



BRITISH COLUMBIA REVIEW BOARD

**IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6**

REASONS ON PRELIMINARY ISSUE IN THE MATTER OF

PETER ROYDEN WHEELER

HELD BY: Video
June 1, 2022

BEFORE: CHAIRPERSON: Dr. M. Lawrence
MEMBERS: Dr. L. Grasswick, psychiatrist
P. Singh

APPEARANCES: AMICUS CURIAE: D. Abbey
DIRECTOR, AFPS: Dr. S. Lax, J. Co
DIRECTOR'S COUNSEL: D. Lovett, QC
ATTORNEY GENERAL: G. Nelson

INTRODUCTION

[1] On June 1, 2022, the BC Review Board convened a hearing at the Director's request in the matter of Peter Royden Wheeler. The Director informed the Board that Mr. Wheeler was absent without authorization and asked the Board to impose a custodial disposition order.

[2] Mr. Wheeler is before the Board as a result of a verdict of not criminally responsible on account of mental disorder dated February 19, 2013. That verdict was in response to a charge of criminal harassment contrary to section 264 of the *Criminal Code*. Mr. Wheeler was granted a conditional discharge at his first hearing before the Board on April 4, 2013. He subsequently breached the terms of that order and, on February 21, 2014, the Board imposed a custodial disposition. On February 16, 2015, the Board granted a second conditional discharge. Mr. Wheeler has remained in community on a conditional discharge since that date. He was last before the Board at a video hearing conducted on January 11, 2022. On that occasion, the Board granted a further conditional discharge order on the same terms as those previously imposed.

FACTS

[3] The Board was provided with evidence in the form of a letter dated May 6, 2022 from Pat Golding, a report dated May 3, 2022 from Dr. S. Lax and J. Co, and a letter dated May 25, 2022 from G. Nelson.

[4] The evidence established as follows:

- a. On January 18, 2022, Mr. Wheeler's case manager spoke with Mr. Wheeler by telephone and scheduled for him to attend the Vancouver Forensic Outpatient Clinic (Outpatient Clinic) on February 22, 2022. Mr. Wheeler did not attend that appointment.
- b. On February 22, 2022, Outpatient Clinic staff:
 - i. attempted to contact Mr. Wheeler by telephone, but were unsuccessful as the telephone line was immediately disconnected;
 - ii. left a voice message for Mr. Wheeler's sister to contact the Outpatient Clinic; and
 - iii. mailed a letter to Mr. Wheeler informing him of his missed appointment and scheduling a new appointment for March 1, 2022.

- c. On February 23, 2022, Mr. Wheeler's sister left a reply voice message indicating that she had been unable to reach Mr. Wheeler by telephone and asking that she not be involved in his matter;
- d. On February 28, 2022, Outpatient Clinic staff attempted to contact Mr. Wheeler by telephone, but were unsuccessful;
- e. On March 1, 2022 Mr. Wheeler did not attend at the Outpatient Clinic. Outpatient Clinic staff:
 - i. attempted to contact Mr. Wheeler by telephone, but were unsuccessful;
 - ii. left a voice message for Mr. Wheeler's sister;
 - iii. attended at Mr. Wheeler's residence and knocked on the door multiple times. There was no response; and
 - iv. left a letter under the door informing Mr. Wheeler that he missed the March 1, 2022 appointment, notifying him of a new appointment on March 10, 2022, and advising that a breach of conditions of his Review Board order may result in him being returned to the Forensic Psychiatric Hospital.
- f. On March 2, 2022, Mr. Wheeler's sister telephoned the Outpatient Clinic. She informed staff that she last spoke with Mr. Wheeler two weeks previously. She reported similar challenges to those experienced by staff when attempting to reach Mr. Wheeler by telephone.
- g. On March 4, 2022, Vancouver Police conducted a welfare check. They entered Mr. Wheeler's residence. They found it was vacated and cleared of all personal belongings and furniture.
- h. Also on March 4, 2022, the Director initiated breach proceedings.
- i. On March 29, 2022, Vancouver Police informed the Outpatient Clinic that the telephone number for Mr. Wheeler's sister appeared to no longer be in service.
- j. Investigations completed on May 5, 2022 revealed no evidence suggesting that Mr. Wheeler had crossed the border into the United States.
- k. On May 11, 2022, RCMP spoke with Mr. Wheeler's sister. She advised that Mr. Wheeler does not live with her. She does not know his whereabouts.

- I. As of that same date, Mr. Wheeler was listed on CPIC as “wanted” under a section 672.91 warrant. A notation was added directing anyone coming into contact with Mr. Wheeler to notify the Outpatient Clinic.

[5] Collectively, the Board finds this evidence establishes a breach on Mr. Wheeler’s part of three conditions of his conditional discharge order: clause 2 (reside at approved location), clause 3 (attend for assessment), and clause 8 (keep the peace and be of good behaviour).

[6] The Registry made multiple unsuccessful attempts at personal service of the notice of hearing. Mr. Wheeler’s whereabouts are not known at this time.

ISSUE

[7] The Board identified as a preliminary issue the question of whether the Board has jurisdiction to conduct the requested disposition hearing in Mr. Wheeler’s absence.

[8] The Director and the Crown took the position that the Board has jurisdiction to proceed. The Director characterized the authority of the Board to conduct a disposition hearing as an alternative to the Board’s authority to issue a warrant compelling Mr. Wheeler to appear, pursuant to section 672.85 of the *Criminal Code*. The Crown argued it was preferable to conduct a disposition hearing and impose a custodial order. Mr. Wheeler would then be returned directly to the Forensic Psychiatric Hospital (“FPH”) without the necessity of having to first appear before a Justice of the Peace. The *amicus curiae* took the contrary position, arguing the Board lacks jurisdiction to conduct a disposition hearing in the absence of the accused. He submitted that the appropriate course of action is for the Board to issue a warrant compelling Mr. Wheeler to appear at a future hearing.

LAW

[9] Section 672.5 of the *Criminal Code* contains procedural rules for courts and Review Boards to follow at disposition hearings. It provides in subsection 672.5(9) that an accused has the right to be present during the whole of their hearing. That right is subject to limited exceptions. Pursuant to subsection 672.5(10)(a), the court or chairperson may “permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or Board chairperson considers proper.” Otherwise, pursuant to subsection 672.5(10)(b), the court or chairperson may cause a person to be removed from the hearing if they are disruptive or present a danger to others.

[10] Conspicuously absent from section 672.5, or any other provision in Part XX.1 of the *Criminal Code*, is express authorization for the Board to proceed with a disposition hearing in circumstances where an accused has absconded.

[11] Counsel for the Director and the Crown argued that subsection 672.5(10)(a) should be interpreted broadly to include authority to proceed with a disposition hearing. This argument strains the ordinary meaning of the language of section 672.5(10)(a). The use of the word “permit” contemplates the court or chairperson approving an accused person’s request to be absent (*R. v. Drabinsky* (2008), 235 C.C.C. (3d) at para. 7). It cannot be read to vest the court or chairperson, in the absence of any such request, with broad discretionary authority to override the fundamental right codified in the preceding subsection, that being the right of an accused to be present at their hearing. The significance of this right bears note. The right to be present is an aspect of an individual’s *Charter* right to a fair trial.

[12] Counsel for the Director argued in the alternative that authority to proceed should be read into Part XX.1 pursuant to the common law doctrine of necessary implication. She submitted that it is practically necessary for the Board to issue a custodial disposition in order to discharge its public safety mandate. She directed the Board to *R v 974649 Ontario Inc.*, [2001] 3 SCR 575 at paras 70-71, *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, [2006] 1 SCR 140 at paras. 38 and 51, and *Pugliese v Clark*, 2008 BCCA 130. As noted by the *amicus curiae*, this argument overlooks the enforcement provisions included in Part XX.1. It is not necessary to imply a power to impose a custodial disposition for public safety purposes given the authority already vested in the Board by operation of section 672.85 to issue a warrant. This provision stipulates that, “for the purpose of bringing the accused in respect of whom a hearing is to be held before the Review Board...the chairperson may, if the accused is not in custody, issue a summons or warrant to compel the accused to appear at the hearing at the time and place fixed for it.” The fact that, on execution of the warrant, an accused would be brought before a Justice of the Peace, rather than returned directly to the FPH, is immaterial.

[13] The *amicus curiae* directed the Board to the decision of the British Columbia Court of Appeal in *Evers v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2009 BCCA 560 (“*Evers*”). The accused in this case breached a Board order by failing to attend for an assessment, and then failed to appear at a subsequent Board hearing. The Board imposed a custodial disposition order backed with a warrant of committal. The Court

of Appeal found that the Board erred by, *inter alia*, not considering the issuance of a summons or warrant. On this point, Madam Justice Kirkpatrick, writing for the Court, wrote at paragraphs 54-56 as follows:

[54] At the hearing of these appeals, counsel for the Director candidly agreed that there was no reason for the Review Board not to issue a warrant or adjourn the hearing.

[55] In my opinion, given that Ms. Evers' liberty interest was at stake, the Review Board erred in proceeding with the hearing and imposing a custodial order without considering those options. It is impossible to say that the outcome would have been the same had Ms. Evers been arrested and appeared and had her counsel had an opportunity to take instructions and make informed submissions to the Review Board.

[56] The Review Board was evidently most concerned as to Ms. Evers' ill health and the apparent need to treat her. However, those concerns needed to be balanced with Ms. Evers' right to be present at the hearing and to make submissions regarding her mental state, treatment and custodial status. The execution of a warrant for her arrest and a short adjournment of the hearing would have afforded her the opportunity to be heard.

[14] Counsel for the Director observed that the facts before the Court of Appeal in *Evers* differ in some ways from the facts of Mr. Wheeler's case. This is true. However, these differences do not diminish the precedential value of the Court's direction, that being a direction to give proper consideration to the issuance of a summons or warrant to compel an accused to appear.

[15] The Director and the Crown suggested the Board instead follow its earlier decision in *Re Terayanon* BCRB (November 4, 2021). The accused in this case also absconded. The Board imposed a custodial disposition without considering the issuance of a warrant. The precedential value of the *Terayanon* decision is limited, and the Board is not bound by it. The initial decision in *Terayanon* predates the Court of Appeal's decision in *Evers*. The Board did not have the benefit of the Court's direction on the proper procedure. The Board appears in subsequent years to have simply renewed its initial order with no apparent consideration of the potential impact of the *Evers* decision. Further, as the *amicus curiae* points out, the Board proceeded without the accused's interests represented in any way. Only the Director and the Crown attended the *Terayanon* hearings. The Board may well have reached a different outcome if fulsome, balanced argument had been presented.

[16] In Mr. Wheeler’s case, the Board finds that a summons is not a viable option. The Registry has already made multiple attempts at service of the notice of hearing. Mr. Wheeler’s whereabouts are not known. There is no clear reason, however, not to proceed with the issuance of a warrant pursuant to section 672.85. Mr. Wheeler has the right to be present at his hearing. At stake are his liberty interests. It is critical that he be afforded the opportunity to provide evidence and make submissions with respect to his mental state, treatment and custodial status. It is noteworthy also that, as time progresses, the evidence available to the Board with respect to Mr. Wheeler’s risk will grow increasingly stale. This is an outcome the Court of Appeal in *Evers* cautioned against. It would be problematic for the Board to proceed without the benefit of complete and fresh evidence on risk. This is especially true in Mr. Wheeler’s case, where the accused otherwise had been living successfully in the community for an extended period of time. The imposition of a custodial disposition may not be justified on the sole basis of his breach. It might well be punitive in its effect, and in that way contrary to the Board’s obligation under section 672.54 of the *Criminal Code* to impose the least onerous and least restrictive outcome in the circumstances of the case (*McAnuff (Re)*, 2016 ONCA 280).

RESULT

[17] For these reasons, the Board concludes that it does not have jurisdiction to proceed with the disposition hearing requested by the Director in the accused’s absence. This is an appropriate case for the chairperson to exercise her discretion to issue a warrant to compel the accused to attend a future hearing, in accordance with section 672.85(b) of the *Criminal Code*. In the alternative, even if that jurisdiction does exist, the Board nonetheless considers it preferable on the facts of Mr. Wheeler’s case not to proceed with the requested hearing and for the chairperson to instead issue a warrant compelling Mr. Wheeler’s absence at a future hearing, the date of which may be set by the Registry once Mr. Wheeler is apprehended. A warrant for Mr. Wheeler’s arrest was therefore issued on June 7, 2022.

Reasons written by Dr. M. Lawrence, with Dr. L. Grasswick and P. Singh concurring.

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