COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sanderson v. British Columbia (Adult Forensic Psychiatric Services),* 2023 BCCA 477

Date: 20231212
Docket: CA49288

Between:

Marvin Wayne Sanderson

Appellant

And

The Director of Adult Forensic Psychiatric Services

Respondent

And

The Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: A disposition of the British Columbia Review Board, dated August 10, 2023.

Oral Reasons for Judgment

Counsel for the Appellant:	R.P. Oluka
Counsel for the Respondent, Director of Adult Forensic Psychiatric Services:	D.K. Lovett, K.C.
Counsel for the Respondent, Attorney General of British Columbia:	M.A. Street
Place and Date of Hearing:	Vancouver, British Columbia December 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 12, 2023

Summary:

The appellant challenges a conditional discharge imposed on him by the British Columbia Review Board on the grounds that the disposition hearing was made procedurally unfair by the Board's decision to proceed with the hearing despite reports being submitted to the Board shortly prior to the hearing. Held: Appeal dismissed. The Board satisfied its duty of procedural fairness by providing the reports to counsel for the accused when they became available. There was no procedural unfairness caused by the Board's decision to proceed with the hearing, as the Board was entitled to consider the appellant's consistent position that the hearing must go ahead as scheduled, the fact that the reports contained largely the same information as had been before the Board at a prior disposition hearing, and the Board's statutory mandate to conduct timely hearings.

[1] **HUNTER J.A.**: The appellant, Mr. Sanderson, was found not criminally responsible on account of a mental disorder ("NCRMD") on January 15, 2018, on charges of assault causing bodily harm. He first appeared before the British Columbia Review Board (the "Board") on February 26, 2018 and has since been under the jurisdiction of the Board, subject to successive conditional discharges.

[2] On August 10, 2023, the Board held a hearing to review the appellant's disposition and determined that a conditional discharge was appropriate. The appellant alleges that the Board hearing was procedurally unfair and appeals the Board's decision relying on s. 672.78(1)(c) of the *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*]. He asks that this Court remit the matter to the Board for reconsideration.

[3] The position of the appellant is that the procedural unfairness arises from the decision of the Board to proceed with the disposition hearing on August 10 although evidence was to be adduced which the appellant had not had time to review.

Background

[4] The appellant has a mild to moderate intellectual disability and functions at an approximate age 10 level of cognition. His disability is further complicated by a diagnosis of intermittent explosive disorder, which means that he is periodically unable to control his anger. The appellant's disorder is attributable to a combination

of his intellectual impairment, impulsivity, poor frustration tolerance, lack of empathy, and a history of childhood trauma and neglect.

[5] On January 15, 2018, the appellant was declared NCRMD in a verdict rendered by Judge Doersken of the British Columbia Provincial Court. The charge was one count of assault causing bodily harm contrary to s. 267(b) of the *Criminal Code*. The Board, in its reasons for the decision under appeal, described the circumstances of the appellant's index offence as follows:

> [3] The circumstances of the index offence are that on July 8, 2017, Mr. Sanderson was a participant in the Special Olympics in Kamloops when he became involved in a dispute with another participant about disassembling a tent. The victim (LS), an off-duty RCMP member, attempted to intervene and calm Mr. Sanderson but he ignored her directions and assaulted her with his fists and with a backpack, which contained a metal water bottle. LS received numerous injuries, including a concussion. She filed a victim impact statement (Tab 10) in which she reported that, due to her injuries, she was unable to work for six months.

[6] Following his first appearance before the Board in February 2018, the appellant was charged with two other violent offences: an assault occurring on January 21, 2020, and an assault with a weapon occurring on August 30, 2020. He was convicted of the latter offence and sentenced, on March 30, 2021, to a two-year probation order.

[7] In November 2020, after being charged with the two offences, the appellant moved into a supported residence funded by Community Living British Columbia ("CLBC"). The supported residence is staffed 24 hours per day.

The Fourth Disposition Hearing

[8] In the appellant's fourth disposition hearing on February 16, 2023, the Board heard evidence that the appellant's CLBC housing supports might cease if he were to be absolutely discharged. The Board concluded that a six-month conditional discharge was appropriate and expressed the expectation that in six months the Board would be better informed as to the resources that would be available to the appellant if he were to be absolutely discharged.

[9] The appellant appealed the February 2023 Board decision on the grounds that it was unreasonable, unsupported by evidence, and the Board ought to have granted an absolute discharge.

[10] In reasons indexed at 2023 BCCA 307, this Court dismissed the appeal and held that community supports for an NCR accused, including their housing arrangements, are a relevant consideration in the Board's decision. Justice Voith, writing for the Court, noted that there was "significant evidence before the Board that the appellant's existing behaviors and risk were moderated by the stability of the housing he was currently being provided" (at para. 27). The Court further stated:

> [33] In summary, the nature of the housing available to the appellant was legally relevant to the issue before the Board. The issue was directly engaged by the submissions of the parties. And the conclusions of the Board, both in terms of how the appellant's housing impacted on his risk to the public and the uncertainty of whether his existing housing arrangements would be affected if he received an absolute discharge, were supported by the evidence before it.
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> …
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> [35] In my view, the Board's decision was reasonable, supported by the evidence, and is entitled to deference. I would not accede to this first ground of appeal.

[11] This Court also rejected the appellant's arguments that the Board had failed to meet its positive obligation to procure evidence concerning his housing or had otherwise improperly placed a burden on him to provide evidence:

> [40] … There is no suggestion that the Board looked to the appellant to provide it with any…evidence or that it otherwise placed any onus on the appellant. …
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> …
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> [46] … the Board understood that continuation of the appellant's present housing arrangements was critically important to whether the appellant posed a significant threat to the safety of the public. It did not, however, have sufficient information to determine whether, or to what extent, the loss of funding from CLBC would impact those housing arrangements and other related supports. In such circumstances, and pending the receipt of further evidence, it was appropriate for the Board to make a disposition that maintained the existing conditional discharge.

The Fifth Disposition Hearing

[12] The conditional discharge ordered by the Board in February 2023 was required to be reviewed in six months, namely by August 16, 2023. On June 13, 2023, the Review Board advised all relevant parties, including the appellant's then counsel, Mr. Ken Walker, K.C., of the need to schedule the appellant's fifth review hearing on or before August 16, 2023.

[13] At that point, the appellant's appeal of the February disposition had not yet been heard, but was scheduled to be heard on July 13, 2023. In light of the pending appeal, Mr. Walker proposed that the hearing date be scheduled for September 2023. The Crown, the appellant's supervising psychologist at the Kamloops Regional Forensic Clinic, Dr. Magee and the appellant's case manager, Mr. Nirenberg, all provided their dates for September.

[14] On June 23, 2023, the Registrar of the Board issued a notice of hearing for August 10, 2023, and on the same day the Board set a tentative hearing date of September 19, 2023, pending receipt and approval of a disposition extension.

[15] On July 13, 2023, this Court heard the appellant's appeal from his February disposition with Mr. Oluka appearing as his counsel. The Court reserved judgment.

[16] On July 17, 2023, Mr. Oluka advised the Board that he was the appellant's new counsel and asked for the date and time of the next hearing. He was advised of the August 10 hearing date and also the tentative date in September. Mr. Oluka advised that the appellant wanted to keep the August 10 date.

[17] This Court's judgment dismissing the appeal of the February disposition was pronounced on July 28, 2023. On July 31, 2023, the Board held a prehearing conference concerning the appellant's next disposition hearing, now scheduled to take place on August 10, 2023. The appellant reiterated that the hearing should take place on August 10, and that date was confirmed.

[18] On August 3, 2023, the appellant's case manager Mr. Nirenberg returned from holiday to discover that the hearing had been set down for August 10 instead of the September 19 date. He advised that his report and that of Dr. Magee would be delayed as a consequence. Counsel for the appellant responded the same day, commenting that, "Delaying this hearing is prejudicial to Mr. Sanderson, yet on the other hand proceeding without the reports or with late submissions would all but guarantee that Mr. Sanderson receives an unfair hearing". The next day, counsel confirmed that Mr. Sanderson wanted to proceed with the hearing on August 10.

[19] The reports of Mr. Nirenberg and Dr. Magee were sent to counsel for the appellant on August 8, 2023.

[20] At the August 10 hearing, the Board Chairperson began by identifying new documents which had been provided to the Board. The documents consisted of reports from Dr. Magee and Mr. Nirenberg, as well as an RCMP synopsis of an event involving the appellant which had been forwarded to the Board by Crown counsel.

[21] Counsel for the appellant objected to the documents being marked as exhibits on the basis that he had not had the opportunity to review them with the appellant. Crown counsel suggested that an adjournment might be a remedy. Counsel for the Director, when asked to make submissions about an adjournment, observed that the Board had travelled to the hearing at the appellant's insistence and it might be a better use of time to stand down briefly so that counsel could review the reports. The appellant was not specifically asked about his view of an adjournment of the hearing at that time, and made no submissions on the suggestion.

[22] The Chairperson declined to adjourn the hearing and instead ordered that the hearing be stood down for twenty minutes so that counsel for the appellant could review the reports of Dr. Magee and Mr. Nirenberg, which the Chairperson noted were five and four pages in length, respectively, and appeared to contain very little new information.

[23] When the Board reconvened, counsel for the appellant informed the Board that he had not read the reports and submitted that it would be prejudicial to the appellant if he were to try to review the reports during the hearing. The Chairperson ruled that the written reports would not be marked as exhibits and that the report authors would instead be asked to provide oral evidence about the reports on which they could be cross-examined.

[24] Counsel for the appellant then declined to question either of the report authors, stating that his participation in the hearing on behalf of the appellant was limited due to the lateness of the reports.

[25] The Board reviewed the evidence before it and found that the appellant's diagnosis had not changed, and further, that:

> [52] … Mr. Sanderson's residence is funded primarily by funds allocated by CLBC headquarters because he is under the Review Board's jurisdiction…if Mr. Sanderson were to receive an absolute discharge, there is no certainty that he will be afforded the level and type of support and supervision that currently mitigates risk to the public…

[26] The Board concluded that a conditional discharge was the least onerous and the least restrictive disposition which was both protective of the public and met the appellant's needs.

Grounds for Appeal

[27] The appellant submits that the hearing was made procedurally unfair by the Board's failure to adjourn the hearing in the face of the late reports, which the appellant says undermined his right to a fair hearing and his right to make full answer and defence, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

Standard of Review

[28] The standard of review of decisions of the Review Board is set out in s. 672.78 of the *Criminal Code* in these terms:

> 672.78(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that
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> (a) it is unreasonable or cannot be supported by the evidence;
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> (b) it is based on a wrong decision on a question of law; or
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> (c) there was a miscarriage of justice.

[29] The appellant relies on s. 672.78(1)(c), which provides that this Court may allow an appeal against a disposition where it is of the opinion that "there was a miscarriage of justice".

[30] Where an allegation of miscarriage of justice is based on an assertion of procedural unfairness, as in this appeal, no deference is owed to the Review Board in assessing the effect of the alleged unfairness. In that sense, the standard of review may be described as correctness: *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at paras. 24–28.

Preliminary Matters

[31] In response to the allegation of procedural unfairness, the Attorney General of British Columbia brought an application to adduce as evidence in this appeal an affidavit of Crown counsel. The affidavit consists of a summary of the email correspondence exchanged between the parties prior to the August 10 hearing. The email correspondence from June 13, 2023 to August 10, 2023 is attached as an exhibit to the affidavit.

[32] The appellant then filed an application to cross-examine Crown counsel on the affidavit prior to its admission into evidence.

[33] The Division considered both applications in writing prior to the hearing. The application to adduce fresh evidence was granted and the application to cross-

examine the deponent was dismissed, with reasons to follow. These are those reasons, as well as the judgment of the Court on the appeal.

Fresh Evidence

[34] An appeal against a disposition by a Review Board "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": s. 672.73(1) of the *Criminal Code*.

[35] In *R. v. Owen*, 2003 SCC 33 at para. 52, the Supreme Court of Canada explained that "interests of justice" as used in s. 672.73(1) takes its meaning from the context in which it is sought to be applied. The Court pointed out that an appeal of a disposition order is an inquisitional administrative procedure, not an adversarial criminal prosecution. This distinction is central to the basis on which this appeal must be decided.

[36] Here, the gravamen of the appellant's appeal is that the Board treated the appellant unfairly by proceeding with the hearing on August 10 in circumstances where evidence was to be adduced that had not been provided to the appellant sufficiently in advance of the hearing to permit counsel to receive instructions from the appellant.

[37] The purpose of the fresh evidence was to demonstrate the context in which this issue arose prior to the hearing. There is no issue as to the reliability or trustworthiness of the evidence, which consists merely of the emails passing among the parties and counsel's summary of those emails.

[38] Where procedural unfairness is alleged relating to the lack of an adjournment of a hearing, this is the type of evidence that provides necessary context for the assessment of the allegation. Thus, it is in the interests of justice to admit it.

[39] At the hearing of the appeal, the appellant sought to introduce further email correspondence dating from January 2023. The appellant submitted that this evidence demonstrated a pattern of delay by the Director in providing information to

the appellant relevant to the disposition hearings. Part of this evidence replicated the email evidence in August 2023 but included out-of-office emails from counsel for the appellant. That portion of the tendered evidence including counsel's out-of-office emails should be admitted for completeness.

[40] It is not, however, in the interests of justice to include evidence of correspondence that occurred eight months before the impugned hearing. That evidence should not form part of the record of this appeal.

Application to Cross-Examine

[41] Section 683(1)(b) of the *Criminal Code* provides that, for the purposes of an appeal, this Court may, "where it considers it in the interests of justice", order any witness who would have been compellable at trial to attend and be examined before the Court. This provision applies to Review Board appeals by s. 672.73(2).

[42] In *R. v. Mehl*, 2020 BCCA 344, this Court explained the principles to be applied on an application to cross-examine under s. 683(1)(b):

> [12] … Cross-examination of a witness pursuant to s. 683(1)(b) is an extraordinary remedy. The party who seeks leave to cross-examine a witness pursuant to s. 683(1)(b) must establish a foundation upon which it can be concluded that it is in the interests of justice to grant the order sought. A key consideration is whether there is a reasonable possibility that the proposed cross-examination will produce evidence that will meaningfully assist the court in determining the issues raised by the appeal: *R. v. Atzenberger*, 2018 BCCA 224 at para. 16; *R. v. Patrick*, 2020 BCCA 259 at paras. 75–79; *R. v. Jerace*, 2020 BCCA 267 at paras. 6, 12. …

[43] The requirement for a foundation upon which it can be concluded that it is in the interests of justice to permit cross-examination is particularly significant when the proposed cross-examination is of Crown counsel: *R. v. Fox*, 2022 BCCA 403 at para. 32.

[44] The position of the appellant as to the need for cross-examination is expressed in this submission from his notice of application:

> The applicant harbors reservations regarding ambiguities, bias or motive, contradiction towards other evidence and the completeness of the information

> within [counsel's] affidavit and requires a cross-examination of [counsel] for the following reasons:
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> (1) To ensure the Court receives precise information;
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> (2) To contest the veracity of the information present; and
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> (3) To effectively counter misleading claims attributed to [counsel's] affidavit.

[45] The appellant has not tendered any evidence contesting the accuracy of the email correspondence attached to counsel's affidavit. There are no contradictory affidavits disputing facts that would assist the court in determining the issues raised in this appeal. In these circumstances, the test for cross-examination has not been met.

[46] The appellant also relies on Rule 44 of the *Court of Appeal Rules*, B.C. Reg. 120/2022, for his application to cross-examine. In my view, the jurisprudence under s. 683(1)(b) sets out the appropriate test for cross-examination of affidavits filed on a Part XX.1 appeal. I do not consider the Court's jurisdiction under Rule 44 alters the test to be applied.

The Appeal

[47] As I have indicated, proceedings before the Board are inquisitorial, not adversarial. Proceedings before the Board are to be conducted "in as informal a manner as is appropriate in the circumstances": s. 672.5(2) of the *Criminal Code*. The general procedure is set out in s. 672.5 of the *Criminal Code*. Any party may present evidence, make oral or written submissions, call witnesses, cross-examine any witness, and, on application, cross-examine any person who has submitted a written assessment report to the court or Board.

[48] Section 672.51(2) requires that "all disposition information shall be made available for inspection by, and the court or Review Board shall provide a copy of it to, each party and any counsel representing the accused". "Disposition information" is defined by s. 672.51(1) as "all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making or reviewing a disposition".

[49] The appellant relies on authorities concerning the Crown's obligation to provide an accused with complete and timely disclosure. In my respectful view, the appellant's reliance on these authorities is misconceived. The Crown obligation to provide complete and timely disclosure does not apply in the context of a disposition hearing conducted under Part XX.1 of the *Criminal Code*. The Crown is not obligated to appear at a Board hearing, and like the accused, has no evidentiary burden.

[50] As the Court explained in *Owen*, Board proceedings are governed by administrative law principles: *Owen* at para. 34. The NCR disposition hearing process is distinct from a criminal proceeding because any infringement of an NCR accused's liberty interest is "for essentially rehabilitative and not penal purposes": *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 [*Winko*] at para. 93. The NCR scheme "exacts no penalty, imposes no punishment and casts no blame": *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412 (B.C.C.A.) at p. 433, as cited in *Winko* at para. 93.

[51] To achieve its purpose, the Board is entitled to consider a variety of evidence, written and otherwise, to determine whether an NCR accused poses a significant risk to the public. The evidence available to the Board should be provided to the accused as soon as reasonably possible, as was done in this case.

[52] The inquisitorial and informal nature of proceedings before the Board influences the content of procedural fairness owed to the accused: *R. v. Sehmbi*, 2019 ABCA 117 at para. 11.

[53] In the present case, the record indicates that providing the reports to counsel for the appellant at an earlier point would have been impossible due to the report writers' availabilities, the timing of this Court's decision in the prior appeal, and the appellant's insistence that the hearing take place on August 10, despite being aware that the reports of Dr. Magee and Mr. Nirenberg would not be available until shortly prior to the hearing.

[54] Here, the Board satisfied its obligation to disclose the relevant materials to the appellant as soon as they became available.

[55] The appellant submits that the breach of procedural fairness arose when the Board failed to adjourn the hearing. However, the record is clear that the appellant did not request an adjournment. Indeed, his position throughout had been that it would be prejudicial to the appellant if the August 10 hearing was adjourned, even after being advised on August 3 that the change in hearing date would result in the reports being delayed.

[56] The decision of a Review Board to grant or refuse a request for an adjournment attracts significant deference from an appellate court, as long as the decision does not deprive an NCR accused of a fair hearing that results in a miscarriage of justice: *Conway (Re)*, 2016 ONCA 918 at para. 23.

[57] In this case, the appellant did not request an adjournment. The Board was entitled to consider the appellant's consistent position that the hearing must go ahead on August 10, the fact that the new reports contained largely the same information as had been before the Board at the time of the February disposition hearing, and the Board's statutory mandate to conduct timely hearings.

[58] I see no error in the Board's refusal to adjourn the hearing in these circumstances that would warrant appellate intervention. To adopt the language of the Ontario Court of Appeal in *McFarlane (Re)*, 2018 ONCA 583 at para. 18, there was "no perfect solution to this procedural dilemma" but the Board's decision to carry on with the hearing was reasonable and did not result in a miscarriage of justice.

[59] The appellant has also alleged a violation of his s. 7 *Charter* rights. Given my conclusion that the hearing was procedurally fair and there was no miscarriage of justice, the appellant's *Charter* argument also necessarily fails.

Disposition

[60] For the above reasons, I would dismiss the appeal.

[61] **HARRIS J.A.**: I agree.

[62] **VOITH J.A.**: I agree.

[63] **HARRIS J.A.**: The application of the appellant to adduce fresh evidence beyond what was previously admitted is dismissed except to the extent set out in these reasons. The appeal is dismissed.

"The Honourable Mr. Justice Hunter"