COURT OF APPEAL FOR ONTARIO

CITATION: Tompkins (Re), 2018 ONCA 654
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Strathy C.J.O., Watt and Epstein JJ.A.

IN THE MATTER OF: Douglas Tompkins

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Erin Dann, for the appellant

Andrew Cappell, for the Ministry of the Attorney General

Janice E. Blackburn, for the Person in Charge of Waypoint Centre for Mental Health Care

Heard: April 27, 2018

On appeal against the disposition of the Ontario Review Board dated September 19, 2017.

Epstein J.A.:

OVERVIEW

[1] The appellant has a long history of serious psychiatric illness. He has been diagnosed with a constellation of psychiatric disorders including sexual sadism, pedophilia, anti-social personality disorder and mild mental retardation. The appellant also has a number of health issues. He suffers from Type II diabetes and a seizure disorder. His seizures appear to have increased in frequency in recent years.

[2] He has resided in institutions since he was 7. He is now 62.

[3] The index offence took place in 1976 on the grounds of the Huronia Regional Centre where the appellant and the victim both lived. The appellant, then 21, and the victim engaged in sexual intercourse, following which the appellant tied the victim to a chair, pulled her clothes off and pushed a stick into her vagina. He then kicked her and dropped a large rock on her head. The appellant tied a belt around the victim's neck and stuffed a rag in her throat. The victim died of asphyxiation.

[4] On a charge of murder, the appellant was found not guilty by reason of insanity – now referred to as Not Criminally Responsible ("NCR"). Since that finding, the appellant has been detained at the Waypoint Centre for Mental Health Care ("Waypoint"). With the exception of a 90-day period in 1994 when he was assessed, and of other trips to hospital for medical reasons, the appellant has not set foot off the Waypoint grounds in over 30 years. There is no dispute that other

than for medical, legal or compassionate purposes, the appellant will never be able to enter the community, even escorted by staff, while detained at Waypoint.

[5] At his most recent Board hearing in September 2017, the appellant conceded the issue of significant risk. He asked for a transfer from Waypoint to an all-male secure forensic unit at the Centre for Addiction and Mental Health ("CAMH") or the Brockville Mental Health Centre ("Brockville"). He sought this transfer so he could take advantage of escorted privileges into the community, available at CAMH and Brockville but not at Waypoint.

[6] A majority of the Board concluded that the necessary and appropriate disposition was an order continuing the appellant's detention at Waypoint, citing the potential negative effect a move could have on the appellant's "quality of life". The alternate chair and a psychiatrist member of the Board dissented – the minority would have ordered that the appellant be transferred either to CAMH or to Brockville.

[7] For the reasons that follow, I agree with the appellant that the majority erred in two ways: (i) the majority erred in law by failing to consider all relevant factors under s. 672.54 of the *Criminal Code*; and (ii) the majority further erred by failing to give sufficient weight in the circumstances to the appellant's reasonable subjective preferences in favour of a transfer. Together, these errors rendered the

majority's disposition unreasonable. I would therefore allow the appeal, set aside the disposition under appeal and order a new hearing.

THE HEARING BEFORE THE BOARD

(1) The Evidence

[8] A detailed review of the hospital report reveals that the appellant's clinical status has remained static for many years. In the past 32 years, he has not engaged in any assaultive behaviour. He has not demonstrated any seriously inappropriate or predatory sexual behaviour in several decades. For the past several decades, but for one minor altercation with another patient, there have been no incidents of serious physical, verbal or sexual aggression and no need for seclusion. However, because of his intellectual disabilities, inappropriate sexual activity preferences, and history of dyscontrolled behaviour, his treatment teams have consistently viewed detention in a highly supervised and structured setting as necessary to protect the public and as most beneficial to the appellant. The appellant does not contest this assessment.

[9] It appears that notwithstanding his hard work in group sessions, the appellant's intellectual disability prevents him from understanding, integrating or remembering much of the content of his rehabilitative programming for sexual offenders.

[10] On the social side, the appellant has generally fared well at Waypoint. He is described as pleasant and cooperative. He interacts well with staff and fellow patients. The appellant has access to all programs and amenities within the secure perimeter at Waypoint and has enjoyed grounds privileges escorted by staff, all without incident. He takes advantage of all available educational, recreational and vocational services, and spends much of his day engaged in programming – most frequently, in Waypoint's workshop. He also enjoys playing cards twice a month with an elderly female volunteer.

[11] The unchallenged evidence is that the appellant could "most definitely" be managed in a less secure environment than Waypoint. However, he does continue to struggle with appropriate boundaries in his relationships with female staff and volunteers and is disposed towards inappropriate sexual activity preferences. These management concerns must be accounted for in his disposition.

[12] As early as 1992, the clinical team recommended that, if an all-male facility with less security and more supervision were available, the appellant should be considered for such a placement.

[13] In preparation for the hearing under appeal, the clinical team initially recommended that the appellant be transferred to a less secure environment at Providence Care in Kingston. The team believed, incorrectly, that there was a specialized program available at Providence for sex offenders with intellectual

disabilities – a facility where the appellant could possibly achieve and sustain a greater quality of life than at Waypoint. The team recommended a transfer with conditions permitting the appellant to exercise hospital grounds privileges accompanied by staff and community privileges, escorted by staff. After learning that such a program was not in fact available, the team changed its opinion and recommended that the appellant remain at Waypoint.

(2) The Parties' Positions at the Hearing

[14] It is against this background that the appellant sought a transfer to an all-male unit available at either CAMH or Brockville. As previously indicated, the appellant sought such a transfer so he could, albeit in a limited manner, enjoy some engagement with the community. He hoped to access the community through occasional escorted trips to locations such as a shopping mall or a hockey arena.

[15] The Attorney General for Ontario supported the appellant's transfer request. Counsel for the Attorney General noted that there was no safety or management need for the appellant to remain at Waypoint and also no treatment advantage to his remaining there. The Attorney General also agreed that there was no actual evidence adduced at the hearing demonstrating that he would not respond well to a transfer. In the light of these factors, the Attorney General submitted that the

appellant's preferences should determine the issue of the transfer and that it should be ordered by the Board.

[16] Noting that he could be managed in a less secure environment, the appellant's clinical team nonetheless concluded that a transfer would result in significant restrictions on the appellant. In support of its recommendation that the appellant remain at Waypoint, the team cited the fact that Waypoint is a familiar environment, that vocational services are a source of both pride and funds for the appellant, that he is able to engage in recreational activities at Waypoint and that he enjoys playing cards with his regular volunteer visitor.

[17] The appellant's attending psychiatrist, Dr. Danyluk, agreed with the conclusion, set out in the hospital report, that the appellant could be managed in a less secure environment on an all-male unit. However, Dr. Danyluk was concerned that transferring the appellant to another institution would negatively affect his quality of life, given the relationships he has formed over the decades he has been at Waypoint and the additional restrictions he would be subject to at either Brockville or CAMH. Notwithstanding this conclusion, under cross-examination the doctor did acknowledge that moving to CAMH or Brockville could provide the appellant with faster and better access to medical care for his serious medical conditions.

[18] Waypoint recommended the appellant's continued detention at its facility, arguing that even though his risk to the community could be safely managed at a less secure facility, his quality of life at such an institution would be diminished. At Waypoint patients have relatively free access within the secure areas of the hospital. Since the majority of the units at CAMH or Brockville are co-ed, in order to ensure the safety of female patients and other vulnerable patients, the appellant's ability to access recreational and vocational opportunities would be severely limited.

(3) The Reasons

[19] The majority of the Board accepted the unchallenged evidence that the appellant's risk to public safety could be safely managed at CAMH or Brockville. However, it nonetheless refused to order the transfer. It concluded that the appellant's lived reality in a less secure hospital would result in his having a diminished quality of life. The appellant would not be able to engage in the various activities that he enjoys at Waypoint, where he is able to move about the grounds with relative ease. The majority concluded that at the other hospitals the appellant would have access to fewer privileges or programming since it would be unlikely that he would be allowed off his unit without direct and close supervision. The majority was concerned that the appellant may not be able to appreciate the significant limits on his liberty that he would face in a less secure environment, or the impact those limits would have on his overall quality of life.

[20] Relying on this court's decision in *Mental Health Centre Penetanguishene v. Magee* (2006), 208 C.C.C. (3d) 365 (Ont. C.A.), the majority concluded that, taking into account the appellant's "other needs" under s. 672.54 of the *Code*, continued detention at Waypoint was the necessary and appropriate disposition.

[21] A minority of the Board would have ordered the appellant's transfer to a less secure environment. The minority recognized the potential negative impact of the appellant's losing access to certain programs and opportunities at Waypoint, but noted that there was no evidence that he would be unable to enjoy his life in a new environment and engage with new hospital staff and patients as he had at Waypoint. Crucially, the minority emphasized that although the appellant may never be discharged to live in the community, "his reintegration into society should not be overlooked as a goal and a transfer to a less secure hospital would broaden [his] access to society outside the confines of the restrictive boundaries at [Waypoint]."

THE LEGAL FRAMEWORK AND STANDARD OF REVIEW

[22] Here, given the parties agree that the appellant remains a significant threat, the Board was required to impose a disposition that was "necessary and appropriate." In determining the proper disposition, the Board was required to consider the four factors set out in section 672.54 of the *Code*:

i. the safety of the public;
ii. the mental condition of the accused;

iii. the reintegration of the accused into society; and
iv. the other needs of the accused.

[23] The necessary and appropriate disposition is that which is the least onerous and least restrictive to the accused consistent with public safety: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326*,* at para. 19. It is the entire "package of conditions" that must be the least onerous and least restrictive: *Penetanguishene Mental Health Centre v. Ontario (Attorney General),* 2004 SCC 20, [2004] 1 S.C.R. 498, ("*Tulikorpi*"), at para. 71; *Re Conway,* 2016 ONCA 918, at para. 38. In making this determination an NCR offender "is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused": *Winko v. Forensic Psychiatric Institute,* [1999] 2 S.C.R. 625, at para. 43.

[24] The Board is required to gather and review all available evidence pertaining to the four factors set out in s. 672.54: *Winko*, at para. 55; *R. v. Aghdasi*, 2011 ONCA 57, at para. 19. Failure to consider all of the factors when determining the least onerous and least restrictive disposition is an error of law: *Magee*, at paras. 59, 65.

[25] Section 672.78 of the *Criminal Code* provides that this court may set aside an order of a Review Board only where it is of the opinion that:

a. it is unreasonable or cannot be supported by the evidence;
b. it is based on a wrong decision on a question of law; or

c. there was a miscarriage of justice.

[26] The standard of review when applying the first branch of s. 672.78 is reasonableness, while the second branch is concerned with a question of law, and thus the standard is correctness: *Mazzei*, at para. 16.

[27] As I explain below, I am of the view that the majority erred in two respects. First, the majority erred in law in failing to meaningfully consider all relevant factors under s. 672.54. Specifically, it failed to consider the relevance of a transfer to CAMH or Brockville in relation to the appellant's reintegration into the community. Second, the majority also erred by failing to assign appropriate weight to the appellant's reasonable perception of his own needs, as well as the objective benefits of a transfer, in considering his "other needs" as required under s. 672.54 of the *Code*. The disposition reached was accordingly unreasonable and must be overturned.

ANALYSIS

(1) The Board failed to consider the appellant's reintegration into society

[28] As previously indicated, it was incumbent on the Board to specifically address all of the factors in s. 672.54 that could be relevant to granting or refusing the appellant's transfer request.

[29] The reasons do not indicate that the majority specifically or meaningfully considered the impact of the appellant's requested transfer on his reintegration

into society. It only addressed rehabilitation by reciting that it had considered all of the factors under s. 672.54, and then later setting them out in full. As this court concluded in *Magee,* a conclusory statement purporting to take into account all the criteria from s. 672.54 is not sufficient for the Board to discharge its responsibility under this section.

[30] The only reasonable inference is that the majority's failure to take reintegration into account was the result of the uncontested evidence that it is unlikely the appellant will *ever* be discharged into the community – he may require institutionalization for the remainder of his life. In my view, this failure is rooted in the majority's unduly narrow interpretation of "reintegration" in the context of this legislative scheme.

[31] Reintegration is a process, not a destination. It need not be regarded as an all or nothing proposition. Although the appellant's potential opportunity to participate in the community on escorted passes may be regarded as minimal reintegration, it is, nonetheless, a relevant component of reintegration, in that it constitutes connection with society outside the boundaries of an institution. Such an opportunity should not be trivialized. Through escorted passes the appellant would be able to achieve a level of engagement with the community that he has been denied for 30 years.

[32] It follows that I agree with the minority's view that, on this record, even though the appellant may never be discharged into the community, his reintegration into society nonetheless remained a relevant factor to be considered under s. 672.54. If anything, the Board's failure to consider this factor is even more significant *because* supervised access into the community may be the most significant level of reintegration the appellant could ever realistically achieve. In my view, the Board erred in law in failing to specifically address this factor. Accordingly, its disposition should be set aside under s. 672.78(b).

(2) The Board unreasonably ignored the preferences of the appellant and the benefits to the appellant of a transfer

[33] I am also of the view that the Board erred in its consideration of the appellant's "other needs" by failing to put appropriate emphasis on the appellant's reasonable perception of his own needs as well as the objective benefits of a transfer on his wellbeing.

[34] The majority correctly recognized that management and containment of the appellant's risk is not the only relevant consideration to be addressed in drafting a disposition. The analysis of the necessary and appropriate disposition must include consideration of privileges or amenities that the individual will be able to access depending on where he is detained. The Board correctly cited *Magee* for the proposition that the fact that an NCR patient wishes to be transferred to a less secure facility, knowing that the consequences of a requested transfer may cause

him difficulty, is not dispositive of whether the proposed transfer would meet the individual's "other needs": see para. 88. While the least onerous and least restrictive disposition requirement usually translates into the most minimally secure environment able to contain the accused's risk, this is not always the case: *Tulikorpi*, at para 34.

[35] However, in my view the majority's perception of the appellant's "quality of life" unduly minimized and disregarded his subjective preferences and ignored the evidence of concrete benefits associated with the requested transfer. As the minority noted, the majority's analysis "[gave] little weight to the possibility that [the appellant] might ultimately obtain and enjoy escorted access to the greater community." Moreover, there is nothing in the reasons that indicates that the majority took into consideration the evidence that the transfer would lead to the appellant's improved access to specialized health care given his seizures and advancing age.

[36] These failures will not always constitute a reversible error, given the significant deference owed to the Board in its crafting of dispositions: *R. v. Owen,* 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 69. However, in these circumstances, they do.

[37] The appellant requested a transfer expressly for the legitimate goal of being able to participate in supervised trips into the community. The majority appears to

have given no weight to this goal or to the additional benefits that a transfer would yield. This case was not like *Magee* or *R. v. Maclean*, 2012 ONCA 909, where the potential benefits of a move to a less secure unit were speculative or based on a questionable motive of the NCR accused. Here, the transfer would unquestionably provide concrete benefits – benefits that the appellant had long desired. The requested transfer would give the appellant a chance to step off hospital grounds. It is difficult for anyone other than the appellant to measure the subjective value of taking such a step after spending many decades inside Waypoint, or the impact of so doing so on his quality of life.

[38] This takes me to the complex issue of determining and assigning weight to the appellant's "needs". This case involved a trade-off between subjective preferences. It required the Board to determine whether the accused "needed" the privilege of community visits – that he has sought for years – more than he "needed" to continue to participate in programs potentially available only at Waypoint. There was no evidence that the requested transfer would impact his risk to the public, lead to his decompensation, or lead to a deterioration in his mental state. It was simply a matter of which option would better meet the appellant's needs.

[39] As the minority held, the majority's findings concerning the appellant's quality of life presuppose that the appellant will be unable to enjoy a new environment and engage with new and different hospital staff. There was no

evidence that he could not do so. As the Attorney General acknowledged before the Board, there was no treatment advantage to the appellant's continued detention at Waypoint. Further, there was no evidence adduced demonstrating that the appellant would not respond well to a transfer, that he will not get along with new patients or in fact enjoy meeting new patients and staff, or that he will be unable to begin a relationship with a new volunteer visitor.

[40] In *Tulikorpi*, at para. 58, the Supreme Court identified the "twin goals" of Part XX.1 as the protection of the public and the safeguarding of the NCR accused's liberty interests. The Board must give consideration to the liberty interests of the NCR accused at every stage of the evaluation process: *Tulikorpi*, at paras. 53-56. These liberty interests are an important component of the "other needs" of the accused. In my view, the values of self-determination and autonomy are relevant aspects of an NCR accused's liberty, and should be considered where relevant.

[41] In the unique circumstances of this case, where the appellant's transfer request creates no safety or management risk, treatment trade-offs or risk of decompensation, and where there are benefits to such a transfer on the evidence that are material and objectively reasonable, the Board, in its balancing of the factors under s. 672.54, was required to give serious consideration to the appellant's subjective wishes.

[42] The Board did not do so in this case. The appellant reasonably came to the conclusion that his personal needs would be better met by a transfer to CAMH or Brockville rather than continuing with the current circumstances at Waypoint.

[43] In the circumstances I am of the view that the Board erred in its assessment of the appellant's "other needs" by failing to assign adequate weight to the appellant's own perception of his needs and preferences, or the evidence of the objective benefits of a transfer. This failure rendered the decision unreasonable.

CONCLUSION

[44] In my view, the appellant is entitled to a transfer to an all-male medium secure unit at either CAMH or Brockville.

DISPOSITION

[45] I would allow the appeal, set aside the Board's order and, subject to the following paragraph, order that the appellant be transferred to either CAMH or Brockville.

[46] I am of the view it would not be appropriate for this court to resolve and order the particulars of the transfer. The record contains no indication of whether CAMH or Brockville is in a position to accept the appellant at the present time, or the appropriate conditions to impose on the appellant's residing at either location. I would accordingly refer the matter back to the Board on an expedited basis to

determine the terms under which the appellant can be transferred to another suitable facility.

Released: “DW” JUL 19 2018

“Gloria Epstein J.A.”
“I agree. G.R. Strathy C.J.O.”
“I agree. David Watt J.A.”