital supervision; and, during the last three years of that period he has been on a conditional discharge.

¶ 8 At the most recent Board hearing both the appellant and the Attorney-General submitted that Mr. Edgar continues to pose a significant risk to the public. In so doing, they relied on evidence to that effect from Dr. Chan, Mr. Edgar's attending psychiatrist, as well as evidence contained in the hospital report that was filed as an exhibit at the hearing. The evidence of risk consisted of three main components.

¶ 9 First, Mr. Edgar's scores on the Violence Risk Appraisal Guide (VRAG) rate him as a moderate risk of re-offending with violence. Specifically, Mr. Edgar's scores indicate that he resembles a group of mentally disordered accused of whom 17% will re-offend violently within seven years of opportunity and 31% will re-offend violently within a ten-year timeframe.

¶ 10 Second, the appellant and the Attorney-General contend that dynamic risk factors relating to Mr. Edgar, including factors surveyed on the HCR-20, demonstrate significant risk. These include: i) the lifelong nature of Mr. Edgar's diagnosed conditions; ii) outstanding questions concerning whether Mr.

Edgar has adequate insight into the relapse path arising from his difficulty in fully appreciating the sexual element of the index offence; iii) uncertainty about whether Mr. Edgar would be able and motivated to be forthcoming with information that might indicate movement towards relapse; iv) the potential for his dysthymic mood to worsen and the requirement that he maintain a course of treatment on low dose anti-depressant medication; v) concerns on the part of the treatment team that Mr. Edgar would not follow-up with psychiatric treatment if discharged absolutely; vi) the potential for exposure to destabilizers including a significantly invested sexual or romantic relationship and resumption of alcohol consumption; and vii) the potential for a return of sadistic fantasies or impulses.

¶ 11 Third, the appellant and the Attorney-General contend that the ongoing inability of forensic professionals to find a satisfactory explanation for what led to the index offence indicates ongoing significant risk. In particular, they rely on Dr. Chan's statement in his oral evidence that "it's a rule in forensics" that one must understand the index offence in order to be best equipped to manage the risk posed by an offender.

¶ 12 In a section entitled "Risk Management", the hospital report concluded that aftercare and a stable mood were important to minimizing the risk of re-offence. The hospital report also recommended reinstitution of a condition restricting the use of alcohol, drugs or other intoxicants because of a question concerning whether alcohol might contribute to the re-emergence of sadistic fantasies and cause behavioural disinhibition.

The Board's Reasons

¶ 13 In its reasons, the Board referred to the circumstances of the index offence and Mr. Edgar's diagnosis and current circumstances. The Board then reviewed the evidence of Dr. Chan. In doing so, the Board noted that Mr. Edgar's VRAG score places him in the fourth lowest of the nine categories of risk to re-offend. Further, the Board stated, "The dynamic risk factors as surveyed on the HCR-20 tests as reviewed with Dr. Chan by Board member Dr. Webster scores virtually zero."

¶ 14 The Board also referred to Dr. Chan's response to a question from a Board member about what it would take for Mr. Edgar to obtain an absolute discharge. The Board stated:

> His response was that the accused could do no better than what he is now doing. He stated that the only reason an absolute discharge is not supported by the hospital is concern about the mystery surrounding why the index offence took place.

¶ 15 Before leaving Dr. Chan's evidence, the Board said:

> In the past year there really has been no change in the accused's situation from the prior year and some years past. ... Over the years, emphasis has been placed by the accused's treating psychiatrist on obtaining from the accused a recognition that the index offence contained a much greater sexual component than the accused has been prepared to concede. This has never come to pass and indeed since Dr Chan took over the accused's care in May 2002 he has concluded that there were a number of factors which brought about the index offence. Of significance is Dr. Chan's evidence that in the absence of a Review Board order the worst thing that could happen would happen with a similar combination of influences.

¶ 16 The Board then turned to its analysis. At the outset, the Board stated that after taking the matters it had reviewed into consideration along with "the accused's consistent and favourable management and behaviour, this year's Review Board panel is compelled to take a fresh look a Mr. Edgar's status." While acknowledging that the hospital had raised legitimate concerns relating to the absence of a satisfactory psychiatric explanation for the offence, the severity of the offence, and the lifelong nature of Mr. Edgar's diagnosed conditions, the Board stated that "considerable weight" had to be given "to the conduct and history of the accused for the past twenty-two years."

¶ 17 In addition, the Board wrote,

> Particular attention must be paid to the last eleven years while he has been living in the community. If there was an opportunity or propensity for the accused's fantasies to be demonstrated or brought to the attention of trained personnel in the hospital system, surely that would have been observed in the past twenty-two years. ... Dr. Chan does not believe that alcohol is a significant risk factor and of importance, he would be confident that Mr. Edgar will continue his relationship with the hospital even if on an absolute discharge.

¶ 18 Finally, the Board noted the following factors:

* Dr. Chan expressed the opinion that it was a confluence of factors that likely brought about the index offence and that it would be a confluence of factors that might cause it to repeat in the future;
* Mr. Edgar testified that even if he would not continue the therapeutic relationship with the specific personnel at the hospital he would continue a relationship with psychiatrists in the community;
* Mr. Edgar had had the opportunity to consume alcohol for two years and reported that he had not done so;
* Mr. Edgar had a reasonably solid therapeutic relationship with Dr. Chan who is confident that on a discharge Mr. Edgar would maintain communication with the hospital team; and
* Mr. Edgar's lifestyle "remains simple and stable and satisfactory to him."

¶ 19 After reviewing the foregoing matters, the Board concluded, "there is at best a small or miniscule risk of great harm of a criminal nature to the public", no high risk of trivial harm, and that in these circumstances, it was obliged to grant an absolute discharge.

Analysis

¶ 20 We begin our analysis by noting that this Court may set aside a Board disposition only where it is of the opinion that:

i. the Board disposition is unreasonable or cannot be supported by the evidence;
ii. the Board disposition is based on an error in law (unless no substantial wrong or miscarriage of justice has occurred); or
iii. there has been a miscarriage of justice. [See Note 1 below]

Note 1: S. 672.78 of the *Criminal Code*; *R. v. Owen*, [2003] 1 S.C.R. 779 at para. 31; *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528 at para. 24.

¶ 21 While the first branch of this test involves application of a standard of review of reasonableness *simpliciter*, the second branch involves application of a standard of correctness.

¶ 22 We have divided our analysis into two parts. The first addresses the grounds of appeal in the absence of the fresh evidence that is, based on the record as it was before the Board. The second part deals with the impact of the fresh evidence. As we will explain, absent the fresh evidence, we would have dismissed the appeal.

a) Consideration of the grounds of appeal in the absence of the fresh evidence

¶ 23 The appellant's first and second grounds of appeal are to some extent interrelated, *i.e.* the appellant's submissions that the Board's finding that Mr. Edgar no longer poses a significant threat to the public is unreasonable and that the Board failed to give sufficient reasons for its findings.

¶ 24 In particular, the appellant submits that, in the face of its comments that nothing had really changed in the past year (or for several years), the Board failed to provide any tenable explanations for several matters: i) why Mr. Edgar no longer poses a significant threat to the community whereas previous Boards found that he did; ii) the basis on which it departed from the most accurate predictive tool of risk, namely Mr. Edgar's VRAG scores; and iii) why the rule in forensics that it is necessary to understand the index offence to be best equipped to manage risk should be departed from in this case. In the absence of such explanations, the appellant contends that the Board's findings are unreasonable.

¶ 25 Further, the appellant contends that the Board appears to have acted based on the mistaken view that Dr. Chan's response to a Board member that Mr. Edgar "could do no better than what he is now doing" indicated that he should be given an absolute discharge.

¶ 26 Finally, the appellant submits that in the face of Mr. Edgar's evidence that he would not necessarily maintain his therapeutic relationship with the hospital, but might instead seek psychiatric care in the community, and Dr. Chan's evidence that it is difficult to find a psychiatrist with the requisite forensic expertise, the Board's decision to grant an absolute discharge without investigating the actual support services available to Mr. Edgar in the community was unreasonable.

¶ 27 In support of the appellant's submissions, the Attorney-General contends that the Board relied unduly on Mr. Edgar's history of good behaviour while ignoring the significance of his VRAG scores; that the Board's finding that Mr. Edgar's HCR-20 dynamic risk test scores were virtually zero was unreasonable; and that the Board ignored Dr. Chan's evidence that there were in fact further steps that Mr. Edgar could take in order to obtain an absolute discharge namely, reassure the hospital staff that, if discharged absolutely, he would continue with his therapeutic program.

¶ 28 We do not accept these submissions. In our view, it is clear from the Board's reasons that, while it was aware of Mr. Edgar's VRAG scores and the importance of understanding what led to the index offence for the purpose of managing risk, it was satisfied, based on its view of the dynamic risk factors, Mr. Edgar's longstanding good behaviour, and Dr. Chan's evidence of the confluence of factors that would be necessary to cause Mr. Edgar to re-offend, that Mr. Edgar's risk of violent re-offending was minimal.

¶ 29 While it may have been preferable for the Board to have referred explicitly to the evidence that actuarial risk assessment tools are the most accurate predictive tools and that caution should be exercised before departing from their assessments based on clinical judgment, we are not persuaded that the Board ignored that evidence. Rather, in our view, it is clear from its reasons that the Board concluded that the evidence relating to Mr. Edgar's history of good conduct, his present circumstances, Dr. Chan's confidence that Mr. Edgar would continue his relationship with the hospital and Dr. Chan's evidence concerning what could cause Mr. Edgar to re-offend, outweighed the evidence indicating a potential for risk.

¶ 30 The Board's findings in relation to risk assessment attract considerable deference from this court, particularly because of the Board's expertise in relation to the issues and evidence before it: *R. v. Owen, supra*, at para. 29; *R. v. Vancurenko*, [2006] O.J. No. 2569 (C.A.).

¶ 31 On our review of the record, there was no detailed evidence concerning the nature of VRAG testing or any circumstances that might affect its predictive validity. In particular, there was no evidence concerning whether longstanding good conduct, as opposed to clinical judgment, can properly outweigh the predictive validity of a VRAG score. In the absence of such evidence and in light of the deference to which the Board's findings are entitled, we see no basis for holding that the Board's implicit conclusions

concerning the significance of the appellant's VRAG score or the absence of a complete understanding of what led to the index offence were unreasonable.

¶ 32 Further, we are not persuaded that the Board made any error in its assessment of the evidence relating to Mr. Edgar's HCR-20 dynamic risk factors. In questioning Dr. Chan in relation to this issue, Board member Dr. Webster made it clear that he understood that Dr. Chan had not assigned scores to the various factors and that scoring was not required.

¶ 33 However, Dr. Webster did note that scoring was recommended in the manual. In that context, he asked Dr. Chan to give him "a slightly clearer idea of where the risks actually are", and requested that Dr. Chan assess the factors based on a "yes, no or maybe." On our review of Dr. Chan's responses, we see no basis for holding that the Board misapprehended Dr. Chan's evidence or that its conclusion was unreasonable.

¶ 34 In our view, it is also clear that the 2005 Board took a different view from that of the 2004 Board of the likelihood that Mr. Edgar was continuing to experience violent fantasies.

¶ 35 In addition, contrary to the appellant's submissions, we do not read the Board's reasons as indicating that it considered that Mr. Edgar should be given an absolute discharge because of Dr. Chan's statement that Mr. Edgar "could do no better than what he is now doing." Rather, in our view, Dr. Chan's statement was simply a factor that the Board took into account in assessing Mr. Edgar's situation.

¶ 36 Further, while we agree that it would have been open to the Board to further investigate the availability of alternate psychiatric care for Mr. Edgar in the community, we are not persuaded that, without the benefit of the fresh evidence, the Board's failure to do so renders its disposition unreasonable.

¶ 37 Viewed as a whole, in our opinion, the reasons for the Board's findings concerning Mr. Edgar's level of risk are apparent. While we consider that it may have been open to the Board to reach a different conclusion, we are not persuaded that, on the record before it, its findings are unreasonable.

¶ 38 Turning to the appellant's submission that the Board failed to discharge its duty to inquire into all relevant evidence, the appellant contends that the Board erred in law by failing to seek out two documents that would have provided important evidence concerning Mr. Edgar's level of risk.

¶ 39 The two documents are: i) a clinical summary dated October 1, 1998 prepared by Dr. James Hillen, which was listed as an attachment to the hospital report and which was not in fact attached; and ii) a note dated September 24, 1999 prepared by Dr. James Hillen, which was described in oral evidence and in the hospital report as providing the best description of the index offence.

¶ 40 The appellant contends that because the annual Board process is an inquisitorial process as opposed to an adversarial process, the Board had a duty to seek out and review these items. Particularly

because of its duty to examine the circumstances of the offence in assessing the risk posed by an offender, the appellant submits that the Board was obliged to obtain and review Dr. Hillen's September 24, 1999 note.

¶ 41 In addition, the 2004 Board listed these two documents as being amongst a series of six documents that it had reviewed and which it described as being "very helpful". Particularly in light of the 2004 Board's description, the appellant submits that the failure of the 2005 Board to obtain these documents was an error in law that mandates a new hearing.

¶ 42 We do not accept these submissions. We have reviewed the documents in issue as part of considering the appellant's fresh evidence application. Based on this review and the reasons of the Board, we are not persuaded that there is any realistic possibility that these documents would have affected the Board's decision had they been filed.

¶ 43 As already noted, in its reasons, the Board concluded that the evidence relating to Mr. Edgar's history of good conduct, his present circumstances, Dr. Chan's confidence that Mr. Edgar would continue his relationship with the hospital and Dr. Chan's evidence concerning what could cause Mr. Edgar to re-offend, outweighed the evidence indicating a potential for risk. The factors indicating a potential for risk were fully detailed in the hospital report and in Dr. Chan's evidence. In our view, there is no realistic possibility that the information included in Dr. Hillen's October 1, 1998 clinical summary would have affected the Board's assessment.

¶ 44 As for the summary of the index offence set out in Dr. Hillen's September 24, 1999 note, the Board was well aware that over the years various physicians had been unable to fully explain what led to the index offence; that Dr. Chan had stated that it is a rule in forensics that it is necessary to understand the index offence in order to be best equipped to manage risk; and that Dr. Chan had drawn some conclusions concerning a confluence of factors that led to the index offence. Given the information and evidence that the Board actually had, we see no realistic possibility that Dr. Hillen's September 24, 1999 note would have affected the Board's conclusions.

¶ 45 Particularly because the documents in issue were referred to in the evidence that was before the Board, we agree that it would have been preferable had counsel and the Board ensured that the documents were filed. However, having reviewed the documents, we are not satisfied that the Board's failure to obtain and review them is a legal error requiring a new hearing.

¶ 46 As part of its submissions relating to the failure of the Board to give adequate reasons, the appellant raised an issue concerning the actions of the Board in receiving additional documentary evidence after the oral hearing ended.

¶ 47 During the oral hearing, Mr. Edgar was questioned by the Board chair about the fact that it appeared he had not given any indication to Dr. Dickey of the Clarke Institute, shortly after committing the index offence, of being depressed or having any signs of depression at the time of the index offence.

Mr. Edgar responded that, in fact, he had indicated to people at the Clarke Institute that he was severely depressed for over a year prior to the index offence; that this was confirmed in material produced by the Clarke Institute at his trial; and that the particular conversation with Dr. Dickey related to whether he was in an unusual state on the day of the index offence.

¶ 48 At the conclusion of the oral hearing, the Board chair asked Dr. Chan for the original notes from the Clarke Institute and from Dr. Dickie. Following the hearing, a note from Dr. Dickie dated November 21, 1983 was produced to the Board. The appellant submits that the Board erred in law in receiving this note without providing the parties or the Board members with an opportunity to examine or cross-examine Dr. Chan in relation to it. In addition, particularly because the note does not support Mr. Edgar's evidence, the appellant submits that the Board erred in law in failing to address the content of the note in its reasons.

¶ 49 We disagree. The request for additional documents was made on the record in the presence of all parties and Board members. If anyone present wished an opportunity to question Dr. Chan concerning the requested documents or even to reserve their rights in that regard, they could have said so. No such request was made; moreover, none of the parties objected to the notes being provided. Further, although the document that was produced did not support Mr. Edgar's evidence, given his statement that there were other documents that did so, it did not serve to refute it. In these circumstances, we are not persuaded that the Board erred in law in receiving the note or in failing to refer to the contents of the note in its reasons.

b) The impact of the fresh evidence

¶ 50 The final issue raised by the appellant is his application to adduce fresh evidence in the form of an affidavit from Dr. Chan concerning Mr. Edgar's treatment following the Board's disposition. In his affidavit, Dr. Chan states that after the Board's disposition Mr. Edgar advised a member of the hospital's outpatient nursing staff that "he no longer wanted to meet with [Dr. Chan] as [Dr. Chan is] associated with the Forensic Unit (although he would continue to see [Dr. Chan] if [Dr. Chan] had a private practice)."

¶ 51 In addition, Dr. Chan deposes that Mr. Edgar permitted the outpatient nurse to visit him on December 20, 2005 and that Mr. Edgar informed the nurse during the visit that he is getting medication from his family doctor (who is not a psychiatrist). Finally, Dr. Chan states, "To my knowledge, Mr. Edgar did not see a psychiatrist until after the Board's disposition was appealed." The effect of the appeal was to return Mr. Edgar to the jurisdiction of the Board and into Dr. Chan's care.

¶ 52 The appellant contends that this evidence could reasonably have affected the Board's decision. He submits that Dr. Chan's opinion that Mr. Edgar would continue to see him was significant to the Board's decision and that evidence of Mr. Edgar's willingness to pursue psychiatric follow-up after an absolute discharge is important to evaluating Mr. Edgar's level of risk.

¶ 53 Counsel for Mr. Edgar responds that the evidence is not admissible because it contains information concerning events that occurred following the Board's disposition and which are therefore irrelevant to our review of the Board's decision.

¶ 54 Sections 672.73(1) of the *Criminal Code* provides that an appeal against a disposition order shall be "based on a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice." In *R. v. Owen, supra*, at paras. 48-61 and 71, the Supreme Court of Canada indicated that, in the context of an appeal of a disposition order under Part XX.1 of the *Criminal Code*, fresh evidence concerning events that postdate the disposition order may be admitted where the evidence is "trustworthy and touches on the issue of risk to public safety." In our view, Dr. Chan's affidavit clearly meets those criteria.

¶ 55 Assuming that it remains necessary on an appeal of a disposition order under Part XX.1 of the *Criminal Code* that proposed fresh evidence meet the fourth *Palmer* [See Note 2 below] criterion for admissibility of fresh evidence in a criminal appeal (namely, that the evidence be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result), we would, for the reasons that follow, nonetheless admit Dr. Chan's affidavit as fresh evidence on appeal.

Note 2: *R. v. Palmer*, [1980] 1 S.C.R. 759.

¶ 56 In its reasons, the Board clearly relied on Dr. Chan's evidence to the effect that he did not think that Mr. Edgar would sever his relationship with the hospital team. The Board also referenced Mr. Edgar's evidence that he might choose to seek out a community psychiatrist. The fresh evidence shows that, following his absolute discharge, Mr. Edgar severed his relationship with Dr. Chan. Further, by the date of the filing of the appeal, Mr. Edgar had not seen a psychiatrist in the community.

¶ 57 In our view, this fresh evidence is important in at least two respects. First, it undermines a finding that was central to the Board's reasoning. One of the bases for the Board's departure from the results generated by the actuarial assessment tools was Dr. Chan's confidence that Mr. Edgar would continue his relationship with the hospital. Maintaining this relationship provided assurance that Mr. Edgar would continue his therapeutic program, a program important in evaluating and controlling his risk.

¶ 58 Second, the fresh evidence gives additional significance to the Board's failure to further investigate the availability of alternate psychiatric care for Mr. Edgar in the community. Once Mr. Edgar determined that he would no longer see Dr. Chan, Mr. Edgar's ability to continue his therapeutic program depended on both his willingness to avail himself of the services of a psychiatrist and the

availability of suitable psychiatric care.

¶ 59 As a result, when the fresh evidence is considered in the context of the whole of the evidence presented at the original hearing and the Board's reasons for its disposition, we are of the view that it might reasonably have affected the result and, for that reason, we would order a new hearing.

Disposition

¶ 60 For the foregoing reasons, we would allow the appeal, set aside the Board's disposition and refer the matter back to the Board for rehearing.

J.M. SIMMONS J.A.
P.S. ROULEAU J.A.
R.P. ARMSTRONG J.A.:— I agree.

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