

COURT OF APPEAL OF YUKON

Citation: *Arscott v. Yukon*,
2016 YKCA 1

Date: 20160304
Docket: 15-YU761

Between:

Marlon Hugh Arscott

Appellant

And

The Government of Yukon

Respondent

And

Public Prosecution Service of Canada

Respondent

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Shaner

On appeal from: An order of the Yukon Review Board, dated June 5, 2015.

Counsel for the Appellant:

L. Whyte

Counsel for the Respondent,
Public Prosecution Service of Canada:

D. McWhinnie

No one appearing for the
Government of Yukon

Place and Date of Hearing:

Whitehorse, Yukon
November 18, 2015

Place and Date of Judgment:

Vancouver, British Columbia
March 4, 2016

Written Reasons by:

The Honourable Madam Justice Shaner

Concurred in by:

The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

Summary:

Appeal from a decision of the Yukon Review Board (Review Board) granting a conditional discharge under the Mental Disorder provisions in Part XX.1 of the Criminal Code. Mr. Arscott sought an absolute discharge. The Crown and Yukon supported his request. The Review Board found Mr. Arscott continued to pose a significant risk to the safety of the public based on its determination that he had recently used, and would continue to use, illegal drugs and that he was not committed to future compliance with treatment recommendations.

Held: The appeal is allowed and an absolute discharged granted. The evidence did not support the Review Board's conclusions respecting illegal drug use and treatment compliance. With respect to illegal drug use, there was considerable evidence, including the results of random drug and alcohol screening tests, that Mr. Arscott had not used illegal drugs in the two and a half years preceding the hearing, despite an absence of a condition requiring him to abstain. With respect to medication compliance and future treatment, a recent psychiatric assessment, as well as a report from Yukon Mental Health Services indicated Mr. Arscott had been compliant with his medication regime and he had attended counselling and a recovery group regularly since the last hearing. Mr. Arscott indicated at the hearing he would continue to comply with treatments directed by his physician. Absent the Review Board's findings on illegal drug use and compliance, there was no basis for concluding Mr. Arscott posed a significant risk to the safety of the public at the time of the hearing, as required by s. 672.54(a) of the Criminal Code.

Reasons for Judgment of the Honourable Madam Justice Shaner:

[1] Marlon Hugh Arscott appeals from a decision of the Yukon Review Board by which he was denied an absolute discharge.

BACKGROUND

[2] Mr. Arscott has schizophrenia. He is 56 years old. In 1997 he was charged with manslaughter in British Columbia. He was found not criminally responsible for his actions by reason of mental disorder (“NCRMD”), and remained under the supervision of the British Columbia Review Board until 2003, when he was granted an absolute discharge. He then moved to Yukon where, in 2004, he was charged with assaults against police officers and a private citizen in Whitehorse. On June 28, 2004 he was found NCRMD in relation to those charges and was placed under the supervision of the Yukon Review Board (the “Review Board”).

[3] The Review Board granted Mr. Arscott a series of conditional discharges, beginning in 2004. For a number of years he was required to abstain from alcohol and non-prescription drugs, attend programming and meetings as directed, and submit to random alcohol and drug screening tests.

[4] In 2011, Mr. Arscott’s mental health deteriorated due to confirmed cannabis use and non-compliance with his prescribed medication regime. There was an attempt to change and adjust his prescribed medication around this time, which seems to have contributed to the decompensation as well. Ultimately, Mr. Arscott’s mental health got to the point where the Review Board deemed it necessary to order him detained in a psychiatric hospital in Ottawa in 2012. Once there, his condition improved and stabilized and he was released from the hospital on a conditional discharge.

[5] The Review Board granted Mr. Arscott two further conditional discharges, in May and September of 2013. Both required him to maintain a certain level of contact with mental health professionals, attend programming as directed, meet with a

psychiatrist at least once during the period of the disposition, abstain from non-prescribed drugs and alcohol and submit to screening for drug and alcohol use.

[6] Following a hearing in August 2014, Mr. Arscott was granted a further conditional discharge. The conditions were less strict than they had been under previous orders. Notably, the condition that he abstain from drugs and alcohol was removed and the frequency with which he was required to meet with various mental health personnel was reduced to from weekly to monthly. He was still required to submit to drug and alcohol testing.

[7] A continuing theme in the hearings related to each disposition was the Review Board's concern about Mr. Arscott's commitment to medication compliance and his willingness to abstain from using cannabis or other illegal drugs in the absence of legally imposed conditions requiring him to do so. This concern was also expressed consistently in psychiatric evaluations prepared for previous Review Board hearings by Dr. Armando Heredia, a psychiatrist who had performed a number of assessments on Mr. Arscott over the years.

[8] The disposition from which Mr. Arscott appeals was imposed following a hearing on June 5, 2015. Mr. Arscott sought an absolute discharge. The Crown and the Government of Yukon concurred. The Review Board disagreed and granted a further conditional discharge.

[9] The conditional discharge imposed following the June hearing contains terms which are less restrictive than the previous one. Mr. Arscott is no longer subject to random drug and alcohol screening tests. Rather, he may be required to submit to such tests only where the Director of Community Health Programs (the "Director") has reasonable grounds to believe Mr. Arscott may have used drugs or alcohol. The previous disposition also required the Director to determine the frequency with which Mr. Arscott would be required to meet with various mental health professionals and required Mr. Arscott to meet with personnel from Yukon Mental Health Services at least once a month. Under the new disposition, Mr. Arscott may determine the

frequency of such meetings and the requirement that he meet with personnel from Yukon Mental Health Services once a month has been removed.

EVIDENCE AT THE JUNE HEARING

[10] Evidence at the June hearing included an assessment report prepared by Dr. Leo Elwell, dated June 3, 2015, and two reports from Craig Dempsey, a clinician with Yukon Mental Health Services. Mr. Dempsey was present at the hearing to provide information about his reports. The Review Board also heard evidence from Diane Graham, a support worker with Yukon Mental Health Services and from Mr. Arscott himself.

[11] One of Mr. Dempsey's reports addressed Mr. Arscott's medication compliance, abstinence and ongoing integration into the community. The other was a risk assessment. In the former, Mr. Dempsey confirmed Mr. Arscott had been compliant with his medication regime since the last Review Board hearing and that random blood and urine testing conducted on Mr. Arscott in the two and a half years preceding his report were negative. In the latter, Mr. Dempsey concluded Mr. Arscott was in the "low risk" category for future violence and that if he remained compliant with his prescribed medication regime and continued to abstain from drugs and alcohol, his risk level would not change. Mr. Dempsey's opinion was based on the results of the risk assessment he carried out. He recommended an absolute discharge for Mr. Arscott.

[12] Dr. Elwell had been treating Mr. Arscott for approximately eighteen months when he prepared his evaluation report for the Review Board. He reported that Mr. Arscott was medication-compliant and that Mr. Arscott had expressed to him his intention to remain so even if discharged absolutely. Dr. Elwell also noted Mr. Arscott was abstaining from alcohol and illegal drugs, that he had been attending meetings with Yukon Mental Health Services as scheduled and that he was attending a recovery group meeting every two weeks. Dr. Elwell shared Mr. Dempsey's opinion regarding Mr. Arscott's risk, but stated this was "guarded".

He suggested if the Review Board decided to grant a further conditional discharge, it should have minimal conditions.

[13] Dr. Heredia did not assess Mr. Arscott and did not prepare a report about him for the June hearing; however, the Review Board relied heavily upon a psychiatric evaluation he had prepared in September 2013. In that evaluation, Dr. Heredia noted Mr. Arscott was medication-compliant and abstinent at the time, but he expressed doubts about Mr. Arscott's willingness to remain so in the future in the absence of a disposition. He opined that Mr. Arscott lacked insight into his illness and that if Mr. Arscott was to use illegal drugs or alcohol, it was possible he could become violent and thus pose a risk to the community.

[14] Mr. Arscott was questioned by each of Crown counsel, a representative of Yukon Mental Health Services, Review Board panel members and his own lawyer. Areas of emphasis were Mr. Arscott's illegal drug and alcohol use, his willingness to engage with mental health service providers and his commitment to continued medication-compliance if an absolute discharge was granted. He was also questioned about his plans for the future which, at that time, consisted primarily of saving sufficient funds to allow him to move to Ontario, where his mother resides.

[15] With respect to alcohol use, Mr. Arscott responded that he had not had an alcoholic drink in ten years. Some of his responses to the questions of when he had last used illegal drugs were not as precise, however.

[16] Mr. Arscott responded to initial questions about his last cannabis use by saying it was "months ago". He was then asked to clarify what he meant by that. At first, he simply indicated his apartment building was "full of it" and that it was "always around". Subsequently, he gave responses which, by themselves, suggested he had been using cannabis from time to time to fit in with other residents of his apartment building, although he did not specify when this had occurred. He then indicated he had used cannabis "a long time ago". Finally, upon it being put to him in precise terms, he agreed with Crown counsel that the last time he had used drugs was

approximately two and a half years prior to the June hearing. This response was consistent with the results of the drug screening tests reported by Mr. Dempsey.

[17] In response to the Review Board Chairperson's question about whether he would use drugs or alcohol if given an absolute discharge, Mr. Arscott said "no". When asked why, he responded that he could not afford it and that he could no longer have alcohol because he has diabetes.

[18] Mr. Arscott was questioned about his willingness to engage with mental health service providers and to take his medication if an absolute discharge was granted. Again, his position was not well-articulated. This is demonstrated in exchanges at the hearing between Mr. Arscott and each of the Crown prosecutor (Ms. Kaur), the Clinic Manager (Ms. Fast), Review Board Member Kane and Counsel for the Government of Yukon (Ms. Sova).

[19] In some exchanges, it was clear Mr. Arscott was prepared to continue to seek counselling, take his medication and abstain from alcohol and illegal drugs if so directed by Dr. Elwell or by mental health professionals, even if he received an absolute discharge. The following exchange with the Crown prosecutor is an example:

Ms. Kaur: And if you didn't have a condition that told you you've got to take your medication and keep up with your mental health, would you do it anyway?

The Accused: I'll – I'll do what I'm told.

Ms. Kaur: Yeah? Okay. What about hooking up with Mental Health Services and keeping in touch with them?

The Accused: If they want me to, I guess –

Ms. Kaur: Yeah?

The Accused: – I'd do that.

Ms. Kaur: Okay. Is that something you think has helped you over the years?

The Accused: Oh, yeah.

[20] Similarly, Mr. Arscott seemed to indicate a willingness to voluntarily comply with recommended counselling in response to questions from Ms. Fast:

Ms. Fast: So, if you were given an absolute discharge you wouldn't have to come to Mental Health Services, but would you choose to come to Mental Health Services?

The Accused: If they want me to.

Ms. Fast: Well, nobody would be telling you to.

The Accused: Yeah, I'll do what I'm told. I'd be glad to. I'd be glad to.

Ms. Fast: Yeah, but do you think you need to come to Mental Health Services?

The Accused: If you want me to.

Ms. Fast: Do you think you need to?

The Accused: Yeah . . .

[21] By contrast, Mr. Arscott's responses to questions by Panel Member Kane and to Ms. Sova, respectively, indicated what might be described as a less certain level of commitment to maintaining contact with mental health services and taking his medication:

Member Kane: Yeah. Well – yeah. Well, that's what I was trying to get at. Because if you get an absolute discharge then Mental health can say they want you to come but they can't really do anything about it.

The Accused: Well, then I wouldn't do it. I would – I have to stay on my medication for diabetes anyhow.

Member Kane: Yeah

The Accused: And as for the needle, the injection, it caused sugar diabetes. It has side effects, which I figure really extreme, but that's what it caused.

Member Kane: Yeah. So if – if you went back to Ontario, do you think you'd get in touch with Mental Health, because no one would know about you.

The Accused: No, I wouldn't do that unless they wanted me to.

...

Ms. Sova: Okay. Now, you've said you would – you know, you would do what you're told. If Dr. Elwell said he would like you to take your medication, your injection, would you do that?

The Accused: If I can get out of it I would. I'd be glad to take it, though, if he wants me to.

Ms. Sova: Okay

The Accused: I've took it 10 years now.

Ms. Sova: So if he said it was a good idea for you, you'd listen to that?

The Accused: Yeah

Ms. Sova: Okay. And what – if your mom said that it was a good idea, would you listen to her?

...

Ms. Sova: So what about your mom?

The Accused: Well, my mom doesn't want me taking it either.

Ms. Sova: She doesn't eh? Okay. But – if Dr. Elwell said that you should take it, you would?

The Accused: If I have to, yeah.

Ms. Sova: If Mental Health said that they would like you to visit them . . . ?

The Accused: If I have to, I will.

Later on, however, his answers suggested he would comply with direction from Dr. Elwell and Yukon Mental Health Services if an absolute discharge was granted.

THE BOARD'S DECISION

[22] Following the June hearing, the Review Board determined Mr. Arscott remained a significant threat to the safety of the public and accordingly, granted the conditional discharge.

[23] In reaching this conclusion, the Review Board considered, *inter alia*, the reports and information from Dr. Elwell and Mr. Dempsey, the responses provided by Mr. Arscott and the unanimous recommendation of the Crown, the Government of Yukon and Mr. Arscott's lawyer, for an absolute discharge. It also placed significant emphasis on the concerns and opinions expressed in the 2013 psychiatric evaluation prepared by Dr. Heredia.

[24] The Review Board acknowledged Mr. Arscott had been compliant with his prescribed medication regime for "some time", but found he had an "ambivalent attitude" towards the need to remain compliant and noted Mr. Arscott sometimes required reminders to attend appointments. It also expressed concerns about whether Mr. Arscott would continue to seek access to mental health support services in the community if granted an absolute discharge. Finally, the Review Board determined Mr. Arscott was continuing to use cannabis, something which had led to

destabilization in the past and which the Review Board considered a serious risk factor for future decompensation.

[25] The essence of the Review Board's decision is captured in the passages below:

17. The totality of the evidence makes it clear that as long as Mr. Arscott remains medication compliant, abstains from the use of alcohol and illicit drugs, and continues to access and use the support of Yukon Mental Health Services, the factors set out in section 672.54 of the *Criminal Code*, namely the safety of the public, Mr. Arscott's reintegration, his mental health, and his other needs, are well addressed.

18. The Review Board is not persuaded by the evidence before it, however, that any of these risk factors are or would be well managed in the future in the event that Mr. Arscott is discharged absolutely, as proposed by the parties. Although submissions of the parties stressed many of the more positive aspects of Mr. Arscott's progress, evidence before the Review Board raises a number of serious concerns.

19. Although materials in the disposition information repeatedly indicate that Mr. Arscott has been abstinent, at the hearing Mr. Arscott testified candidly about his use of illicit drugs. Though his responses to questions about how recently he used drugs lacked detail, his characterization of use within a period of "months" and his discussion about having used at least some marijuana to fit in with the other "Joe's" at his residence makes it clear that he has continued to use illicit drugs recently. Mr. Arscott's use of drugs also raises significant concerns about both his ability to comply with abstinence conditions that have been in place for many years, and more important – his level of insight into his mental health and how this is affected when illicit drugs are consumed. In light of this evidence, the Review Board has no reason to believe that Mr. Arscott's drug use would cease or even diminish in the absence of a Review Board disposition.

...

25. Although he has done well on many counts, the Review Board's analysis of the totality of this evidence, including Mr. Arscott's continued use of illicit drugs, his relative lack of insight or commitment to maintain his medication compliance and mental health, led the Review Board panel to conclude unanimously that Mr. Arscott remains a significant threat to the safety of the public – as stated orally at the conclusion of the hearing.

ANALYSIS

[26] Mr. Arscott challenges the Review Board's conclusion that he continues to pose a significant risk to the safety of the public and, in particular, the findings upon which the Review Board's conclusion is based.

[27] It is useful to set out very generally the applicable legal framework.

[28] The Mental Disorder provisions found in Part XX.1 of the *Criminal Code* provide a mechanism for ensuring, to the extent possible, that society is not at risk from individuals who have committed criminal acts, but who have been found NCRMD.

[29] Review Boards have the authority to impose a variety of conditions and restrictions on NCRMD individuals who come before them, which can be tailored to suit each individual's psychiatric needs. Ideally, the conditions imposed on the NCRMD individual will result in access to treatment and support which, in turn, will improve that person's mental health to a point where he or she no longer poses a significant risk of harm. This is where a Review Board's role ends, however. Its role does not extend to managing the mental health needs of an NCRMD individual, even though it may appear an NCRMD individual will benefit from continued oversight. The law simply does not allow a Review Board to exercise control over individuals unless they continue to pose "a significant threat to the safety of the public" at the time of the hearing. In cases where the individual does not pose such a threat, an absolute discharge must be granted: *Criminal Code*, s. 672.54(a).

[30] What constitutes a "significant threat to the safety of the public" is now codified in s. 672.5401:

For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public . . . resulting from conduct that is criminal in nature but not necessarily violent.

[31] Prior to amendments to the *Criminal Code* in 2014 to include this specific provision, the meaning of "significant threat to the safety of the public" was considered by the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. Justice McLachlin, as she then was, stated (at 665) that the risk cannot be speculative and must be:

. . . 'significant' in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the

sense that this potential harm must be serious. A minuscule risk of grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold.

[32] Justice McLachlin discussed specifically the need for a Review Board to make a positive finding of significant risk to public safety to justify anything other than an absolute discharge at 660-661:

Section 672.54, read thus, does not create a presumption of dangerousness. There must be evidence of a significant risk to the public before the court or Review Board can restrict the NCR accused's liberty. Nor does s. 672.54 permit the court or Review Board to refuse to grant an absolute discharge because it harbours doubts as to whether the NCR accused poses a significant threat to the safety of the public. Since there must be a positive finding of a significant risk to the safety of the public to engage the provisions of the *Code* and support restrictions on liberty, something less – i.e., uncertainty – cannot suffice.

[33] The key areas about which the Review Board was concerned in this case, and which figured most prominently in its ultimate conclusion were, first, whether Mr. Arscott was using cannabis; and second, whether he would remain medication-compliant and continue to access mental health services in the absence of conditions. With respect to cannabis use specifically, there was information before the Review Board, which was not in dispute, that Mr. Arscott had used cannabis in the past and that it had contributed to prior episodes of decompensation.

[34] Although some of his responses to questions about when, exactly, he had last used cannabis were imprecise, Mr. Arscott ultimately agreed with Crown counsel that he had not used illegal drugs in the two and a half years before the June hearing. This was corroborated by the results of random drug tests reported by Mr. Dempsey. The accuracy and reliability of those results were not in issue and the Review Board expressly acknowledged at paragraph 19 of its decision that there was information which demonstrated Mr. Arscott *had* been abstinent. Nevertheless, the Review Board determined Mr. Arscott had used cannabis recently and that he was likely to continue to do so.

[35] With respect to the question of whether Mr. Arscott would use illegal drugs in the future, the Review Board placed significant emphasis on Dr. Heredia's 2013

opinion that Mr. Arscott lacked insight into both his illness and the need to remain abstinent. While it was not improper for the Review Board to have considered Dr. Heredia's report, the Review Board does not appear to have turned its attention to the report's age, nor Mr. Arscott's conduct and progress in the years since it was written. The Review Board referred to the report as "recent", but it was not recent relative to the reports from Mr. Dempsey and Dr. Elwell, prepared specifically for the June hearing.

[36] In their own reports, both Dr. Elwell and Mr. Dempsey acknowledged the need for Mr. Arscott to remain abstinent, but neither expressed an opinion that Mr. Arscott was likely to start using illegal drugs and alcohol if he received an absolute discharge. Further, neither identified potential illegal drug use in the future as a major concern. Finally, Mr. Arscott himself told the Review Board's Chairperson he would not start using illegal drugs again if granted an absolute discharge.

[37] Respectfully, I find the Review Board erred in concluding that Mr. Arscott had used illegal drugs recently and that he would continue to do so. There was no evidence from which it could be concluded there had been recent drug use. There was, however, a significant amount of evidence, including the results of random drugs tests, to support the conclusion Mr. Arscott had not been using illegal drugs, even in the absence of conditions requiring him to abstain.

[38] Further, I find the Review Board's conclusion that Mr. Arscott would not continue to comply with his treatment regime of medication and counselling, was not reasonable, given the evidence.

[39] In response to a question about future compliance from Panel Member Kane, Mr. Arscott suggested he would not continue counselling, nor comply with his medication regime, unless he was required to do so. Later in that exchange, and in response to questions from other individuals, it is apparent he does not distinguish between a legal requirement to comply and a medical recommendation or direction that he do so. For example, he told Panel Member Kane he "wouldn't do that unless they wanted me to" and in his responses to each of the Crown prosecutor and Panel

Member Fast he indicated he would take his medication and continue to access services if “they” wanted him to do so, or if Dr. Elwell directed it. Taken together, Mr. Arscott’s answers demonstrate a clear intention to comply with treatment recommendations from health care professionals.

[40] Just as it did on the issue of illegal drug use, Dr. Heredia’s 2013 report figured prominently in the Review Board’s concerns and the conclusions it reached about Mr. Arscott’s willingness to comply with recommended treatment in the future. Dr. Heredia opined that Mr. Arscott had limited insight into his condition. He also reported that Mr. Arscott had told him he would remain compliant only to satisfy the Review Board. Again, however, the Review Board considered neither the age of the report, nor Mr. Arscott’s progress and conduct in the almost two years following its preparation.

[41] The Review Board had before it information from a number of sources about Mr. Arscott’s more recent progress and conduct. One of these sources was Diane Graham, Mr. Arscott’s support worker from Yukon Mental Health Services. She was present at the hearing and among other things, she relayed that Mr. Arscott’s landlord considered him a “model tenant”; that he was in regular and frequent contact with her; and that he required little prompting in attending appointments for his injections and picking up and taking other prescribed medication.

[42] Additional information about Mr. Arscott’s compliance and progress was contained in the reports from Dr. Elwell and Mr. Dempsey. Each reported that Mr. Arscott recognized the need for ongoing treatment even if the Review Board no longer exercised authority over him. Specifically, Dr. Elwell stated:

Mr. Arscott remains medication compliant and is at therapeutic dose. When queried regarding his compliance he states that he would remain taking the medication even if he is discharged from the Yukon Review Board. He recognizes the need for his medication and desires to “stay out of trouble”.

CONCLUSION

[43] The question for the Review Board was whether, at the time of the hearing, Mr. Arscott posed a significant risk to the safety of the public or, perhaps more precisely, whether there was a foreseeable and substantial risk he would commit a serious crime in the future if he was granted an absolute discharge. The Review Board found there was such a risk, based on its findings that Mr. Arscott had recently used illegal drugs and was likely to continue to do so, and that he would not comply with treatment recommendations in the absence of a disposition. There was, however, no basis for the Review Board's finding that Mr. Arscott had recently used illegal drugs and would continue to do so, nor was its conclusion respecting future compliance reasonably supported by the evidence. Absent these findings, there was no basis upon which to conclude Mr. Arscott posed a significant risk to the safety of the public at the time of the hearing, as required by s. 672.54(a) of the *Criminal Code*.

[44] I would allow the appeal, set aside the disposition and grant Mr. Arscott an absolute discharge.

“The Honourable Madam Justice Shaner”

I AGREE:

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Mr. Justice Groberman”