

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JOANNE WOODS)
Applicant) *Anita Szigeti*, for the Applicant, Joanne
- and -) Woods
)
HER MAJESTY THE QUEEN)
Respondent) *Michael Feindel*, for the Respondent, Her
-and-) Majesty the Queen
)
PERSON IN CHARGE, CENTRE FOR)
ADDICTION AND MENTAL HEALTH) *Leisha Senko*, for the Respondent, Centre for
Respondent) Addiction and Mental Health
)
-and-)
)
ONTARIO REVIEW BOARD)
Respondent) *J.R. Wright*, for the Respondent, Ontario
) Review Board
)
)
) **HEARD:** November 6, 2020

RULING ON CERTIORARI APPLICATION

P.J. MONAHAN J.

[1] The Applicant, Joanne Woods, seeks a writ of *certiorari* quashing a July 31, 2020 ruling of the Ontario Review Board (the “ORB” or “Board”). In that ruling, the Board held that it could hold a disposition review hearing under Part XX.1 of the *Criminal Code*¹ by videoconference over the objections of the accused, who had asked for an in-person hearing.

[2] For the reasons that follow, I find that the *Criminal Code* permits the ORB to hold a disposition review hearing by videoconference only with the consent of the accused. The ORB

¹ R.S.C. 1985, c. C-46.

exceeded its jurisdiction in deciding to proceed with a videoconference hearing without the accused's consent and over her objections. Accordingly, Ms. Woods' application is granted and the July 31, 2020 ruling is hereby quashed.

Background Facts

[3] Joanne Woods is a 53-year-old woman who, on May 9, 2012, was found not criminally responsible ("NCR") for uttering a threat to cause death or bodily harm and for possession of a weapon for a dangerous purpose. At the time of the July 31, 2020 hearing, she was subject to a disposition ordered by the ORB on May 27, 2019 discharging her into the community with certain conditions.

[4] Section 672.81 of the *Criminal Code* mandates an annual review of disposition orders by the ORB. Prior to 2020, such hearings have generally proceeded in person unless the accused agrees to some other mode of participation.

[5] However, in response to the COVID-19 pandemic, in March 2020 the Board decided to hold all of its hearings by videoconference. This decision was communicated publicly in a "COVID-19 Update" posted by the Board Chair on the ORB website on May 25, 2020. The COVID-19 Update indicated that, since in-person hearings were not possible at that time, all Board hearings would proceed via Zoom. The Board Chair expressed confidence that the Board's mandate would be effectively met employing this medium. However, the Chair also noted that this manner of proceeding may give rise to "arguable inconsistencies with the Code", and that individuals with such concerns could apply to have their matter adjourned:

For those who have misgivings with respect to the Board's jurisdiction to conduct hearings employing this technology the alternative would be to apply to have the matter adjourned to a time when we might anticipate a resumption of on-site hearings.

[6] The Applicant's 2020 annual review hearing was originally scheduled for May 29, 2020. At the outset of that hearing, the Applicant indicated through her counsel that she was not comfortable proceeding with the hearing by videoconference. Relying on s. 672.5 (13), which provides that the Board may proceed by videoconference "if the accused so agrees", Ms. Woods sought an adjournment until such time as an in-person hearing could be made available.

[7] After hearing argument on the issue, the Board adjourned the hearing until July 31, 2020 to permit the parties to prepare written and oral submissions with respect to the Board's jurisdiction to hold hearings by videoconference without the consent of an accused.

July 31, 2020 Hearing

[8] At the July 31, 2020 hearing, the Applicant maintained that the Board lacked the jurisdiction to hold a videoconference hearing without her consent, in accordance with s. 672.5 (13) of the *Criminal Code*. The Applicant noted that Toronto had entered Phase 3 of its COVID-19 response on July 31, 2020, which meant that indoor gatherings of up to 50 people, with social

distancing measures in place, were now permitted. There was no legal restriction on the Board's ability to convene an in-person hearing with appropriate physical distancing measures. The Applicant indicated that she was prepared to proceed with an in-person hearing and requested an adjournment until such time as an in-person hearing could be provided.

[9] Counsel for the Attorney General, as well as for the Centre for Addiction and Mental Health ("CAMH"), argued that it was not possible to offer in-person hearings since the Board Chair had previously determined that all hearings would proceed only via Zoom. If Zoom hearings could not proceed without the consent of the accused, the accused could, in effect, postpone their disposition review indefinitely. It was therefore argued that s. 672.5 (13) of the *Criminal Code*, which provides that electronic hearings can only proceed with the consent of the accused, was in conflict with s. 672.81 of the *Criminal Code*, which requires the Board to review disposition orders every 12 months.

[10] The Attorney General took the position that the appropriate way to resolve this conflict was to consider s. 672.5 (13) "inoperative" and of no force or effect in the present circumstances. On this basis, it was argued that the Board had the authority to proceed with a hearing by videoconference regardless of whether the accused consented. Moreover, if the accused refused to participate in a virtual hearing, the Board could proceed in her absence on the basis of s. 672.5 (10) (a) of the *Criminal Code*, which provides that the chair of the Review Board may "permit the accused to be absent" during a hearing.

[11] At the conclusion of the July 31, 2020 hearing, the Board ruled orally that it had authority to proceed with the disposition review hearing by videoconference regardless of whether the accused consented and ordered that the hearing take place as soon as a date could be selected. The Board indicated that written reasons for this ruling would follow.

August 25, 2020 Board Reasons

[12] In its August 25, 2020 reasons, the Board noted that Ms. Woods had full right to base her application for an adjournment on the wording of s. 672.5 (13) and that she was under no obligation to advance any other explanation. However, the Board went on to find that any application for an adjournment based on a request for an in-person hearing would not necessarily be granted. Rather, the Board would assess the reasonableness of the request in light of the individual accused's circumstances, as well as the reason the accused was objecting to a hearing by videoconference.

[13] In the Board's view, Ms. Woods had not provided any evidence that might justify her resistance to an audiovisual hearing. The Board found that there was "no element of unfairness to Ms. Woods by ordering her hearing by audiovisual means", and that "it is tempting to conclude today that her request for an adjournment based on a refusal of an audio-visual hearing is a not-so-subtle maneuver to delay her hearing so that she can remain on a conditional discharge and maintain her current privileges without change."

[14] Since in-person hearings were not possible, the Board reasoned that Ms. Woods was in effect seeking the right to postpone her hearing indefinitely. To interpret s. 672.5 (13) as granting Ms. Woods such a right would be "an illogical and unreasonable and absurd result", which would

prevent the board from fulfilling its statutory mandate of providing timely annual reviews for the purposes of securing the safety interests of the public and the necessary treatment of the NCR accused.

[15] The Board concluded that such an absurd result could not have been contemplated by the legislators of Part XX.1 of the *Criminal Code*. The request for an adjournment was therefore denied and the hearing was ordered to take place as soon as a date could be selected. If Ms. Woods did not wish to be present by videoconference, then the Board had the authority under s. 672.5 (10) (a) to proceed in her absence.

Subsequent Proceedings

[16] A different panel of the Board convened a videoconference hearing on September 28, 2020 to review Ms. Woods' disposition. Neither Ms. Woods nor her counsel participated. The Board heard evidence from CAMH with respect to Ms. Woods' current medical condition, needs and circumstances.

[17] On October 8, 2020, the Board issued a disposition detaining Ms. Woods at CAMH with privileges up to and including living in the community and supervised accommodation approved by the hospital.

[18] The parties have advised that this October 8, 2020 disposition order is the subject of a separate appeal to the Court of Appeal and is outside the scope of the present application. The Applicant is seeking relief only with respect to the July 31, 2020 ruling of the Board ordering a hearing by videoconference over the objection of Ms. Woods.

Positions of the Parties

[19] The Applicant argues that the Board exceeded its jurisdiction in its July 31, 2020 ruling that it had authority to proceed with a videoconference review hearing without her consent and over her objections. Not only is the Board's decision to dispense with her consent before holding a hearing by videoconference in clear contravention of s. 672.5 (13) of the *Criminal Code*, it is also a denial of natural justice and fairness.

[20] The Applicant takes the position that there was no legal or public health rule preventing the Board from holding an in-person hearing on July 31, 2020, since Toronto had entered Phase 3 of its COVID-19 emergency response on that date. Rather than consider whether an in-person hearing was possible, the Board simply relied upon the May 25, 2020 COVID-19 Update from the Board Chair as having precluded in-person hearings indefinitely. The Board mischaracterized Ms. Woods' request for an in-person hearing as an attempt to adjourn her disposition hearing indefinitely. In fact, the Applicant was prepared to proceed immediately. The Board's decision to proceed in the absence of Ms. Woods, whose liberty was at stake in the hearing, was unlawful and a denial of the most basic principles of fairness and natural justice.

[21] The Respondents take the position that the application for *certiorari* is moot since a differently constituted panel proceeded with the hearing on September 28, 2020. Thus, even if the

Board's July 31, 2020 ruling were quashed, that quashing could not then be applied to decisions of other panels that may have subsequently relied upon it.

[22] In the alternative, the Respondents argue that s. 672.5 (13) is limited to circumstances where in-person hearings are normally possible. It is a procedural provision that Parliament did not intend to operate as a deflection of the Board's core mandate, which is the ongoing supervision of NCR accused. As a response to the health and safety concerns brought on by the COVID-19 pandemic, the Board Chair made a practice decision in May 2020 to conduct all Board hearings by videoconference. There is no statutory mandate that a hearing be in person, and the current practice of conducting hearings by videoconference does not deny the Applicant the right to be present, nor does it deny her a fair hearing.

Analysis

a. Mootness

[23] The Respondents' submission that the application is moot can be dealt with briefly.

[24] The doctrine of mootness applies in circumstances where a decision of the court would not resolve some controversy affecting the rights of the parties. If the tangible and concrete dispute has disappeared and the issues have become academic, then the court will normally decline to decide the case.²

[25] There can be little doubt that the dispute between the parties remains real and that the legal authority of the board to hold a hearing by videoconference without the consent of the accused is a live issue. The July 31, 2020 procedural ruling was relied on by the Board when it proceeded, in Ms. Woods' absence, to review her disposition and order her detained. In fact, by acting on that procedural ruling and subsequently ordering the Applicant detained, the dispute between the parties became even more urgent and pressing.

[26] I find no basis upon which it could be concluded that the application is moot.

b. Availability of *Certiorari* in this Matter

[27] No issue was taken with respect to this court's jurisdiction to undertake a *certiorari* review of the Board's July 31, 2020 procedural ruling. However, for completeness, I summarize the basis upon which *certiorari* is available in these circumstances.

[28] *Certiorari* is an aspect of the Superior Court's supervisory jurisdiction over a tribunal of limited jurisdiction. An extraordinary remedy, it is generally only available in respect of jurisdictional errors. In the criminal or quasi-criminal context, a jurisdictional error occurs where

² *R. v. Borowski*, [1989] 1 S.C.R. 342.

a tribunal fails to observe a mandatory provision of a statute or acts in breach of the principles of natural justice.³

[29] Even where *certiorari* review is available, the Superior Court retains jurisdiction to refuse to conduct that review. One of the discretionary grounds for refusing to engage in *certiorari* review is the existence of an adequate alternative remedy.

[30] In this case, it is clear that the ORB is a tribunal whose jurisdiction is defined and thus limited by the *Criminal Code*. Moreover, s. 672.5 is a mandatory provision which provides that Board hearings “shall be held in accordance with this section.” Thus, if the Board has made a ruling contrary to s. 672.5, that would amount to a jurisdictional error reviewable by way of *certiorari*. Moreover, deciding to proceed with a disposition review hearing in the absence of the accused would appear to be a violation of the principles of natural justice, which is a further basis for *certiorari* review.

[31] I note that s. 672.78 (1) of the *Criminal Code* provides for appeals from disposition orders directly to the Court of Appeal, and the Board’s subsequent October 8, 2020 disposition order has been appealed. However, there is no such right of appeal from the Board’s July 31, 2020 procedural ruling. Moreover, I am also advised that it may be some months before the appeal of the October 8, 2020 disposition order can be heard. In the meantime, Ms. Woods has been detained in reliance upon the Board’s July 31, 2020 procedural ruling. In the circumstances, particularly the importance of the personal liberty interest at stake, I would not decline to entertain this application on the basis that there may be an alternative remedy available at some unspecified point in the future.

c. Criminal Code Provisions Defining an Accused’s Right to Appear before the ORB

[32] The Board is a statutory body whose jurisdiction is defined by the *Criminal Code*. Accordingly, in order to determine the right of an accused to appear before the Board, it is necessary to have regard to the relevant *Criminal Code* provisions.

[33] Those provisions include the following:

672.5 (1) A hearing held by a court or Review Board to make or review a disposition in respect of an accused, including a hearing referred to in subsection 672.84 (1) or (3), shall be held in accordance with this section.

* * *

672.5 (9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

³ *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] S.C.J. No. 31 at paras. 21-35.

672.5 (10) The court or the chairperson of the Review Board may

(a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper; or

(b) cause the accused to be removed and barred from re-entry for the whole or any part of the hearing

(i) where the accused interrupts the hearing so that to continue in the presence of the accused would not be feasible,

(ii) on being satisfied that failure to do so would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused, or

(iii) in order to hear, in the absence of the accused, evidence, oral or written submissions, or the cross examination of any witness concerning whether grounds exist for removing the accused pursuant to subparagraph (ii).

* * *

672.5 (13) If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by close circuit television or videoconference for any part of the hearing.

* * *

672.81 (1) A review Board shall hold a hearing not more than 12 months after making a disposition and every 12 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 para. 672.54 (a).

672.81 (1.1) Despite subsection (1), the Review Board may extend the time for holding a hearing to a maximum of 24 months after the making or reviewing of a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.

* * *

715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally.

715.22 The purpose of the provisions of this Act that allow a person to appear at participate in or preside at a proceeding by audio conference or videoconference, in

accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

[34] Statutory interpretation requires that the words of a statute “are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament.”⁴ It is also well-established that the legislature does not intend to produce absurd consequences. Such would be the case if an interpretation of an enactment would defeat the purpose of the statute, render some aspect of it pointless or futile or lead to ridiculous or frivolous consequences.

[35] With these general principles of statutory interpretation in mind, the accused’s right of appearance in disposition hearings before the ORB would appear to be as follows:

- i. Subsection 672.5 (9) states the general or default rule, which is that the accused has the “right to be present during the whole of the hearing.” Section 715.21 specifies that this right to be present is the right to appear and participate in person.
- ii. The right to appear in person in subsection 672.5 (9) is subject to subsection (10), which provides certain circumstances in which the chair of the Review Board may cause the accused to be removed from the hearing. These circumstances are set out in s. 672.5 (10) (b), none of which applies in this case.
- iii. Subsection 672.5 (10) (a) states that the chair of the Review Board may “permit the accused to be absent during the whole or any part of the hearing”. The use of the word “permit” indicates that this provision only applies where the accused has sought to be absent or has waived the right to be present.

Subsection 650 (2) (b) contains a virtually identical provision, stating that a court may “permit the accused to be out of court during the whole or any part of his trial”. Courts have made it clear that s. 650 (2) (b) only applies where an accused has waived their right to be present at trial, is fully aware of the consequences of that waiver and is not acting under compulsion.⁵ It does not authorize exclusion of an accused who wishes to be present at their trial. The same reasoning and result apply in relation to 672.5 (10) (a) which, therefore, only applies where the accused has waived or agreed to being absent from the disposition review hearing.

⁴ *Rizzo v. Rizzo Shoes Limited*, [1998] 1 S.C.R. 27 at para. 21.

⁵ *R. v. Drabinsky* (2008), 235 C.C.C. (3rd) 350 (S.C.J.); *R. v. Fecteau* (1989), 49 C.C.C. (3rd) 534 (Ont. H.C.J.)

- iv. Subsection 672.5 (13) leads inescapably to the conclusion that the Board may hold a hearing by videoconference only if the accused has consented. This follows not only from the opening words of the subsection, stating that a videoconference hearing may proceed “if the accused so agrees”, but also from the later reference to the Board “permitting” the accused to appear by videoconference. As discussed above, the word “permit” indicates that the accused must have waived the right to an in-person hearing in order for the hearing to proceed by videoconference. Moreover, the right to appear in person, as provided for in s. 672.5 (9), would be negated if the Board could order a videoconference over the objections of the accused.
- v. This interpretation is further reinforced by contrasting the wording of s. 672.5 (13) with that of s. 715.23 (1), which provides that “except as otherwise provided in this act, the court *may order an accused to appear by audio conference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances*” (emphasis added). The reference in this latter provision to a court’s authority to “order an accused to appear by audio conference or videoconference” makes it clear that the court may make such an order whether or not the accused has consented. This is in contrast to s. 672.5 (13), which expressly requires an accused’s consent and further states that the Review Board may “permit” (as opposed to “order”) the accused to appear by videoconference.⁶
- vi. There is no conflict between the procedure to be followed in disposition reviews, as provided for in s. 672.5, and the requirement in s. 672.81 that the Board review dispositions every 12 months. Section 672.81 deals with the timing of such reviews, not the manner in which they are to be conducted.

To be sure, circumstances may arise which might make it difficult to comply with the various procedural requirements of s. 672.5 within the timeframe set out in s. 672.81. However, in such circumstances, the Board is not authorized to ignore or “render inoperative” the procedural requirements of s. 672.5, which are mandatory. In any event, it would seem that Parliament had regard to the possibility of unforeseen circumstances complicating the timing of review hearings, as it granted the Board the power to extend the time for holding a hearing to a maximum of 24 months, as set out in s. 672.81 (1.1).

⁶ For clarity, it might also be pointed out that since s. 715.23 applies “except as otherwise provided in this Act”, and because s. 672.5 (13) “otherwise provides”, s. 715.23 does not grant the ORB authority to order an NCR accused to appear by videoconference.

[36] It might also be observed that there is nothing absurd, illogical or unreasonable in the requirement that the Board hold disposition hearings in person unless the accused otherwise agrees. It is a longstanding and fundamental principle of our criminal law that an accused has the right to be personally present at their trial.⁷ Although a disposition review hearing before the ORB is not a trial and is conducted in an informal manner, the nature of the liberty interest at stake is every bit as significant as in criminal trials.

d. The Board's Ruling that it Could Proceed with a Hearing by Videoconference over the Objections of the Accused

[37] Given the statutory framework set out above, it is evident that the Board exceeded its jurisdiction by ignoring the requirements of both ss. 672.5 (9) and (13) and ordering the Applicant's disposition review hearing proceed by videoconference over her objections.

[38] The Board reasoned that, because it was not possible to hold in-person hearings while the COVID-19 pandemic was ongoing, Ms. Woods was in effect seeking the right to postpone her disposition review hearing indefinitely. This could not have been contemplated by the drafters of s. 672.5 (13), so the requirement that the accused consent to a hearing by videoconference ceased to apply in the context of the COVID-19 pandemic.

[39] There are a number of fundamental errors in this reasoning and conclusion.

[40] First, the Board failed to consider whether it was, in fact, possible to hold a hearing in person, as requested by Ms. Woods. On July 31, 2020, there was no legal rule or public health recommendation preventing gatherings of up to 50 persons. Nor is there any evidence indicating the Board had considered whether physical distancing measures could be implemented such that an in-person hearing could be held safely. Instead, the Board relied upon the earlier decision of the Board Chair that all hearings would proceed via Zoom and simply assumed that in-person hearings were not possible until further notice.

[41] This assumption led the Board to mischaracterize Ms. Wood's request as an attempt to adjourn her disposition hearing indefinitely. In fact, Ms. Woods was prepared to proceed with her hearing immediately, provided that it was in person. It was the Board's refusal to entertain her request that led her to seek an adjournment.

[42] The Board certainly had authority to decide that it would not hold in-person hearings until such time as it believed it was appropriate to do so. But what the Board could not do was order a disposition hearing proceed by way of videoconference over the objections of the accused. This decision ignored the clear and unambiguous language of ss. 672.5 (9) and (13) that the accused

⁷ *R. v. Barrow*, [1987] 2 S.C.R. 694.

has a right to an in-person hearing, as well as the fact that any hearing by videoconference requires her consent.

[43] Nor could the Board order that the hearing proceed in Ms. Woods' absence on the basis of s. 672.5 (10) (a). As previously discussed, that provision allows the Board to proceed in the absence of the accused only where the accused has waived her right to be present. Obviously, given Ms. Woods' request for an in-person hearing, no such waiver had been expressed here.

[44] With the dramatic improvements to videoconferencing technology in recent years, it is entirely possible that the traditional emphasis on in-person hearings will wane. In fact, recent *Criminal Code* amendments have expanded the circumstances in which trials and other criminal proceedings may be conducted by videoconference.⁸ But those amendments did not make any changes to the procedural requirements applicable to disposition review hearings conducted by the ORB. It will be for Parliament, rather than the Board, to determine whether to amend s. 672.5 (13) and grant the Board authority to order a disposition review hearing proceed by way of videoconference over the objections of an accused.

[45] I have no doubt that the review panel of the Board acted in good faith, in a manner they believed was in the best interests of both Ms. Woods and the public. Nevertheless, in essence the Board rewrote s. 672.5 (13) to grant itself the power to override the objections of an accused to a videoconference hearing when it believes it appropriate to do so. The Board has no authority to amend or ignore the mandatory requirements of the *Criminal Code*, and the decision to dispense with the consent of Ms. Woods before holding a videoconference hearing was without legal authority.

Disposition

[46] The July 31, 2020 ruling of the Board was beyond its jurisdiction. The application is granted and the decision is quashed.



P. J. Monahan J.

Released: November 23, 2020

⁸ *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and other Acts*, S.C. 2019, c. 25, ss. 1(2), 188, 216, 225(2), 290 and 292.

CITATION: Woods v. Ontario, 2020 ONSC 6899
COURT FILE NO.: CR-
DATE: 20201123

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JOANNE WOODS

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

-and-

PERSON IN CHARGE,
CENTRE FOR ADDICTION AND MENTAL HEALTH

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ONTARIO REVIEW BOARD

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RULING ON *CERTIORARI* APPLICATION

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