

Case Name:

T R. v. Miller

Between

Her Majesty the Queen, appellant, and
Leeford Lincoln Miller, respondent, and
Administrator, Penetanguishene Mental Health Centre,
respondent

[2003] O.J. No. 3455

Docket No. C38697

**Ontario Court of Appeal
Toronto, Ontario
Charron, Feldman and Simmons JJ.A.**

Heard: May 2, 2003.

Judgment: September 10, 2003.

(39 paras.)

Criminal law — Mental disorder — Dispositions by court or review board — Jurisdiction and powers — Appeals — Duties of court or review board — Aliens and immigration — Exclusion and expulsion — Immigration, deportation.

Appeal by the Crown from a disposition by the Ontario Review Board allowing Miller to be transferred to his country of origin. Miller was found not guilty by reason of insanity of first degree murder in 1978. He was detained at the Oak Ridge Division of the Penetanguishene Mental Health Centre on a warrant of the Lieutenant Governor of Ontario, and had been under the jurisdiction of the Board since 1991. Miller was born in Jamaica in 1954 and came to Canada in 1969. He had a few criminal convictions prior to the murder, and was convicted of three violent offences between 1989 and 1996. Aside from a period of detention in a less secure facility with community access prior to his 1989 conviction, Miller was either in Oak Ridge or jail since the murder. His treatment team determined that he functioned relatively well in secure settings, but was likely to violently reoffend if released into the community. Miller refused to engage in therapy and denied that he had a mental disorder. In 1993, Miller was ordered deported to Jamaica. Notwithstanding this order, Miller remained in Canada under the Board's detention. Miller wanted to return to Jamaica, and in 2000 he presented a plan with the cooperation of Oak Ridge, immigration officials and Jamaican officials whereby he would be transferred to a hospital in Jamaica and then to a supervised group home. In a 2001 review hearing, the Board found that Miller was still a significant threat to the safety of the public and ordered his continued detention at Oak Ridge, but included a provision to allow Miller to travel to Jamaica in immigration custody and be placed in the custody of Jamaican authorities for admission to a maximum security facility. Just before

Miller's departure, the Board learned that the Jamaican hospital was not maximum security. In response, the Board held a hearing to review its 2001 decision and made the same disposition, deleting the requirement that Miller be admitted to a secure facility. On appeal from that disposition, the Crown argued that the Board did not have the jurisdiction to order Miller detained in a hospital while allowing him to be transferred to care in Jamaica, that it did not exercise its jurisdiction appropriately, and that the Board should not have given any effect to the deportation order.

HELD: Appeal allowed. The Board's disposition was unreasonable and unsupported by the evidence. The Board should only have considered the protection of the public, Miller's mental condition, the reintegration of Miller into society, and Miller's other needs. The disposition did not address any of the relevant criteria, particularly the danger to the public. The Board's disposition would have necessarily put Miller beyond its authority and therefore was a refutation of the Board's ongoing jurisdiction over him. The Board did not have a legislative mandate to implement a deportation order. The disposition was set aside and the matter was referred back to the Board for rehearing.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 672.5, 672.54, 672.54(a), 672.54(c), 672.78(1)(a), 672.81, 672.81(2)(b), 672.82, 672.83, 672.86, 672.88, 672.89.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 50.

International Transfer of Offenders Act, 2d sess. 37th Parl., 2003.

Transfer of Offenders Act, R.S.C. 1985, c. T-15.

Counsel:

Eric H. Siebenmorgen, for the appellant.

John Norris, for the respondent, Leeford Miller.

Janice E. Blackburn, for the respondent, Penetanguishene Mental Health Centre.

Janet A. Leiper, for the intervenor, the Ontario Review Board.

The judgment of the Court was delivered by

¶ 1 **FELDMAN J.A.**:— This appeal raises the issue of what circumstances, including a deportation order, may justify a disposition by the Ontario Review Board ("ORB" or the "Board") allowing an accused who has been found not guilty by reason of insanity (now not criminally responsible on account of mental disorder ("NCR")), and who remains a significant threat to the safety of the public and therefore cannot be given an absolute discharge, to be transferred to his or her country of origin for care and supervision.

Background

¶ 2 Mr. Miller was found not guilty by reason of insanity on a charge of first degree murder in 1978 (the "index offence"). He was detained at the Oak Ridge Division of the Penetanguishene Mental Health Center ("PMHC") on a Warrant of the Lieutenant Governor of Ontario. Since the 1991 enactment of Part XX.I of the Criminal Code, he has been detained under the jurisdiction of the Board.

¶ 3 The index offence occurred after Miller's common-law wife of three years left him on July 20, 1977. He followed her to her brother's home and tried to force his way in. The police stopped him and removed him from the scene. The following day, Miller bought a 30/30 caliber rifle and returned to the brother's home where he shot and killed a woman who was coming down the stairs and who he believed was trying to stop him. He subsequently pointed the gun at the sister-in-law, saying he wanted to talk to his common-law wife and then kill himself. The police arrived and Miller remained in the house where he was talking on the telephone trying to contact his common-law wife. The sister-in-law left the house but her two children remained inside. Miller took both of them hostage, but after a short time, he released one of them. Five hours later, he surrendered. The child hostage was released unharmed.

¶ 4 Miller, one of eight children, was born in Jamaica on March 19, 1954. A few years later, his parents moved to England with some of the children, leaving Miller and four siblings with an aunt in Jamaica. He joined his family in England at age ten, then came with them to Canada in 1969. He left home during tenth grade, has a sparse employment history, and suffers from substance abuse. Miller also has a criminal record that pre-dates the index offence. He was convicted of theft under in 1972, common assault in 1974, possession of stolen property in 1977 and assaulting a police officer in 1977.

¶ 5 Following the index offence, Miller was detained originally at Oak Ridge, but eventually he was transferred to less secure facilities and given community access. However, in 1989 he was convicted of assault with a weapon on his girlfriend and served a sentence of twenty-one months at Quinte Detention Center in Millbrook, following which he was returned to Oak Ridge. In 1992 he was charged with assaulting two hospital staff members at the Kingston Psychiatric Hospital. He was removed to Quinte Detention Center where he spent six months in pre-trial custody before pleading guilty and receiving a sentence of a further one day in jail before again returning to Oak Ridge. Having been moved again to a medium security hospital in 1994, Miller pled guilty in 1996 to assault with a weapon on another patient, and received six months in jail, after which he again returned to Oak Ridge, where he remains.

¶ 6 Until 2002, Miller was diagnosed with Antisocial Personality Disorder and Narcissistic Personality Disorder. [See Note 1 below] The PMHC Clinical Team agreed that he functions relatively well in secure, structured settings like Oak Ridge, and that with less structure and fewer external controls, he has found it difficult to refrain from more menacing behaviours and on more than one occasion has acted very dangerously. Miller does not acknowledge that he is mentally disordered and tends to project blame onto others. He met the criteria for violent recidivism when he was convicted of assault with a weapon in 1989. The majority of the Clinical Team was of the opinion that Oak Ridge remains the most appropriate setting for him, even though he had not been a management problem there

and his mental status remains stable. The Clinical Team had come to the same conclusion in 1997, 1998, 1999, and 2000. Mr. Miller has refused to engage in psychotherapeutic treatment or to accept responsibility for his own actions. Historically he has had difficulties in his attitudes toward, and relationships with, women. It was stated that he has a deeply ingrained belief that others are out to get him; he perceives himself to be under the control of others and he operates on a principle of immediate gratification rather than by anticipating the consequences of his actions. He has declined further participation in therapy.

Note 1: In 2003 Dr. Malcolmson re-examined him and modified the diagnosis to personality disorder, mixed type with narcissistic and anti-social traits: see para. 26 infra.

¶ 7 On March 12, 1993, the Government of Canada ordered Miller deported to Jamaica as a consequence of his conviction for assault with a weapon. Notwithstanding the deportation order, Miller has not been deported and until September 2001, the yearly dispositions by the ORB detained Mr. Miller, without provision for transfer to Jamaica.

¶ 8 Miller had expressed an interest in returning to Jamaica years before the deportation order was issued. Consequently, his lawyer, Mr. Mudry, explored arrangements for returning Miller to a secure facility in Jamaica. On December 10, 1997, he was told, in a letter from then counsel to the ORB, Mr. Schneider, that although repatriation of NCR accused was relatively uncommon, a "protocol of sorts" had been developed. The protocol required that the accused present a plan to the ORB providing for his "seamless" transfer from Canada to Jamaica. On arrangement of such a plan, the ORB would hear the evidence; if satisfied that there were no "loose ends", the ORB would vary the disposition to allow for one-way escorted travel to Jamaica. Upon receipt of written confirmation that the accused was safely in the hands of the receiving jurisdiction, the ORB could then decide to discharge the accused absolutely. By mid-2000, with the cooperation of the PMHC, officials at Immigration Canada and officials in Jamaica, Mr. Mudry had arranged for Miller's admission to the Bellevue Hospital in Kingston, Jamaica, for assessment and subsequent transfer to Sunnybrook Community Group Home, a supervised group home in Jamaica, where he would be under the care of a doctor.

Dispositions of 2001 and 2002

¶ 9 In its reasons for disposition dated January 22, 2001 (following a hearing on September 13, 2000), the ORB decided not to permit Miller to return to Jamaica, but that he was to remain in the Board's custody until he was absolutely discharged, and that there was nothing entitling him to an absolute discharge. The Board noted that it would be abdicating its jurisdiction if it were to release Miller, whom it believed to be dangerous and in need of maximum security, from its custody. Miller, the Board wrote, would pose a risk to the public in Jamaica and in Canada if he were to return to Canada

after the Board had given up its jurisdiction over him.

¶ 10 However, at Miller's hearing in September 2001, the Oak Ridge Hospital no longer opposed his transfer to Jamaica. The ORB continued to find Miller to be a significant threat to the safety of the public and ordered his continued detention at Oak Ridge, but now included a provision, 2(b), allowing the PMHC to permit Miller "to travel to Jamaica in the custody of Immigration Canada and [be] placed in the custody of the Jamaican authorities for transport to the Bell[e]vue Hospital in Jamaica for admission to maximum security." The reasons for this disposition, dated October 9, 2001, review the testimony of Ms. Upshaw on behalf of the PMHC administrator, and of Dr. Malcolmson, Miller's attending psychiatrist. Both said they would object to Miller's deportation unless it occurred by means of a secure transfer to a maximum security hospital in Jamaica. The ORB decided that Miller could travel to Jamaica to stay at Bellevue Hospital - which, at the time, it believed to be a maximum security facility - as long as a seamless transfer occurred. It did not give him an absolute discharge, but noted that if and when the Bellevue Hospital presented it with evidence of a seamless transfer, it would consider granting Miller an absolute discharge. In deciding that the accused required maximum-security facilities, the Board wrote:

[T]he Board finds on the evidence that the accused is a significant threat to the safety of the public. At this time he requires maximum-security detention to adequately protect the public. On the evidence before it, the Board finds that public protection can continue if the Board permits the accused to travel to Jamaica under guard, placed in the hands of the Jamaican police and immigration officials, and transferred securely to the maximum-security hospital for assessment. It is in the accused's interest to return to his home. He is a Jamaican under deportation order, and has been requesting a return to Jamaica for many years.

The Board finds on the evidence that it can adequately protect the safety of the public by permitting his deportation to Jamaica into the hands of the staff at the maximum-security hospital, Bellevue. The Board will not make any assumptions other than that the mental health officials in Jamaica will carry out their responsibilities for proper assessment and treatment of Mr. Miller and will thereby protect the safety of the public in Jamaica. The Board was advised that those officials have been provided with Mr. Miller's record and they are fully aware of his current diagnosis. Therefore, the least onerous and least restrictive disposition is that the accused continue to be detained at the Oak Ridge Division, Mental Health Centre, Penetanguishene, but that he be granted a travel privilege to be escorted by Immigration Canada officials to Jamaica and placed in the hands of police and Jamaican immigration official for transfer to the maximum-security hospital, Bellevue, where he will be admitted.

Once the deportation has occurred, the hospital may request an early hearing in order to provide the Board with evidence as to this exchange having taken place and to consider an absolute discharge at that time.

¶ 11 Just before Miller's departure scheduled for November 14, 2001, the PMHC learned that the Bellevue Hospital was not a maximum security hospital, that there were no maximum security facilities

in Jamaica able to receive Miller, and that Miller's placement in the Sunnybrook Community Group Home would have to be financed by his family, for which no arrangements were in place. In a letter dated December 19, 2001, the permanent secretary to the Department of Health in Jamaica wrote to the Ambassador of Foreign Affairs and Foreign Trade in Jamaica, strongly recommending that Miller remain in Canada:

[T]he Jamaican Government does not have maximum security facilities for mentally ill persons. As such Mr. Miller, if deported, would present a significant risk to the safety of the Jamaican Public.

It is strongly recommended that Mr. Miller remain in Canada where he has family support and is able to receive treatment within a suitable facility.

¶ 12 The Ministry of Foreign Affairs and Foreign Trade indicated by fax on December 19, 2001, that this was the position of the Jamaican Government. This was communicated to Ontario's Ministry of the Attorney General the same day. Consequently, the ORB commenced a hearing to review the September 21, 2001 disposition, resulting in the July 29, 2002 disposition under appeal.

The July 29, 2002 Disposition Under Appeal

¶ 13 After hearing further evidence, the Board's disposition reaffirmed the disposition of September 21, 2001, except that it deleted the requirement that Miller's transfer be to a maximum security facility in Jamaica. More will be said about the Board's reasons for its disposition later in this judgment.

Issues and Analysis

¶ 14 There are three issues raised on appeal:

- (1) Does the ORB have the jurisdiction under s. 672.54(c) of the Criminal Code, where a person is a significant threat to the safety of the public, to order the person detained in the custody of a hospital, but also allow the person to be transferred to care in a foreign country with the intent to then order an absolute discharge?
 - (2) If the Board has that jurisdiction, did the Board exercise its jurisdiction appropriately in this case and is the order a reasonable one?
 - (3) If the Board has that jurisdiction, what effect, if any, is the Board to give to a deportation order issued by the Government of Canada?
- (1) Jurisdiction of the Board

¶ 15 Ontario submits that under its current legislative mandate, the Board cannot make a disposition detaining in a hospital an accused who is considered to be a significant threat to the safety of the public and also allow that accused to be transferred to another country, because the effect of such a disposition is that the Board will lose jurisdiction over the accused.

¶ 16 Sections 672.54 and 672.81 of the Criminal Code provide:

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.

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

- (2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend
 - (a) has increased the restrictions on the liberty of the accused significantly for a period exceeding seven days; or
 - (b) requests a review of the disposition.
- (3) Where an accused is detained in custody pursuant to a disposition made under paragraph 672.54(c) and a sentence of imprisonment is subsequently imposed on the accused in respect of another offence, the Review Board shall hold a hearing to review the disposition as soon as is practicable after receiving notice of that sentence.

¶ 17 By a combination of ss. 672.54 and 672.81 of the Criminal Code, the Board is required to make an initial disposition of the status of an accused who has been found not criminally responsible (formerly not guilty by reason of insanity), and to hold a review hearing annually thereafter, as well as on the happening of certain other events such as a subsequent conviction, as long as the accused continues to be

a significant threat to the safety of the public and therefore has not been discharged absolutely under s. 672.54(a). It is trite that the Board cannot act except within its statutory mandate.

¶ 18 Having said that, it is clear from the precedents that have been presented on this appeal, that historically, the Board has determined that there are circumstances where it is in the best interests of an accused who remains a danger to the public to recover in his country of origin. The Board has therefore developed an informal protocol for facilitating transfers if possible, with the co-operation of the receiving country. [See Note 2 below]

Note 2: As an intervenor in these proceedings, the Board recognized some of the problematic features of this case, but sought to maintain maximum flexibility for the Board to be able to allow NCR accused to travel out of the country in appropriate circumstances.

¶ 19 Such a situation arose in the case of *Re Malinowski* (October 24, 1995), No. 7019-1096/95 (ORB), where arrangements were made with the authorities in Poland to transfer the accused to a mental health facility there for treatment and reassessment, on the understanding that if he were considered to be a threat to the public in Poland, the hospital could obtain a court order from a Polish court for preventive detention. In that case the accused had difficulty communicating in English, was very lonely for his family in Poland, and was resisting treatment here as a result. The Brockville Psychiatric Hospital recommended, based both on psychiatric and compassionate grounds and taking into account the significant risk to others, that the accused be returned to Poland if appropriate safeguards could be put in place. The opinion of hospital staff was that the accused would only realize improvement if he were returned to Poland. The Board made an order detaining the accused in the Brockville hospital on conditions including that the administrator of the hospital could allow the accused to travel, properly accompanied, to Poland for transfer to a psychiatric hospital there. The following year the Board held a review hearing in the absence of the accused but with his lawyer representing him: *Re Malinowski* (July 17, 1996), No. 7835-1096/96 (ORB). The Board received a report from the Polish psychiatric facility that the accused was not suffering from a psychiatric disorder and had been released into the community. The Board concluded that the accused was no longer a threat to the safety of the public, either in Canada or in Poland, and directed an absolute discharge.

¶ 20 Consequently, in the *Malinowski* case, the Board was able to effectively retain jurisdiction over the accused and fulfill its statutory obligations. What is left unanswered is whether the co-operation with the Polish authorities was such that the Board could have exercised control over the accused, had it determined either that further detention was required, or that only a conditional discharge was appropriate in the circumstances.

¶ 21 This situation can be usefully compared to interprovincial transfers of accused, which transfers are specifically provided for in ss. 672.86-672.89 of the Code. Under these provisions, either the Review

Board of the province to which the accused is transferred, or where an agreement is made between the Attorneys General of the affected provinces, the Review Board of the province from which the accused was transferred, retains jurisdiction over the accused to perform the duties of a Review Board under ss. 672.5 and 672.81-672.83 of the Code.

¶ 22 Assuming, without deciding, that there may be circumstances where it would be within the Board's statutory mandate to detain an accused in custody subject to a condition that would allow him to be transferred to another country, do those circumstances exist in this case?

(2) Was the Board's Order in this case appropriate and reasonable?

¶ 23 The order under appeal was made by the Board on a review hearing convened at the request of the administrator of the hospital under s. 672.81(2)(b) of the Criminal Code to clarify the terms of the Board's then current order. The disposition of the Board in its earlier order was made under s. 672.54 (c): the accused remained a significant threat to the public and was therefore ordered detained in hospital, but on condition that the hospital administrator could allow him to be transferred to a maximum security mental hospital in Jamaica. The administrator learned, however, after its initial order, that the Bellevue Hospital in Jamaica where the accused was going to be transferred is not a maximum security hospital, nor is there such a facility in Jamaica. Consequently, the purpose of the review hearing was to determine if the maximum security requirement could be deleted as a condition of the disposition ordered.

¶ 24 In its reasons for the disposition under appeal, the Board clarified the current status:

It is obvious from the reasons for the disposition under review that the Board was satisfied that Mr. Miller was a Jamaican citizen, subject to a lifelong deportation order from Canada, that the Jamaican authorities being fully cognizant of all the circumstances were prepared to accept him, that all appropriate arrangements had been made and the conditions laid down by the Review Board to allow the transfer to Jamaica had been met. However, it is also apparent that the board at that time was under the impression, based on the evidence before them, that maximum secure hospital facilities were available in Jamaica. It is clear from the evidence now before the Board that such is not the case.

¶ 25 Of course, the other major change in circumstances was that the Jamaican authorities were no longer prepared to accept the accused. Significantly, the Jamaican Government advised that because it had no maximum security facilities for mentally ill people, "Mr. Miller ... would present a significant risk to the safety of the Jamaican Public."

¶ 26 The Board discounted the new position adopted by the Jamaican government on the basis that it had possessed all of the relevant information about the accused when it agreed to accept him. The Board was also influenced by the evidence that (a) the accused was currently receiving no treatment; (b) the

accused wanted to be transferred to Jamaica; (c) the accused's parents now lived in Jamaica and were supportive of his return there; (d) the accused's sister advised that the family would pay the 1,000 dollars per month for his stay in a Jamaican facility; (e) Jamaica was obliged to accept the accused pursuant to the deportation order because he is a Jamaican citizen; (f) Dr. Malcolmson, the accused's attending physician at Oak Ridge had recently re-examined him and had significantly modified his assessment and conclusions about Mr. Miller.

¶ 27 Dr. Malcolmson's new diagnosis of Mr. Miller was personality disorder, mixed type with narcissistic and anti-social traits, with no current symptoms of schizophrenia, psychosis or major depression. He had only one serious incident of aggressive behaviour in the last ten years, was functioning at a high level and would probably do better in his own country. Dr. Malcolmson concluded that the accused remained a substantial risk, but could be managed in medium security with the goal of rehabilitation and community access within two years. Finally, the doctor's opinion was that the accused could be managed in the Jamaican mental health system.

¶ 28 The Board's disposition was that the order under review should reissue, but without the maximum security condition for transfer to Jamaica. Recognizing the risk to the public in Jamaica, the Board stated:

In making this disposition the Board is not laying down the principle that in all cases the word "public" as used in s. 672.54 means only the Canadian public. However all members of the Board are of the view that where the accused is the subject of an outstanding deportation order of the Government of Canada, and where all reasonable security arrangements have been made for Mr. Miller's safe transfer to Jamaica to be placed in the hands of the appropriate well-informed Jamaican authorities to be dealt with as they see fit, pursuant to the governing legislation of that country, in those particular circumstances, s. 672.54 authorizes such a disposition. After carefully considering all four of the factors set out in s. 672.54, in the light of the evidence presented, the least onerous and least restrictive disposition is that Mr. Miller continue to be detained at the Oak Ridge Division Mental Health Center Penetanguishene and that he be permitted a travel privilege to be escorted by Immigration Canada officials to Jamaica and placed in the hands of Jamaican authorities.

¶ 29 These reasons indicate that in making its disposition, the Board concluded that the following three factors justified making the accused's detention subject to a condition allowing his transfer to Jamaica: (1) the accused was subject to a deportation order, (2) the accused could safely and securely travel to Jamaica and be transferred to Jamaican authorities, and (3) the Jamaican authorities could deal with the accused as they saw fit in accordance with their law.

¶ 30 In my view, the Board's disposition is unreasonable and cannot be supported by the evidence. [See Note 3 below] None of these three factors deals with the criteria to be considered by the Board under s. 672.54: protection of the public, the mental condition of the accused, the reintegration of

the accused into society, and the other needs of the accused. Neither do they address the fact that with no agreement with Jamaica to effectively implement the criteria there, or to allow the Board to retain jurisdiction if necessary (a difficult proposition where the accused has been deported), the disposition contains no conditions to address the relevant criteria, particularly the danger to the public.

Note 3: Section 672.78(1)(a) of the Code allows a Court of Appeal to set aside a disposition on the ground that "it is unreasonable and cannot be supported by the evidence".

¶ 31 The evidence from Jamaica indicated not only that the authorities there did not have the facilities to deal with the accused from a purely supervisory and safety viewpoint, they also did not have the legal authority to hold the accused against his will. What was proposed was a brief assessment period, then a transfer to a high security private group home setting where the accused's continued placement would depend both on his own co-operation and the ongoing financial commitment of his family. From the record, it is clear that it was the intent of the Board at the subsequent review hearing to make a pro forma disposition of absolute discharge, regardless of the public safety issue. In fact, the Board specifically contemplated divesting itself of jurisdiction over the accused when it said that he would be dealt with as the Jamaican authorities "see fit" and in accordance with Jamaican law.

¶ 32 A previously constituted Board in this matter (January 22, 2001) that refused the travel condition, recognized the problem faced by the Board when it observed:

The better question is, when should we abdicate our jurisdiction by deporting someone who we have found should be detained in a maximum security setting, because he is dangerous, and a serious risk to the safety of the public, there and perhaps here if he or she decides to return. Put that way we think the answer is obvious.

¶ 33 It is clear that the disposition of the Board in this case necessarily put the accused beyond the authority of the Board and therefore involved a refutation of its ongoing jurisdiction over the accused. In so doing, the Board acted unreasonably.

(3) The Effect of the Deportation Order

¶ 34 The Criminal Code provisions, which provide the Board with its authority and obligations, make no reference to a deportation order. The administrator, PMHC, submits that the deportation order is not stayed by s. 50 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (prior to June 2002, the Immigration Act, R.S.C. 1985, c. I-2.) [See Note 4 below] However, there is no need to fully address that question here because the issue is not what authority the Government of Canada may or may not have to deport an accused who is detained pursuant to Part XX.1 of the Criminal Code, but what use the

Board is to make of the order when determining its disposition with respect to an accused pursuant to the criteria set out in s. 672.54.

Note 4: Section 50 provides:

A removal order is stayed

- (a) if a decision that was made in a judicial proceeding - at which the Minister shall be given the opportunity to make submissions - would be directly contravened by the enforcement of the removal order;
 - (b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;
 - (c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;
 - (d) for the duration of a stay under paragraph 114(1)(b); and
 - (e) for the duration of a stay imposed by the Minister.
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¶ 35 It is clear that there is no legislative mandate for the Board to implement a deportation order just because the order exists. The administrator refers, however, to *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, where the Supreme Court of Canada stated that the intent and effect of the legislative mandate of the Board is to achieve the twin goals of protection of the public and fair and appropriate treatment of the accused person, and referred to the Board's wide latitude to determine appropriate conditions. The Supreme Court also said that "[T]he NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation." *Winko*, at para. 42. In that context, the Administrator submits that the Board ought to consider the deportation order and whether the accused might benefit from proximity to family.

¶ 36 In my view, facilitating the execution of a deportation order cannot be viewed as consonant with treating an accused with dignity, nor is such an order intended in any way to afford an accused more liberty than he would have in Canada. A deportation order is imposed on a non-Canadian who is considered undesirable by the government of Canada, in many cases because of criminal activity committed here. The fact that an accused may be subject to a deportation order should not make him more eligible for a Board order transferring him out of the country than an accused who has not been ordered deported. The fact that executing the deportation order in this case would facilitate the wishes of the accused who would otherwise remain in hospital custody for an undetermined time in Ontario, is merely fortuitous and not a factor that affects his dignity. In any event, the wishes, dignity and liberty of an accused are to be considered by the Board, whether or not he or she is subject to deportation.

¶ 37 I note that although the current Transfer of Offenders Act, R.S.C. 1985, c. T-15, does not make any provision for international transfer of accused who have been found not criminally responsible, the new Bill C-33, International Transfer of Offenders Act, 2d sess. 37th Parl., 2003, does provide a system of administrative arrangements for their transfer. The process, as currently worded, involves the consent

of the Attorney General of the Province on the recommendation of the Review Board, which must consider: "(a) the best interests of the person, including their mental condition, the likelihood of their reintegration into society and their treatment and other needs; and (b) the need to protect society from dangerous persons." Significantly, there is again no reference to the existence of a deportation order.

¶ 38 In my view the Board erred in considering the deportation order as a factor that gave the Board authority under s. 672.54 to make the custodial order subject to the condition that the accused could be permanently transferred to Jamaica.

Conclusion

¶ 39 I would allow the appeal, set aside the order of the Board, and refer the matter back to the Board for a rehearing.

FELDMAN J.A.

CHARRON J.A. -- I agree.

SIMMONS J.A. -- I agree.

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