COURT OF APPEAL FOR ONTARIO

CITATION: McFarlane (Re), 2018 ONCA 583
DATE: 20180626
DOCKET: C63808 and C64293

Sharpe, Roberts and Trotter JJ.A.

BETWEEN

IN THE MATTER OF: Odean McFarlane

AN APPEAL UNDER PART XX.1 OF THE CODE

Anita Szigeti, for the appellant

Elena Middelkamp, for the respondent, the Attorney General of Ontario

Michele Warner, for the respondent, the Centre for Addiction and Mental Health

Heard: June 22, 2018

On appeal from the dispositions of the Ontario Review Board, dated May 23 and August 11, 2017, with reasons dated June 14, 2017 and September 1, 2017.

REASONS FOR DECISION

[1] The appellant appeals from the May 23 and August 11, 2017 dispositions of the Ontario Review Board.

[2] The appellant has been under the supervisory jurisdiction of the Board since December 13, 2007 when he was found not criminally responsible on account of mental disorder on a charge of assault that occurred in July 2005. The appellant has a long history of mental illness from at least 2002 and his diagnoses include

schizophrenia, substance use disorder, and antisocial personality traits. He has a substantial but dated criminal record starting in about 2001 to about 2010, including convictions for robbery and assault.

[3] Since coming under the Board's supervision, the appellant's mental state, compliance with medication use, insight into his mental health and addiction issues, and abstinence from illicit drugs, have greatly fluctuated. However, throughout the period from about February 2015 to May 2017, the appellant made enormous strides: he was gainfully employed; drug free; became engaged to be married; complied with his medication and reporting requirements; joined a church; and lived successfully in the community. As a result, following the annual review, on May 23, 2017, the Board changed the appellant's disposition from a detention order in the General Forensic Unit of the Centre for Addiction and Mental Health (CAMH) to a conditional discharge with a number of conditions.

[4] Sadly, the appellant's father passed away unexpectedly in March 2017 and the appellant experienced other life stressors. Tragically, because of the enormous progress he had accomplished, within a couple of months, the appellant's mental stability and conduct dramatically deteriorated: he relapsed into regular cocaine use; failed to report and receive his medication; broke up with his fiancée; was no longer employed; and put his apartment into jeopardy. As a result, there was an early hearing for the appellant. On August 11, 2017, the Board ordered that the appellant again be detained at CAMH.

[5] The appellant submits that both of the Board's dispositions are unreasonable and that the August 11, 2017 order should also be set aside because of procedural unfairness and reasonable apprehension of bias in relation to one of the Board members.

[6] For the reasons that follow, the appellant's appeals are dismissed.

[7] We agree with the respondents that the appeal from the Board's May 23, 2017 disposition is moot because the May 23, 2017 order has been overtaken by the August 11, 2017 disposition and there would be no practical utility in considering it. Accordingly, we dismiss the appeal from the May 23, 2017 disposition.

[8] Turning to the appeal from the Board's August 11, 2017 disposition, we are not persuaded by the appellant's submissions.

[9] The Board's finding that the appellant represented a significant threat to the safety of the public under s. 672.54 of the *Criminal Code* was reasonable and based on ample evidence. From May 31, 2017, when the appellant relapsed into daily cocaine use, until his re-admittance to CAMH on a Form 1 on August 11, 2017, the appellant exhibited aggressive and violent behavior: this included harassing his former fiancée who was fearful of him to the point where she called the police to remove him from her parents' property and was contemplating obtaining a peace bond against him; harassing a tenant of his apartment building

to pay a drug debt while holding a knife; stealing his superintendent's camera; yelling at and threatening security personnel at CAMH and preventing them from leaving their office; and kicking open a mag-lock door at CAMH. This recent behavior was consistent with the appellant's historical pattern of aggressive, threatening and sometimes violent behavior while relapsed into drug use and non-compliant with his medication.

[10] The Board's determination that a detention order was the least onerous and restrictive disposition was also reasonable. The appellant's recent violent, threatening and aggressive behavior, his relapse into drug use, his lack of compliance with his reporting requirements, drug screening, and medication use, as well as his absconding, fully supported the Board's conclusion that the appellant's risk to the safety of the public could not be adequately managed on a conditional discharge order.

[11] The appellant submits that the Board's refusal of an adjournment of his August 11th hearing because of his counsel's concussion and consequent lack of preparedness for the hearing, as well as the appellant's incapacity during the hearing, resulted in procedural unfairness and a miscarriage of justice. We do not accept this submission.

[12] The well-established factors that the Board was required to take into account in determining whether to grant an adjournment and the standard of appellate

review of the Board's determination are set out by this court in *Conway (Re)*, 2016 ONCA 918, at para. 23:

> In deciding whether to grant or refuse a request for an adjournment, the Board must take into account the interests of the not criminally responsible (NCR) accused, the interests of the hospital, and its own statutory mandate to hold timely hearings. Because its decision is discretionary, it attracts significant deference from an appellate court. But an appellate court may justifiably interfere if the Board errs in principle, or exercises its discretion unreasonably. So, for example, an appellate court may intervene if the Board's denial of an adjournment deprives an NCR accused of a fair hearing and thus is contrary to the interests of justice: see *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.), at para. 14.

[13] We see no error in the Board's refusal of the appellant's adjournment request that would permit appellate intervention.

[14] Given the appellant's severe deterioration, there was urgency in proceeding with the review hearing, which the appellant's Form 1 admission did not ameliorate. A short adjournment was not possible because appellant's counsel would not be available. His counsel did not indicate that she was physically unable to proceed. There is no suggestion of ineffective assistance of counsel. Indeed, the Board complimented counsel on her skill and ability.

[15] The Board was faced with a difficult balance to strike in determining whether to grant the appellant's request to adjourn the hearing. The Board's reasons

demonstrate to our satisfaction that it took into account the competing interests and exercised its discretion to deny the adjournment in a reasonable fashion.

[16] The Hospital's request for an early hearing was well supported. The appellant's condition had deteriorated and dealing with him on the basis of the conditional discharge or under the *Mental Health Act*, R.S.O. 1990, c. M.7, had proven problematic. There was evidence of a significant risk to public safety and the Board did not err in finding on this record that an early hearing was required.

[17] The Board also took into account the appellant's right to procedural fairness and to have proper legal representation. The Board considered the appellant's counsel's accident a few days earlier and her ability to represent the appellant and to adequately prepare for the hearing on short notice.

[18] There was no perfect solution to this procedural dilemma but, in our view, the Board's decision to carry on with the hearing was entirely reasonable. The Board did its best to accommodate the appellant and his counsel within the short time-frame available. It granted a short adjournment to allow counsel to review the case with the appellant and to prepare for the hearing. Counsel was very familiar with the appellant's situation having represented him in the very recent past and the only new material to emerge since counsel's last representation was a relatively brief seven-page report. The appellant has not advanced before this

court any fresh evidence that might have been produced had an adjournment been granted.

[19] While we sympathize with the difficulty faced by the appellant and his counsel in having to proceed on relatively short notice, we are not persuaded that there was a denial of his right to procedural fairness or any miscarriage of justice. The conditions of the hearing may not have been perfect; however, the challenges encountered by the appellant and his counsel did not rise to the level of procedural unfairness. There is nothing in the transcript that supports the suggestion that the appellant did not obtain a fair hearing. We see no error in the exercise of the Board's discretion in these circumstances.

[20] Finally, the appellant submits that the Board erred in allowing Dr. Ben-Aron to remain as a Board member because he had previously treated the appellant. We do not accept that the presence of Dr. Ben-Aron gave rise to a reasonable apprehension of bias.

[21] There is a legal presumption that Board members are impartial; as a result, there is a high threshold to successfully challenge a decision based on bias or reasonable apprehension of bias: *Tolias (Re)*, 2016 ONCA 463, at para. 24.

[22] Dr. Ben-Aron had seen the appellant on seven brief and discrete occasions, once in 2003, four times in 2004, and once in 2007, over ten years prior to the Board hearing. He had no notes of his treatment and opinion concerning the

appellant and no recollection of his case. Unlike the rules governing Consent and Capacity Board hearings, there is no absolute prohibition against a treating physician sitting as a Board member during a hearing for a former patient.

[23] In these circumstances, an informed reasonable person viewing the matter realistically and practically would not conclude that Dr. Ben-Aron would be consciously or unconsciously influenced in an improper manner: see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 74. We see no error in the exercise of the Board's discretion to proceed with the hearing with Dr. Ben-Aron as a Board member.

[24] As a result, the appeal from the August 11, 2017 disposition is also dismissed.

"Robert J. Sharpe J.A."

"L.B. Roberts J.A."

"G.T. Trotter J.A."