

COURT OF APPEAL FOR ONTARIO

CITATION: Jakaj (Re), 2024 ONCA 490

DATE: 20240619

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Benotto, Favreau and Madsen JJ.A.

IN THE MATTER OF: Robert Jakaj

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

Anita Szigeti, for the appellant

Owen Goddard, for the Attorney General of Ontario

Heard: June 6, 2024

On appeal against the disposition of the Ontario Review Board, dated October 4, 2023, with reasons dated October 27, 2023.

REASONS FOR DECISION

[1] The appellant, Robert Jakaj, was found not criminally responsible on June 18, 2015, on a charge of arson. On October 4, 2023, the Ontario Review Board (the “Board”) found that Mr. Jakaj continues to pose a significant threat to the safety of the public. The Board ordered Mr. Jakaj’s continued detention at the Forensic Psychiatry Program of St. Joseph’s Healthcare Hamilton with privileges, which include living in the community in accommodation approved by the person

in charge. As part of the disposition, the Board continued a restriction precluding Mr. Jakaj from the non-medical use of any alcohol or drugs, including cannabis.

[2] The only issue on appeal is whether the Board erred in refusing to grant Mr. Jakaj a cannabis exemption. We are satisfied that the Board's decision is reasonable and that the appeal should be dismissed.

[3] Mr. Jakaj's current diagnosis is schizophrenia, cannabis use disorder and cocaine use disorder. Both the cannabis and cocaine use disorders are described as "in remission, in a controlled environment".

[4] Mr. Jakaj has a history of cocaine use, including use of crack cocaine. He believes that using cannabis would reduce his use of cocaine, and that this would be a helpful harm reduction strategy. He suggests that, because cannabis is legal and less harmful than cocaine, allowing him to use cannabis would reduce his risk of losing privileges and assist in his rehabilitation and reintegration in the community.

[5] Mr. Jakaj does not agree with the Board's conclusion that a cannabis restriction remains necessary. He argues that the evidentiary record before the Board did not support a finding that the appellant's cannabis use is linked to an increased risk to public safety.

[6] This court will only interfere with a decision of the Board if the decision was unreasonable, if the Board made an error of law or if there was a miscarriage of

justice: *Criminal Code*, R.S.C., 1985, c. C-46, s. 672.78(1); *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 31. The test for reasonableness is whether the Board's risk assessment and disposition order are supported by reasons that can bear an even "somewhat probing" examination: *Owen*, at para. 33. The court must evaluate reasonableness by considering the reasons given by the Board and the context in which the decision was made to determine whether an acceptable and defensible outcome has been reached: *Wall (Re)*, 2017 ONCA 713, 417 D.L.R. (4th) 124, at para. 22.

[7] We are satisfied that the Board's conclusion is reasonable and supported by a "somewhat probing" review of the record.

[8] It is worth noting that Mr. Jakaj does not dispute the finding that he continues to pose a significant risk to the public, which the Board described as follows:

The Board therefore accepts that absent an ORB Disposition, Mr. Jakaj would likely become non-compliant with prescribed medications which would lead to decompensation, use of substances and the re-emergence of behaviours similar to those seen at the time of the index offences. We are satisfied that absent an ORB Disposition, it is likely that Mr. Jakaj will cause serious physical or psychological harm to members of the public and such conduct will likely be criminal in nature. [Emphasis added.]

[9] When addressing the restrictions that should be imposed on Mr. Jakaj, the Board provided several reasons for maintaining the restriction on cannabis.

[10] The Board noted that there is a link between Mr. Jakaj's use of cannabis and the index offence. At the time of the offence, Mr. Jakaj had been using two to three grams of cannabis daily for several months.

[11] The Board reviewed the evidence of Dr. Baldeo, a psychiatrist from St. Joseph's, who testified that, for Mr. Jakaj, cannabis is a gateway drug that increases his risk of using cocaine. Dr. Baldeo believes that, allowing Mr. Jakaj to use cannabis would diminish his ability to progress through the ORB system, because it would increase his substance use and non-adherence with medications.

[12] The Board also found that, based on Mr. Jakaj's prior history with a cannabis exemption, there is no sign that such an exemption would help manage his use of cocaine. In particular, the Board referred to a time in 2021 when Mr. Jakaj was apprehended after using significant amounts of crack cocaine over several days.

The Board described what occurred as follows:

On June 28, 2021 Mr. Jakaj was apprehended at his apartment subsequent to being declared unlawfully at large. At that moment, he is said to have stated that cannabis use was a predisposing factor for his severe and recurrent use of crack cocaine and agreed to the reinstatement of a cannabis prohibition in his disposition. Mr. Jakaj's recollection at this hearing differs from what is reported. His viva-voce recollection is that he stated he needed to take a break from all substances. Whichever of these response is accurate the panel agrees that a cannabis use prohibition is both necessary and appropriate and that Mr. Jakaj is correct in stating he requires a break from all substances.

The evidence does not support Mr. Jakaj's contention that when prohibited from using cannabis his cocaine use *explodes* or that when he uses cannabis he does not use cocaine. Only one month subsequent to receiving a conditional discharge in July of 2020 Mr. Jakaj tested positive for both cannabis and cocaine. On September 6, 2023 he again tested positive test for both cannabis and cocaine. Mr. Jakaj's contention that when he uses cannabis he does not use cocaine is not credible. [Emphasis in original.]

[13] Mr. Jakaj's circumstances are different from those in *Re Davies*, 2022 ONCA 716. In that case, this court found that the Board had failed to distinguish between the impact of different substances and that there was no evidence before the Board that allowing Ms. Davies to use cannabis would pose any risk of harm to the public. In contrast, in this case, the Board identified a link between cannabis use and the index offence, identified a prior connection between Mr. Jakaj's use of cannabis and his use of cocaine, and pointed out that lifting the restriction on cannabis had previously been ineffective in curbing his use of cocaine.

[14] We are satisfied that the Board's evidentiary findings and conclusion are reasonable and supported by the record.

[15] Accordingly, the appeal is dismissed.

"M.L. Benotto J.A."

"L. Favreau J.A."

"L. Madsen J.A."