COURT OF APPEAL FOR ONTARIO

CITATION: Woods (Re), 2021 ONCA 190
DATE: 20210329
DOCKET: C68774 & C68940

Tulloch, Huscroft and Thorburn JJ.A.

DOCKET: C68774

IN THE MATTER OF: Joanne Woods
AN APPEAL UNDER PART XX.1 OF THE CODE

DOCKET: C68940

AND BETWEEN

Her Majesty the Queen

Appellant

and

Joanne Woods

Respondent

Michael Davies, for the appellant (C68774), Joanne Woods

Dena Bonnet and Emily Marrocco, for the appellant (C68940) and respondent (C68774), Her Majesty the Queen

Anita Szigeti and Maya Kotob, for the respondent (C68940), Joanne Woods

Leisha Senko, for the respondent (C68774 & C68940), Person in Charge of Centre for Addiction and Mental Health

David Humphrey and Michelle Biddulph, for the respondent (C68940), Ontario Review Board

Amy Ohler and Eric Neubauer, for the intervener (C68940), Criminal Lawyers' Association (Ontario)

Heard: March 12, 2021 by videoconference

On appeal from the judgment of Justice Patrick J. Monahan of the Superior Court of Justice, dated November 6, 2020, with reasons reported at 2020 ONSC 6899, 152 O.R. (3d) 595, granting *certiorari* to quash the ruling of the Ontario Review Board, dated July 31, 2020, holding it had jurisdiction to conduct a disposition review hearing under Part XX.1 of the *Code* by videoconference without the accused's consent (C68940).

Tulloch J.A.:

A. INTRODUCTION

[1] On May 9, 2012, the Ontario Review Board ("the ORB" or "the Board") found Ms. Woods not criminally responsible on account of mental disorder ("NCRMD" or "NCR") for charges of uttering a threat to cause death or bodily harm, and possession of a weapon for a dangerous purpose. She has been under the jurisdiction of the Board ever since.

[2] In May 2020, the ORB announced that it would hold all of its hearings remotely, by videoconference, due to the COVID-19 pandemic. Ms. Woods' annual disposition hearing was initially scheduled for May 29, 2020. Ms. Woods did not consent to proceeding by videoconference and sought to adjourn her hearing until the Board could convene in person.

[3] After a two-month adjournment, on July 31, 2020, the Board held that the hearing could proceed by videoconference, without Ms. Woods' consent and

despite her objections. Ms. Woods served and filed an application to quash the Board's decision in the Ontario Superior Court. Notwithstanding r. 43.03(5) of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario),* SI/2012-7 – which suspends the proceedings before the Board once Ms. Woods had served and filed a Notice of Application to quash, unless a judge permits the proceedings to go ahead[1] – the Board held a disposition hearing by videoconference on September 28, 2020. Just over a week later, on October 8, 2020, the Board ordered Ms. Woods detained at the General Forensic Unit at the Centre for Addiction and Mental Health ("CAMH"), subject to conditions.

[4] Prior to this order, since April 2017, Ms. Woods had been living in the community under a conditional discharge.

[5] Monahan J. heard Ms. Woods' application to quash on November 6, 2020. On November 23, 2020, Monahan J. issued a writ of *certiorari* and quashed the Board's July 31, 2020 decision to conduct its proceedings by videoconference, for want of jurisdiction. He held that Part XX.1 of the *Criminal Code,* R.S.C., 1985, c. C-46*,* which governs the NCR regime, did not authorize the Board to convene

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[1] Rules 43.03(5) and (6) provide:
"(5) Subject to subrule (6), service of a notice of application to quash under subrule (2) upon a provincial court judge, justice or justices, coroner, or as the case may be, suspends the proceedings which are the subject of the application.
(6) A judge may, upon service of a notice of application therefor in such manner, if at all, as the judge may direct, order that the proceedings which are the subject of the application to quash shall continue upon such terms as appear just."

by videoconference without the consent of the accused. The parties agreed that this decision only affected the Board's jurisdictional ruling on July 31, 2020, and not the disposition order rendered on October 8, 2020.

[6] The Crown appeals Monahan J.'s *certiorari* order, while Ms. Woods appeals the order of the Board setting aside her conditional discharge and entering a detention order.

[7] For the reasons that follow, I would dismiss the appeal of the *certiorari* application. The Board did not have jurisdiction to proceed by videoconference without the consent of the NCR accused. It follows that the Board rendered Ms. Woods' October 8, 2020 disposition order without jurisdiction. The disposition is therefore null and void for want of jurisdiction.

[8] Accordingly, it is unnecessary to address the merits of Ms. Woods' appeal of her disposition order in great detail. Suffice to say, even if I had reached a different conclusion on the merits of the *certiorari* appeal, the disposition order would still be void because the Board conducted its disposition hearings in violation of r. 43.03(5).

[9] It is my understanding that Ms. Woods is currently detained at the hospital. She has had another disposition hearing in the interim, heard on December 8, 2020 and decided on January 13, 2021. The Board continued her detention order in that disposition: *Woods (Re),* [2021] O.R.B.D. No. 104.

However, this detention order rests on a faulty foundation given that the Board entered the original detention order without jurisdiction.

[10] Thus, the detention order is quashed, and Ms. Woods' conditional discharge is reinstated. I would return the matter to the Board to be heard by a different panel as soon as practicable.

B. BACKGROUND AND OVERVIEW

[11] As noted above, in May 2020, the ORB announced that it would hold all of its hearings remotely, by videoconference, due to the COVID-19 pandemic. In this announcement, the Board's Chair also noted that this manner of proceeding may give rise to "arguable inconsistencies with the *Code*," and individuals with any "misgivings" could apply to have their matter adjourned.

[12] Ms. Woods' annual disposition hearing was initially scheduled for May 29, 2020. Ms. Woods attended the hearing, represented by counsel. She did not consent to the hearing proceeding by videoconference and sought an adjournment until the parties could schedule an in-person hearing. The Board granted the adjournment and scheduled a new hearing date for July 31, 2020.

(a) The ORB's Ruling on Jurisdiction

[13] By the time of Ms. Woods' adjourned hearing date on July 31, 2020, the ORB was still not convening for in-person hearings. The hearing proceeded by videoconference.

[14] Counsel for Ms. Woods filed a notice of application submitting that the Board lacked jurisdiction to hold the hearing by videoconference without her consent. She argued that s. 672.5(13)[2] of the *Criminal Code* only allows the Board to proceed by videoconference "if the accused so agrees." Additionally, counsel for Ms. Woods pointed out that s. 672.81(1),[3] which imposes a mandatory review of dispositions after twelve months, is not absolute and that adjournments are a reasonable justification for an extension of that time period.

[15] The Crown argued that s. 672.81(1) requires the Board to fulfill its statutory duty to hold a hearing within twelve months of the last disposition and that this duty takes priority over any consent required by s. 672.5(13). The Crown also submitted that the current public health emergency rendered s. 672.5(13) "inoperative" in the circumstances. Finally, the Crown argued that the Board is entitled to govern its own process.

[16] The Board, in an oral ruling, dismissed the application and denied Ms. Woods' request for a further adjournment. It held that the Board had the

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[2] Section 672.5(13) provides: "If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing."

[3] Section 672.81 (1) provides: "A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve 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 paragraph 672.54(a)."

authority to proceed by videoconference notwithstanding s. 672.5(13) and Ms. Woods' objections.

[17] In reasons released on August 25, 2020, the Board decided that an overall review of s. 672.5 and the Board's Rules of Procedure indicates that the ORB has "wide latitude in deciding how its hearing procedures are to be governed with a fundamental goal of securing '…the just determination of the real matters in dispute.'" It further held that requests to extend the twelve-month review by way of adjournment would be assessed on a case-by-case basis.

[18] In the case at hand, the Board found that another adjournment was unreasonable because there appeared to be significant live issues concerning the hospital's ability to manage Ms. Woods' illness and substance use, and these issues needed to be resolved in a timely manner. The Board also observed that there was no evidence that a denial of an in-person hearing occasioned any unfairness to Ms. Woods.

[19] Since an in-person hearing was not possible while COVID-19 continued to pose a risk, the Board reasoned that Ms. Woods was, in effect, seeking to postpone her annual disposition hearing indefinitely. The Board noted that it was "tempting to conclude" that Ms. Woods' refusal to consent was "a not so subtle manoeuvre to delay her hearing so that she can remain on a conditional discharge and maintain her current privileges without change." The Board reasoned that an

interpretation of s. 672.5(13) that would permit Ms. Woods to delay the annual disposition hearing indefinitely would lead to an absurd result, since it would prevent the Board from fulfilling its statutory mandate.

[20] Based on the foregoing, the Board denied Ms. Woods' request for an adjournment. The hearing was ordered to take place as soon as practicable. The Board found that it had the authority to proceed in Ms. Woods' absence, even if she did not consent to a hearing by videoconference, under s. 672.5(10)(a).[4]

(b) The Continuation of Ms. Woods' Hearings

[21] On August 28, 2020, the Board reconvened. Counsel for Ms. Woods informed the Board that she had filed and served an application to quash the Board's July 31, 2020 jurisdictional decision in the Superior Court. She took the position that r. 43.03(5) of the *Criminal Proceedings Rules* applied and suspended the proceedings. In the alternative, counsel for Ms. Woods asked the Board to recuse itself on the basis of a reasonable apprehension of bias. The Board disagreed on both counts and commenced the hearing. It did not have enough time to hear all the evidence, so the matter was again adjourned to a later date.

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[4] Section 672.5(10)(a) provides: "(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…"

[22] A differently constituted panel convened by videoconference on September 28, 2020.[5] Ms. Woods did not attend this hearing. Counsel for Ms. Woods did not have instructions to proceed in Ms. Woods' absence and asked for a further adjournment to either obtain instructions or seek advice from the Law Society as to whether she could participate as counsel without instructions.[6] The Board ordered that the hearing proceed in Ms. Woods' absence, citing s. 672.5(10)(a), notwithstanding that her counsel could not participate without her instructions. It heard evidence from the hospital and a psychiatrist regarding Ms. Woods' current medical condition, needs and circumstances. Counsel for Ms. Woods did not, and could not, make submissions or cross-examine any of the witnesses without instructions from her client.

[23] On October 8, 2020, the Board issued its disposition. It set aside Ms. Woods' conditional discharge and entered a detention order.

(c) Ms. Woods' *Certiorari* Application

[24] A month later, on November 6, 2020, Monahan J. heard Ms. Woods' writ of *certiorari* application to quash the Board's July 31, 2020 decision to proceed by videoconference without her consent. In reasons released on November 23, 2020,

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[5] One of the members of the panel suffered a sudden illness that prevented him from sitting on the Board. The Board lost quorum and was reconstituted as a new panel.
[6] The Law Society later informed counsel that it would not be proper for her to participate without instructions.

Monahan J. allowed the application and quashed the Board's July 31, 2020 decision, holding that the Board acted without legal authority.

[25] At the outset, Monahan J. noted that the Board's jurisdiction is defined and limited by the *Criminal Code*. The default rule in s. 715.21 of the *Criminal Code* provides that "a person who appears at, participates in, or presides at a proceeding shall do so personally." Monahan J. found that "personally" means that criminal proceedings must proceed in the physical presence of the accused.

[26] Monahan J. turned his analysis to Part XX.1 of the *Criminal Code,* which governs the NCRMD regime. He noted that an iteration of the default rule entitling accused individuals to an in-person hearing is found in s. 672.5(9).[7] Subsection 672.5(10) goes on to list specific circumstances where the accused may be absent from the hearing.

[27] Monahan J. noted that only s. 672.5(10)(a)[8] could apply, which provides that the Board may "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." However, Monahan J. found the word "permit" in s. 672.5(10)(a) to be premised on the accused having waived the right to an in-person hearing. In other words,

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[7] Section 672.5(9) provides: "(9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing."
[8] Section 672.5(10)(a) provides: "(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…"

Monahan J. found that the Board could not rely upon s. 672.5(10)(a) to proceed in the absence of an accused without their consent; s. 672.5(10)(a) only applies where the accused has waived her right to be present.

[28] Lastly, Monahan J. found that Part XX.1 specifically addresses the Board's ability to proceed by videoconference in s. 672.5(13), and that provision requires the accused's consent.[9]

[29] After his review of the statutory framework, Monahan J. concluded that the Board's decision ignored the clear and unambiguous language of ss. 672.5(9) and (13), which provide the NCR accused with a right to an in-person hearing.

[30] Monahan J. also pointed out that the Board failed to consider whether it was, in fact, possible to hold a hearing in person. At the time, there was no legal rule or public health recommendation that prevented the Board from convening in person.

[31] More broadly, Monahan J. reasoned that it is open to Parliament, and not the Board, to determine whether to amend s. 672.5(13) and grant the Board authority to conduct a disposition review hearing by videoconference over the objections of the accused. As I return to below, Parliament did not do so in its recent amendments to the *Criminal Code*, which expanded the circumstances

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[9] Again, 672.5 (13) provides: "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."

under which trials and other criminal proceedings may take place by videoconference.

C. ANALYSIS

[32] The central question in the Crown's appeal of Monahan J.'s *certiorari* order is the correct interpretation of Part XX.1 of the *Criminal Code.* The Crown asks this court to find that the Board has jurisdiction to conduct its proceedings by videoconference without the consent of the NCR accused. This jurisdiction, according to the Crown, derives from the Board's statutory regime, its core mandate, and its governing practice directions. The Crown further submits that the exercise of this jurisdiction is reasonable in light of the global pandemic. Notably however, the Crown conceded in the hearing that this jurisdiction is rooted in the Board's legal framework; put another way, the Crown also argues that the jurisdiction to hold proceedings by videoconference, without the NCR person's consent, exists regardless of COVID-19.

[33] For the reasons that follow, I disagree. The Board's conclusion about the boundaries of its jurisdiction is incorrect. The statutory regime provides no authority for the Board to conduct its hearing by videoconference without the consent of the NCR accused. The Board's decision was not justified when one considers the legal constraints under Part XX.1 of the *Criminal Code*.

[34] Again, the Board's proceedings were suspended once counsel for Ms. Woods filed and served the notice of application to quash in the Superior Court pursuant to r. 43.03(5). The Board nonetheless proceeded to convene by videoconference without Ms. Woods' consent and without her counsel participating. It subsequently entered a detention order on October 8, 2020. This disposition was made without jurisdiction from the *Criminal Code,* and in direct contravention of the *Criminal Proceedings Rules.* The detention order would be null and void on both accounts.

[35] The COVID-19 pandemic cannot justify a clear departure from the terms of the *Criminal Code.* The Board is a creature of statute and its powers are strictly circumscribed by the *Criminal Code.* The Board cannot expand its jurisdiction based on a sense of perceived urgency to act outside its statutory authority. Given the liberty interests at stake and the unique vulnerabilities of the NCR accused, the rights provided in the *Criminal Code* and the principles of natural justice must be zealously guarded in disposition hearings, even in the face of a global pandemic. Ms. Woods is entitled to an in-person annual disposition hearing unless and until the *Criminal Code* says otherwise.

(1) The Standard of Review

[36] The parties appeared before Monahan J. on an application for a writ of *certiorari. Certiorari* is an extraordinary remedy that derives from the supervisory

jurisdiction of the Superior Court over a tribunal of limited jurisdiction. For parties in criminal or quasi-criminal proceedings, *certiorari* is available to address alleged jurisdictional errors; that is, when a court or tribunal either (a) fails to observe a mandatory provision of a statute or (b) acts in breach of the principles of natural justice: *Bessette v. British Columbia (Attorney General),* 2019 SCC 31, [2019] S.C.J. No. 31, at para. 23. The standard of review is correctness: *Ontario (Attorney General) v. Taylor,* 2010 ONCA 35, 98 O.R. (3d) 576, at para. 16.

(2) Statutory Interpretation of Part XX.1 of the *Criminal Code*

[37] Whether the Board failed to observe a mandatory provision of the *Criminal Code* is a question of statutory interpretation. In Canada, it is trite law that the modern approach to statutory interpretation requires that "the words of an Act 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": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[38] The starting point is to determine the ordinary meaning of the text. The ordinary meaning refers to "the understanding that spontaneously comes to mind when words are read in their immediate context" and is "the natural meaning which appears when the provision is simply read through": *R. v. Wookey*, 2016 ONCA 611, 531 O.A.C. 13, at para. 25; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006]

2 S.C.R. 513, at para. 30; and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724, at p. 735.

[39] After establishing an initial impression, the court must consider and draw inferences from the Act as a whole. This includes related provisions and the overall scheme. It is presumed that the legislature is competent and well informed, that it uses language consistently, and that the provisions in the Act collectively form a coherent scheme: Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 162-63 and 186-87; *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437, at para. 60.

[40] There is also a presumption against tautology: *R. v. Gallone,* 2019 ONCA 663, 147 O.R. (3d) 225, at para. 31. That presumption instructs "that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), ("Sullivan"), at p. 211, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838. Instead, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": *Sullivan*, at p. 211.

[41] Finally, a court must situate its interpretation within the purpose of the legislation. Insofar as the language of the text permits, courts should adopt

interpretations that are consistent with the legislative purpose and avoid interpretations that defeat or undermine that purpose. It is presumed that the legislature does not intend absurd consequences: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27.

[42] The questions to be answered are whether ss. 672.5(9), (10) and (13) support the conclusions that: (a) the accused has the right to an in-person hearing unless they consent to a hearing by videoconference; and (b) the Board may proceed in the absence of the accused without their consent. Given the interrelated nature of these questions, I will consider them in a blended manner.

[43] Before doing so, I will briefly summarize ss. 672.5(9), (10) and (13). Subsection 672.5(9) states that “[s]ubject to subsection (10), the accused has the right to be present during the whole of the hearing”. Subsection (10) goes on to list specific circumstances where the accused may be absent from the hearing. As noted above, only ss. 672.5(10)(a) is applicable and it reads: “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.” The statute specifically addresses videoconferencing in s. 672.5(13), which provides: “[i]f 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.”

(a) The Ordinary Meaning

[44] When read alone, s. 672.5(9) arguably gives rise to some ambiguity as to whether the term “present” entitles an accused to be *physically* present. The right to be present could simply mean a right to attend the hearing. In contemporary times, someone could attend a hearing either physically or virtually. This would be consistent with the approach of courts to consider advances in technology that did not exist when Parliament enacted the provision: *John v. Ballingall*, 2017 ONCA 579, 136 O.R. (3d) 305, at para. 24, leave to appeal refuse [2017] S.C.C.A. No. 377. Such an approach ensures that statutory interpretation applies “a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities”: *R. v. 974649 Ontario Inc*., 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 38.

[45] However, any ambiguity about whether an accused’s right to be “present” entitles him or her to an in-person hearing is resolved when one considers s. 672.5(13). That section explicitly addresses circumstances where an NCRMD accused’s “presence” may be virtual, that is, through a videoconference. Parliament was careful to stipulate that the NCRMD accused must agree to appear by videoconference. This provision would have no meaning if s. 672.5(9) did not entitle the NCRMD accused to be physically present at a hearing. As noted above, the presumption of tautology states that “[e]very part of a provision or set of provisions should be given meaning if possible”, and courts should avoid, “as much

as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant": *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 SCR 346, at para. 16; *Sullivan*, at p. 211.

[46] A plain reading of s. 672.5(10)(a) does not assist this court in interpreting whether the accused person has a right to be physically present. The Board's ability in certain circumstances to proceed in the absence of the accused does not speak to whether the accused is entitled to an in-person hearing.

[47] However, a plain reading of s. 672.5(10)(a) does shed light on whether the Board may proceed in the absence of the accused without their consent. I am not convinced that the Board may do so. The word "permit" in s. 672.5(10)(a) implies that the Board may grant the accused permission to be absent. Stated otherwise, it is premised on an accused waiving her right to an in-person hearing.

[48] The word "permit" also has a specific connotation in the *Criminal Code* context. Monahan J. pointed to s. 650(2)(b) – a virtually identical provision – which courts have interpreted as only applying where an accused has waived their right to be present at trial: *R. v. Drabinsky,* [2008] 235 C.C.C. (3d) 350 (Ont. S.C.), at paras. 7-11. Mohanan J. also compared the word "permit" with the language of s. 715.23(1), which provides: "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." Under s. 672.5(13), which carves out an exception to s. 715.23(1), the Board may only "permit" (as opposed to "order") the accused to appear by videoconference. It is presumed that the legislature uses words consistently and intentionally. I agree with Monahan J.'s analysis on this point.

[49] On a plain reading of ss. 672.5(9), (10) and (13), the right to be present implies a physical presence unless the accused consents to a hearing by videoconference. Additionally, the Board cannot proceed in the absence of the accused unless she has waived her right to be present.

(b) The Act as a Whole

[50] The next step involves a consideration of the Act as a whole. The Crown asks us to interpret ss. 672.5(9), (10) and (13) in light of ss. 672.81(1), 672.5(2), and 672.53. Subsection 672.81(1) requires the Board to hold annual hearings to review dispositions made with respect to an NCR accused.[10] Subsection 672.5(2) provides that a review hearing may be conducted as informally as is appropriate in the circumstances.[11] Finally, s. 672.53 provides that any procedural irregularity in relation to a disposition hearing will not affect the validity of the hearing itself

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[10] Subsection 672.81 (1) provides: "A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve 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 paragraph 672.54(a)."

[11] Subsection 672.5(2) provides: "The hearing may be conducted in as informal a manner as is appropriate in the circumstances."

unless the irregularity causes substantial prejudice to the NCR accused. [12] I will deal with each of these provisions in turn.

[51] There is no question that the Board must conduct review hearings on an annual basis and that this responsibility is a core aspect of its jurisdiction over NCR accused persons. Annual review hearings are of paramount importance as they allow the Board to ensure that the disposition is appropriately calibrated in a manner that balances the liberty interests of the accused with the protection of the public.

[52] However, those hearings must be fair. An annual review hearing that proceeds by videoconference, over the objections of the accused, and without representation for the accused, cannot be considered fair. In the absence of consent of the NCR accused, only Parliament may require accused persons to forego the protections currently provided by the *Criminal Code.*

[53] In the present context, the need for fairness is amplified given the vulnerability of those under the jurisdiction of the Board. For some NCR accused, the forced use of videoconferencing could contribute to anxiety or paranoia relating to the use of technology: Community Legal Assistance Society (“CLAS”),

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[12] Subsection 672.53 provides: “Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice.”

Operating in Darkness: BC's Mental Health Act Detention System, (Vancouver: CLAS, 2017), at p. 135. Here it is important to keep in mind that the use of technology in criminal proceedings should be used to enhance access to justice, not inhibit it. The court and the Board must remain vigilant about the risk that COVID-19 protocols could erode the fairness of the decision-making process.

[54] Presently, there are other ways to accommodate the needs for NCR accused people who do not consent to attending their annual hearing virtually. Part XX.1 contemplates circumstances where this review period can be extended beyond a year. Specifically, ss. 672.81(1.1) permits the Board to extend the time for holding a hearing by a maximum of twenty-four months in certain circumstances.[13] As I return to below, if a public safety issue arises, the accused remains under the hospital's supervision. An accused can still be hospitalized without their consent pursuant to the *Mental Health Act,* R.S.O. 1990, c. M.7*.*

[55] The Crown also argues that the Board's decision to proceed by video was an extension of its authority under s. 672.5(2) to conduct the hearing informally where circumstances permit. I am not convinced that this is what Parliament had in mind when drafting this provision. In the limited jurisprudence surrounding

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[13] Subsection 672.81(1.1) provides: "Despite subsection (1), the Review Board may extend the time for holding a hearing to a maximum of twenty-four 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."

s. 672.5(2), this provision has been used to make reasonable accommodations when it comes to information gathering or requests on consent of all parties. For example, the Board has invoked s. 672.5(2) to make informal information requests from the hospital on an urgent basis: *R. v. Conception,* 2014 SCC 60, [2014] 3 SCR 82, at para. 122. It has also been used to permit an NCR accused's parents to attend an in-person hearing by video link with the consent of all parties: *Santia (Re),* [2014] O.R.B.D. No. 1051, at para. 9. Permission to operate informally is meant to assist the Board in executing its role as an inquisitorial tribunal; it is not meant to supersede an accused person's codified rights.

[56] Finally, I am not of the view that proceeding by video is simply a "procedural irregularity." The Crown asks this court to find that remote hearings "do not impact the exercise of the procedural or substantive rights of the accused as they allow for meaningful participation." This case does not provide the necessary evidentiary record for this court to weigh-in on the extent to which a video forum impacts an accused's substantive and procedural rights. However, as alluded to above, I am not prepared to treat the difference between an in-person hearing and a videoconference hearing as insignificant. The court must be cautious in endorsing such a broad proposition about the rights of vulnerable people in a time of crisis. Suffice to say, I am persuaded that the *Criminal Code* treats deviations from in-person hearings as more than mere procedural irregularities.

[57] Turning to the Act more broadly, it is important to note that the Board's jurisdiction is defined and limited by the *Criminal Code*. The default rule in s. 715.21 of the *Criminal Code* provides that "a person who appears at, participates in, or presides at a proceeding shall do so personally." When read in the context of other provisions in the *Code,* including ss. 502.1(1) or 487.01(7), "personally" in s. 715.21 means that criminal proceedings must proceed in the physical presence of the accused.

[58] In 2019, Parliament enacted the default rule in s. 715.21 as part of a series of amendments to the *Criminal Code* that sought to modernize criminal procedure and expand the circumstances in which the accused and other participants in a criminal proceeding may appear virtually: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* (Bill C-75), S.C. 2019, c. 25, ss. 1(2), 188, 216, 225(2), 290 and 292.

[59] In the new Part XXII.01, entitled "Remote Attendance by Certain Persons", Parliament provided a judge or justice the authority to preside over proceedings via remote means, and in certain circumstances, to require the accused to appear by videoconference. Parliament had the opportunity to expand remote appearances to Part XX.1 of the *Criminal Code* to grant the Board statutory authority to order an NCR accused to appear by video. Parliament did not do so. This may well have been a legislative oversight. However, in the absence of an

amendment, neither the Board nor this court has the authority to expand the Board's jurisdiction beyond the confines of Part XX.1.

(c) The Purpose of ss. 672.5(9), (10) and (13)

[60] Turning now to the purpose of the legislation, the dual objectives of Part XX.1 of the *Criminal Code* are the protection of the public and the fair treatment of the NCR accused: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services),* [2006] 1 S.C.R. 326, at paras. 26-29. In furtherance of these twin goals, the Board has wide latitude to make orders and conditions binding on the parties before it.

[61] As noted above, annual disposition hearings are central to this legislative scheme. They permit the Board to continuously ensure that the appropriate balance is struck between the protection of the public and the degree of restrictions on the liberty of the NCR accused.

[62] It is up to Parliament to define the outer limits of the Board's jurisdiction when it comes to the balance between the accused's procedural rights and the need for expediency. The statute is clear: there was no jurisdiction here.

[63] There are practical implications for this interpretation, but they do not rise to the level of absurdity. As Monahan J. observed at para. 42, the Board is entitled to delay its in-person hearings until it is appropriate to convene in person or it can do so in a safe manner. However, assuming an in-person hearing was truly

impracticable, the proper way forward would have been to grant adjournments when an accused does not consent to a video hearing. As noted above, s. 672.81(1.1) of the *Criminal Code* accounts for irregularities in the timeline of annual dispositions. While this is by no means a long-term solution, it is up to Parliament to carve out an exception to the default rule entitling people under the Board's jurisdiction to in-person hearings.

[64] If concerns about the protection of the public arise in the interim, it remains open for the hospital to step in. Patients can be brought in under the *Mental Health Act* in the event of rapid decompensation. Pursuant to ss. 672.81(2) and (2.1), the Board is required to hold a review hearing as soon as practicable where the hospital seeks an early review hearing, or when the hospital has significantly increased restrictions on the accused's liberty for a period exceeding seven days. The hospital may request an early review hearing when there is reason to believe that the current disposition does not adequately protect public safety: *Strachan (Re),* 2019 ONCA 481, at paras. 4-9.

[65] It is certainly foreseeable that an NCR accused might not consent to a video hearing in these circumstances, and that a delay could lead to an impractical and potentially dangerous result. But it is the role of the legislature, and not the Board, nor this court, to address this potential problem.

(d) Conclusion on the Interpretation of Part XX.1

[66] In summary, the task of this court was to interpret the relevant provisions of Part XX.1 of the *Criminal Code* and determine whether the Board acted without statutory authority. I am of the view that the Board failed to remain within the proper bounds of its jurisdiction, as conferred by statute. I do not see any error in Monahan J.'s approach that would warrant this court's intervention.

D. MS. WOODS' APPEAL OF HER DISPOSITION ORDER

[67] The operation of r. 43.03(5) is automatic. Once counsel for Ms. Woods filed and served a notice of application to quash in the Superior Court, r. 43.03(5) suspended the proceedings before the Board. The Board erred in proceeding notwithstanding r. 43.03(5), without first seeking the approval of a judge, as is required by r. 43.03(6). Again, the Board does not have the authority to unilaterally override clear directions from the *Criminal Proceedings Rules for the Superior Court of Justice*.

[68] The Board's decision to proceed without the NCR accused or her counsel raises procedural fairness concerns that might have afforded an alternative basis for quashing the decision, but it is unnecessary to decide this point given that the Board had no authority to proceed with the hearing in any event.

E. CONCLUSION AND DISPOSITION

[69] I would dismiss the appeal of the *certiorari* order and allow the appeal of the Board's disposition. Further, I would return this matter to the Board for a new hearing before a differently constituted panel, to be heard as soon as practicable.

Released: March 29, 2021

Gilbert J.A.

Lauwers J.A.

I agree
Thorburn J.A.