NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Denny*, 2019 NSCA 93

Date: 20191204
Docket: CAC 483408
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Andre Noel Denny

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	October 1, 2019, in Halifax, Nova Scotia
Subject:	Criminal; Criminal - mental disorder - not criminally responsible; Criminal - Criminal Code Review Board; Sufficiency of reasons
Legislation:	*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54
Cases Considered:	*R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498; *R. v. Sheppard*, 2002 SCC 26; *S.R. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 46;
Summary:	The Criminal Code Review Board conducted a statutorily mandated hearing at which the decision was made to increase Mr. Denny's level of hospital privileges from the L4 to the L5 category.

Issues:

(1) Did the Criminal Code Review Board err in failing to properly apply and consider s. 672.54 of the *Code* thereby reaching an unreasonable decision?
(2) Did the Criminal Code Review Board provide sufficient reasons for the decision reached?

Result:

The Board's reasons reveal it considered all of the necessary factors to reach its determination. The decision was one open to the Board on the evidence before it and was not unreasonable.
The reasoning process used by the Board in its decision is identifiable and does not frustrate meaningful appellate review. Sufficient, albeit economical reasons were provided. The appeal is dismissed.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Denny*, 2019 NSCA 93

Date: 20191204
Docket: CAC 483408
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Andre Noel Denny

Respondent

Judges:	Beveridge, Bryson and Beaton, JJ.A.
Appeal Heard:	October 1, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	James Gumpert, Q.C., for the appellant Lee Seshagiri and Kelly Ryan, for the respondent

Reasons for judgment:

[1] On January 9, 2012, the respondent Mr. Denny was found not criminally responsible on a charge of assault causing bodily harm. He was conditionally discharged and required to live in approved, supervised premises.

[2] Since then, Mr. Denny has been resident in the East Coast Forensic Hospital ("the Hospital") and has been the subject of successive disposition hearings before the Criminal Code Review Board ("the Board"). The Board derives its authority from statute – the *Criminal Code* ("the *Code*") – but performs an administrative function of a specialized nature.

[3] The Crown appeals from a decision of the Board made at a disposition hearing on December 4, 2018. In that decision, made pursuant to s. 672.54 of the *Code*, the Board determined it appropriate to adjust the level of Mr. Denny's hospital privileges from the L4 category to the L5 category. The Crown asks this Court to set aside that disposition. For the reasons that follow, I would dismiss the appeal.

Issues

[4] The Crown's four enumerated grounds of appeal can be distilled into two issues:

i) Did the Board err in failing to properly apply and consider the requirements of s. 672.54 of the *Code* such that the Board's decision was unreasonable?

ii) Did the Board provide sufficient reasons for the decision reached?

Background

[5] As indicated above, Mr. Denny has been the subject of successive disposition hearings pursuant to s. 672.54 of the *Code* since 2012. That section mandates a determination of one of the three possible dispositions, guided by the considerations set out in s. 672.54:

> When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, ***it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society***

> ***and the other needs of the accused, make one of the following dispositions*** that is necessary and appropriate in the circumstances:
>
> > (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
> >
> > (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
> >
> > (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.
>
> [Emphasis added]

[6] In January 2012, Mr. Denny was found not criminally responsible in relation to a charge of assault causing bodily harm. The first Board hearing was conducted in February 2012, with a decision rendered on April 12, 2012 granting a conditional discharge but imposing a number of restrictions on Mr. Denny in the interest of the protection of the public.

[7] At each successive hearing Mr. Denny has been ordered detained in the Hospital, with graduated levels of privileges at that facility as determined by the Board to be appropriate over time.

[8] Four days after the first Board decision in April 2012, Mr. Denny left the Hospital without authorization. In the early morning hours of April 17, 2012, he brutally attacked Raymond Taavel on Gottingen Street in Halifax; Mr. Taavel died of his injuries. Mr. Denny eventually pled guilty to the offence of manslaughter and on March 24, 2016 was sentenced to just under eight years in custody. At that point, Mr. Denny began serving his manslaughter sentence in the Hospital as a dual status offender, pursuant to s. 672.67 of the *Code*, since he was already in the Hospital in relation to the assault causing bodily harm referenced above.

[9] While the decision under appeal relates to an offence that is separate and distinct from the manslaughter offence, the latter was a significant marker in terms of the Board's assessment of the chronology of Mr. Denny's gradual improvement in progress since that time.

[10] Pursuant to successive Board determinations, Mr. Denny had no access to the community from December 2014, with the exception that "access for medical purposes is allowed at the L2 level of privileges, subject to the agreement of

Correctional Services and the provision of one or more correctional guards to supervise the accused continually during such access". That continued to be the case until July 2017 when he was granted L2 privileges with exceptions. L2 privileges are defined by the Hospital as:

> **Level 2**
>
> ***Community Access Supervised by Staff:***
>
> Patient has access to grounds of ECFH or community under direct supervision.
>
> The clinical team:
>
> - determines the level of staff to patient ratio that is required for each patient.
> - may also determine that a patient with community access level 2 may be directly supervised by an approved person as per ECFH Approved Person Guidelines (Approved Persons 1902).
> - may consider the use of volunteers (refer to CH 08-017 *Volunteer Placement*).

[11] Mr. Denny continued to operate at the L2 level until the disposition order of June 1, 2018 when the privileges were increased to the Hospital's L4 category, defined as:

> **Level 4**
>
> ***Indirectly Supervised Community Access:***
>
> Patient has access to community without direct supervision by staff or approved person.
>
> Community day passes may be granted from a minimum of three hours up to a maximum of 14 hours.
>
> Patients may be indirectly supervised for programming of any duration without this affecting their independent indirectly supervised community access hours.

[12] The L4 designation also came with a caveat by the Board that it was to be notified if a particular medication was discontinued or if there were any instances of actual aggression or substance use by Mr. Denny. The L4 level of privileges meant Mr. Denny successfully exercised unescorted passes into the community. At the December 2018 hearing the privilege level was increased to L5; that decision forms the subject of this appeal.

[13] During that hearing, the Crown was opposed to any increase in the ceiling of privileges for Mr. Denny, while his counsel advocated for an increase to the

highest level of privileges – L6 – consisting of indirectly supervised overnight passes.

[14] Exercising its inquisitorial function, the Board determined the appropriate disposition for Mr. Denny was continued detention at the Hospital with a ceiling of privileges of L5, defined by the Hospital as:

> **Level 5**
>
> ***Indirectly Supervised Overnight Passes:***
>
> Patient has consecutive overnight passes to ECFH Transition Bungalow or Daily Living Suite (DLS).

[15] The Board's decision discussed that the increase to the L5 level meant Mr. Denny would have the opportunity, if approved by his medical team, to spend periods of time unsupervised in either of those settings, both located on Hospital grounds.

Issue 1 – Was the decision unreasonable?

[16] The Crown challenges the Board's decision pursuant to s. 672.78(1)(a) of the *Code*, on the basis it was unreasonable and cannot be supported by the evidence. In *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33, the Supreme Court of Canada recognized the unique position and expertise of such a Review Board and reminded appellate courts to be cognizant of the Board's specialized function:

> [29] To make these difficult assessments of mental disorders and attendant safety risks, the Board is provided with expert membership and broad inquisitorial powers. While the chairperson is to be a federally appointed judge, or someone qualified for such an appointment, at least one of the minimum of five members must be a qualified psychiatrist. If only one member is so qualified, at least one other member must "have training and experience in the field of mental health", and be entitled to practise medicine or psychology (*Cr. C.*, ss. 672.39 and 672.4). The chairperson has all the powers conferred under ss. 4 and 5 of the *Inquiries Act*, R.S.C. 1985, c. I-11, and a broad authority to consider "disposition information" that may not in all respects comply with strict rules of evidence (*Cr. C.*, ss. 672.43 and 672.51).
>
> [30] It is evident that the assessment of whether the respondent's mental condition renders him a significant threat to the safety of the public calls for significant expertise.
>
> [. . .]

> [40] [. . .] the court should be vigilant in protecting the liberty of persons detained under the NCR provisions of the *Criminal Code*, but this vigilance must be tempered with recognition of the inherent difficulty of the subject matter and the expertise of the medical reviewers. As stated in *Winko, supra*, at para. 61:
>
> > Appellate courts reviewing the dispositions made by a court or Review Board should bear in mind the broad range of these inquiries, the familiarity with the situation of the specific NCR accused that the lower tribunals possess, and the difficulty of assessing whether a given individual poses a "significant threat" to public safety.

[17] In this case, the Board has had an extended period of contact with Mr. Denny and multiple occasions to reflect upon his circumstances. Indeed, that history was commented on in the Board's reasons:

> One of the advantages of having chaired this Board for a number of years is the ability to revisit the circumstances of previous decisions, such as the orders issued when Mr. Denny was first under our jurisdiction. … the offence that occurred on Gottingen Street happened at a time when Mr. Denny had no level of community access at all …

[18] The standard of review invoked by s. 672.78(1)(a) is reasonableness (*Owen; Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498). This requires consideration of whether it was reasonable for the Board, performing its task under the analytical framework set out in s. 672.54, to increase the level of privileges for Mr. Denny from the L4 designation to the L5 designation.

[19] As identified earlier, the *Code* mandates the Board's four considerations in making the "necessary and appropriate" disposition:

i) the safety of the public (the paramount consideration);

ii) the mental condition of the accused;

iii) the reintegration of the accused into society;

iv) the other needs of the accused.

[20] In *Tompkins (Re)*, 2018 ONCA 654, the Ontario Court of Appeal framed the task of the Board and the exercise of appellate review this way:

> [23] The necessary and appropriate disposition is that which is the least onerous and least restrictive to the accused consistent with public safety: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, at para. 19. It is the entire "package of conditions" that must be the least onerous and least restrictive: *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, ("*Tulikorpi*"), at para. 71; *Re Conway*, 2016 ONCA 918 (CanLII), at para. 38. In making this determination an NCR offender "is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused": *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625, at para. 43.
>
> [24] The Board is required to gather and review all available evidence pertaining to the four factors set out in s. 672.54: *Winko*, at para. 55; *R. v. Aghdasi*, 2011 ONCA 57 (CanLII), at para. 19. Failure to consider all of the factors when determining the least onerous and least restrictive disposition is an error of law: *Magee*, at paras. 59, 65.
>
> [25] Section 672.78 of the *Criminal Code* provides that this court may set aside an order of a Review Board only where it is of the opinion that:
>
> a. it is unreasonable or cannot be supported by the evidence;
>
> b. it is based on a wrong decision on a question of law; or
>
> c. there was a miscarriage of justice.
>
> [26] The standard of review when applying the first branch of s. 672.78 is reasonableness, while the second branch is concerned with a question of law, and thus the standard is correctness: *Mazzei*, at para. 16.

[21] The reasonableness standard means deference must be given to the Board's decision. The Crown argues the Board erred in law in failing to acknowledge and consider Mr. Denny's diagnosis and in failing to examine his other needs. The Crown also argues the Board's decision to increase Mr. Denny's level of privileges was unreasonable as it does not represent the least onerous and restrictive disposition in keeping with the paramountcy of public safety.

[22] As to the Crown's argument that the Board erred in law, a review of the decision reveals that despite its economy of reasons, the Board properly instructed itself on and applied the four statutory factors to be considered in determining the appropriate disposition.

[23] The Board discussed the medical evidence, which spoke to Mr. Denny's ongoing progress with treatment compliance and abstinence. His medical history and his level of insight were also examined in the decision. References to his efforts toward reintegration, both in past and at the time of the disposition hearing, are found at several points in the Board's decision. The decision does not

pointedly use the phrase "safety of the public" after identifying it as one of the four mandated factors at the outset of the decision. Nonetheless, the decision did discuss what it would mean for Mr. Denny to circulate in the community, both in terms of past failures and their resultant consequences, and in terms of what future investigations might be needed and steps taken, in the Board's opinion, to allow him to continue to progress.

[24] The Board summarized the medical evidence offered in the hearing and Mr. Denny's history of progress exercising the privileges of both supervised and partially supervised time in the community. The Board was also cognizant that increasing the level of privileges was not automatic in the sense that any implementation of the increased L5 level of privilege was at the medical team's discretion:

> The team goal is to move away from programming towards structured activities in the community. There are no definitive plans to use the bungalow. The team wants to see more independent community outings before overnights are implemented. Work will have to be done with the family as well. (p. 4)

[25] The Board's decision gave authorization to the medical team to permit, as and when determined appropriate, the enhanced privilege associated with the increase from the L4 to the L5 designation.

[26] The Board did not need to wrestle with competing or contradictory evidence in reaching its conclusion to move Mr. Denny from an L4 to L5 privilege level. Rather, all of the evidence provided to the Board at the hearing, and all of the historical context referenced in the hearing and in the decision, concurred as to Mr. Denny's ongoing progress in responding to treatment and gradual increases in his level of privileges. The decision makes it clear that Mr. Denny's success with increased levels of community access after his initial hospitalization, and certainly after the events surrounding the death of Mr. Taavel, were measures of progress that could justify for the Board their decision to increase the level of privileges from L4 to L5.

[27] The Board's reasons permit the conclusion it was satisfied Mr. Denny's progress and circumstances were much different than they had been at any earlier time since coming to the Hospital.

[28] The Board was uniquely positioned to assess Mr. Denny's situation. That the reasons articulated by the Board were a model of brevity does not automatically permit the conclusion they were not reasonable. Each of the four

mandated factors are reflected and captured in its reasons. A reading of the transcript of the hearing satisfies me the Board's decision was supported by the evidence before it, in concert with the Board's cumulative knowledge of Mr. Denny's diagnosis and progress. Mr. Denny was not under any burden in the hearing; it was the Board's task to gather and consider the evidence (*Kachkar (Re)*, 2014 ONCA 250 at para. 32). The decision does not reveal any errors in law.

[29] The Board is entitled to deference; the decision was one open to it on the evidence before it. With the benefit of detailed information from the medical team, the Board determined an increase in privileges to L5, and not L6 as had been advocated by Mr. Denny, was appropriate in light of the decision-making criteria in s. 672.54. Absent any error in law, I am unable to conclude the decision was unreasonable.

Issue 2 – Sufficiency of Reasons

[30] The Crown maintains the content of the Board's disposition reasons are insufficient to permit an understanding as to how its decision was reached. While the decision was terse, once again it must be considered in the context of the Board's cumulative knowledge of Mr. Denny and the evidence that was made available to the Board at the hearing. Arguably the pathway to its reasons might have been set out in more breadth, however I am satisfied the decision in its entirety allows the reader to understand the Board's conclusions. The reasons provided support the decision reached, one that was within a reasonable range of outcomes given Mr. Denny's privilege level had been rising over time relative to success in rehabilitation. The evidence of Mr. Denny's situation and progress were reflected in the reasons. The decision made was open to the Board on the evidence before it and the absence of more expansive reasons is not fatal.

[31] *R. v. Sheppard*, 2002 SCC 26, is one of a series of cases that signalled a modern approach to the need for "reasoned reasons". Within the context of a criminal law decision, Binnie, J. said this about adequacy of reasons:

> [22] There is a general sense in which a duty to give reasons may be said to be owed to the public rather than to the parties to a specific proceeding. Through reasoned decisions, members of the general public become aware of rules of conduct applicable to their future activities. An awareness of the reasons for a rule often helps define its scope for those trying to comply with it. The development of the common law proceeds largely by reasoned analogy from established precedents to new situations. Few would argue, however, that failure to discharge this jurisprudential function necessarily gives rise to appellate intervention. New

> trials are ordered to address the potential need for correction of the outcome of a particular case. Poor reasons may coincide with a just result. Serious remedies such as a new trial require serious justification.
>
> [23] On a more specific level, within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented (*R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at p. 356; *R. v. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49 (Man. C.A.), at pp. 53-56 and 61-63; *R. v. Hache* (1999), 25 C.R. (5th) 127 (N.S.C.A.), at pp. 135-39; *R. v. Graves* (2000), 189 N.S.R. (2d) 281, 2000 NSCA 150, at paras. 19-23; *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 (Ont. C.A.), at pp. 67-68). The absence of reasons, however, does not necessarily indicate an absence of such concentration. We are speaking here of the *articulation* of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former. [Emphasis in original.]

[32] The Crown objects to the decision on the basis it does not permit the reader to fully understand the reasons for the decision the Board reached.

[33] In *S.R. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 46, this Court discussed the ability to exercise meaningful appellate review as key to the question of adequacy of reasons:

> [17] In a series of cases, the Supreme Court of Canada has recognized the importance of reasons in various settings: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39; *R. v. Sheppard*, 2002 SCC 26; *R. v. Braich*, 2002 SCC 27; *R. v. Walker*, 2008 SCC 34; *F.H. v. McDougall*, 2008 SCC 53; *R. v. R.E.M.*, 2008 SCC 51. Their import can be summarized thusly:
>
> (a) the need for, and adequacy of reasons, is contextual and depends upon the adjudicative setting, (*Sheppard*, para. 19);
>
> (b) reasons inform the parties – and especially the losing party – of why the result came about, (*R.E.M.*, para. 11);
>
> (c) reasons inform the public, facilitating compliance with the rules thereby established, (*Sheppard*, para. 22);
>
> (d) reasons provide guidance for courts in the future in accordance with the principle of *stare decisis*, (*R.E.M.*, para. 12);
>
> (e) reasons allow both the parties and the public to see that justice is done and thereby enhance the confidence of both in the judicial process, (*Baker*, para. 39);

> (f) reasons foster and improve decision-making by ensuring that issues are addressed and reasoning is made explicit, (*Baker*, para. 39; *Sheppard*, para. 23; *R.E.M.*, para. 12);
>
> (g) reasons facilitate consideration of judicial review or appeal by the parties, (*Baker*, para. 39);
>
> (h) reasons enhance or permit meaningful appeal or judicial review, (*Sheppard*, para. 25; *R.E.M.*, para. 11).
>
> . . .
>
> [19] At common law, the inadequacy of reasons does not automatically trigger appellate intervention. "Poor reasons may coincide with a just result" (*Sheppard*, para. 22). As Chief Justice MacDonald said in *McAleer v. Farnell*, 2009 NSCA 14, citing *R.E.M.*:
>
> > [15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:
> >
> > > ¶53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. ***More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.***
> >
> > (Original emphasis)

[34] Insufficient reasons create an inability to appreciate fully the reasoning process used to arrive at a result. As stated in *Awalt v. Blanchard*, 2013 NSCA 11:

> [38] … **the absence or paucity of reasons is not a free standing ground of appeal** (*R. v. Walker*, 2008 SCC 34, ¶ 20; F.H., ¶ 99). Reasons must be assessed in the context of the active issues at trial. Do the reasons fail to disclose an intelligible basis for the result; do they allow meaningful appellate review? (*R. v. R.E.M.*, 2008 SCC 51, ¶ 53.)
>
> . . .
>
> [46] While it can be disappointing for counsel when a judge does not address all his arguments, that does not automatically become "inadequacy of reasons". The evidence supports the trial judge's conclusion, even though that conclusion could have been more articulate. But he committed no error of law or fact in arriving at his conclusion.
>
> [Emphasis added]

[35] Here, there is an identifiable reasoning process set out in the Board's decision. Therefore it is not a case in which the right to meaningful appellate review is frustrated by the insufficiency of reasons.

[36] It cannot be said the Board failed to appreciate or consider relevant evidence or disregarded evidence, despite its rendering of economical reasons. Its reasons may not be structured in a manner the Crown might have preferred, but the Board's decision does allow for meaningful review.

Conclusion

[37] Read in the context of the Board's task under s. 672.54 and the evidence before it, the disposition reached is not tainted by legal error, is not unreasonable, nor is it deficient of reasons and therefore I would dismiss the appeal.

Beaton, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.