

CANADA / JUDGMENT

Cole (Re)

2025 ONCA 899

COURT

Court of Appeal for Ontario

DECIDED

29 December 2025

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Collection

Decisions of the Court of Appeal

Date

2025-12-29

Neutral citation

2025 ONCA 899

Docket numbers

COA-25-CR-0094

Judges

van Rensburg, Katherine; Paciocco, David M.; Wilson, Darla A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: Cole (Re), 2025 ONCA 899

DATE: 20251229

DOCKET: COA-25-CR-0094

van Rensburg, Paciocco and Wilson JJ.A.

IN THE MATTER OF: Rohan Mark Cole

AN APPEAL UNDER PART XX.1 OF THE CRIMINAL CODE,

R.S.C. 1985, c. C-46

Anita Szigeti, for the appellant

Stephanie Pak, for the respondent the Attorney General of Ontario

Jessica Szabo, for the respondent Person in Charge, Ontario Shores Centre for Mental Health Sciences

Heard: September 26, 2025

On appeal against the disposition of the Ontario Review Board, dated January 22, 2025, with reasons dated January 29, 2025, reported at 2025 CanLII 13614.

van Rensburg J.A.:

A. Overview [1] The appellant Rohan Mark Cole appeals the disposition of the Ontario Review Board (the “Board”) from his most recent annual review hearing.

[2] The disposition ordered that the appellant be detained at the Ontario Shores Centre for Mental Health Sciences (the “Hospital”) within a Secure Forensic Unit in the Forensic Program. The appellant contends that the Board erred in failing to impose the least onerous and least restrictive disposition commensurate with public safety, which, in his submission, was his continued detention in the Hospital’s Forensic Program in the unit determined by the Hospital. The appellant also appeals two other aspects of the disposition: he seeks to remove clause 4(d), referred to as the “electronics supervision clause”,^[1] and he asks that the disposition be amended to add back in clauses 2(d), 2(g) and 2(h) from his previous disposition of January 19, 2024, providing for accompanied and indirectly supervised hospital grounds and community privileges and passes, with the approval of the person in charge.

[3] The Hospital supports the appellant’s appeal in all respects, asserting that the Board’s disposition was not grounded in the evidence before it and was unreasonable.

[4] The Attorney General asks that this court uphold the disposition providing for the appellant’s detention in a Secure Unit and the inclusion of the electronics supervision clause. The Attorney General agrees that the clauses providing for accompanied and indirectly supervised privileges and passes were mistakenly removed by the Board and should be reinstated.

[5] For the reasons that follow, I would allow the appeal in respect of the clauses pertaining to accompanied and indirectly supervised privileges and passes, and I would dismiss the balance of the appeal.

B. Relevant Facts [6] The appellant was first placed under the supervision of the Board in April 2008, when he was found not criminally responsible on account of mental disorder (“NCR”) on charges of criminal harassment. The index offences consisted of the appellant, over the course of a year, making frequent phone calls, sometimes of a sexual and/or threatening nature, to a female actor with whom he believed he was in a romantic relationship.

- [7] The appellant was also found NCR on June 14, 2012, and December 13, 2018, in respect of further criminal charges and breaches of his Board dispositions, after he again initiated contact with the victim of the index offences through repeated phone calls.
- [8] The appellant’s primary mental health diagnosis is schizophrenia. He has also been diagnosed with cannabis use disorder and alcohol use disorder, both of which are in remission in a controlled environment.
- [9] During the reporting year the appellant was under a disposition that provided for his detention in the Forensic Program of the Hospital. He began the year in a Secure Unit but was transferred to a General Unit on August 23, 2024. On September 18, 2024, he was granted indirectly supervised hospital grounds privileges. On November 9, 2024, the appellant eloped, after postponing and not receiving his scheduled dose of long-acting injectable antipsychotic medication. Two days later, the police located him at his brother’s home in Brampton, and he was returned to the Hospital. The appellant was in possession of electronic devices, in breach of the electronics supervision clause, which was also in his 2024 disposition.
- [10] In January 2025, just days before his annual Board hearing, the appellant again eloped from the Hospital, while on indirect hospital grounds privileges (which had recently been reinstated). He was found and returned by the police hours later.
- [11] At the annual review hearing it was not contested that the appellant continued to pose a significant risk to public safety; the only live issue was the appropriate disposition. The appellant and the Hospital submitted that the appropriate disposition would be (1) his continued detention at the Hospital in the Forensic Program; (2) the removal of the electronics supervision clause from the appellant’s disposition; and (3) the continuation of the clauses providing for indirect and accompanied privileges. Prior to the hearing, the Hospital abandoned its recommendation for community living.
- [12] While at the outset of the hearing it appeared that all parties were in agreement on the appropriate disposition (indeed, the chairperson of the Board referred to the parties’ “joint submission”), in the course of the proceedings it became apparent that the Attorney General was asking the Board to specify the appellant’s detention in a Secure Unit and that absent this disposition, the Attorney General would oppose the removal of the electronics supervision clause.

C. The Board’s Disposition [13] It is sufficient at this point to briefly summarize the disposition and reasons of the Board.

- [14] The Board observed that the appellant's behaviour had been challenging during the reporting year, with two unauthorized leaves of absence since November 2024, sexualized comments and aggression. The first elopement in the reporting year took place when the appellant had not taken his required medication, and during this elopement he violated the electronics supervision clause. The Board noted that the risk to public safety increased greatly when the appellant eloped under these conditions.
- [15] Regarding the terms of the disposition, the Board concluded that it was not reasonable to remove the electronics supervision clause because the appellant continued to hear the victim's voice through auditory hallucinations, and the auditory hallucinations should be brought under control before this clause was removed. The Board also noted that it was unreasonable to expect the victim to report a breach. Further, as per the Hospital's recommendation and the agreement of the parties, the appellant would not be granted community living privileges. Stating (inaccurately) that clauses 2(d), 2(g) and 2(h) from the previous disposition were terms that support the community living clause, the Board did not include them in its disposition. Finally, the Board concluded that the necessary and appropriate, least onerous and least restrictive disposition was detention in a Secure Unit.

D. Issues on Appeal [16] The appellant's position on appeal can be summarized as follows:

- (1) The order for the appellant's detention in a Secure Unit rather than in the Forensic Program was unreasonable: it was not the least onerous and least restrictive disposition, and it was not supported by the evidence, which was in part misapprehended by the Board;
- (2) The Board's removal of clause 4(d), the electronics supervision clause departed from the parties' joint position and was unreasonable; and
- (3) The Board inadvertently erred in removing clauses 2(d), 2(g) and 2(h) from the disposition, as these terms were not in support of community living but provided for indirectly supervised and accompanied privileges and passes.

[17] Pursuant to s. 672.78 of the Criminal Code, an appeal from a Board disposition may be allowed only if (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: *Campbell (Re)*, 2018 ONCA 140, 139 O.R. (3d) 401, at para. 27.

[18] The test of a decision's reasonableness is whether "the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination": *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 33. This evaluation is to be undertaken with recognition of the Board's specialized knowledge and expertise. The court should decline to intervene in a decision that falls within the range of possible outcomes available to "Board members properly informed of the facts and instructed on the applicable law": *Owen*, at para. 33.

[19] I will address each issue in turn.

- (1) The Appellant's Detention in a Secure Unit [20] The appellant asserts that the Board's direction that he be detained in a Secure Unit of the Hospital's Forensic Program, rather than simply in the Forensic Program (which was the disposition from the previous year), was unreasonable because it was not the least onerous and restrictive disposition necessary to control his risk. The appellant contends that the Board ignored or discounted the evidence of the progress he had made in reducing his aggression and incidents of violence during the reporting year, and that moving him back to a Secure Unit would set back his rehabilitation and was simply a punitive reaction to his recent elopements. The appellant asserts that the Board misinterpreted the evidence of his psychiatrist Dr. Beverly Chuong, who authored the Hospital report, when it said that "Dr. Chuong testified that she would not be opposed to the Board finding whether Mr. Cole is to be detained on a Secure Unit or General Unit." The appellant also contends that the Board's disposition reflects that it improperly relied on a passage from the Victim Impact Statement seeking a restrictive disposition.
- [21] The appellant and the Hospital submit that the appellant's continued detention in a General Unit would have allowed the Hospital team flexibility in completing their assessment of the appellant after his recent elopement and to manage the appellant as the Hospital saw fit. Indeed, even after the second elopement, the Hospital was assessing the appellant to determine whether his risk could be managed in a General Unit. In the meantime, there was no evidence that his risk was not being managed.
- [22] The Attorney General asserts that the Board's determination that the appellant's risk could only be managed in a Secure Unit was reasonable having regard to the evidence before the Board.
- [23] In my view, the Board's determination that detention of the appellant in a Secure Unit was the least onerous and least restrictive disposition was reasonable.
- [24] First, I note that, while at the outset of the annual review hearing all parties indicated that they were in agreement that the existing disposition should be continued (with the removal of the electronics supervision clause), counsel for the Attorney General indicated that, at the time of the hearing she had incorrectly believed the appellant was in a Secure Unit. On appeal, counsel for the appellant fairly acknowledges that there was no procedural unfairness in the Attorney General's apparent change in position. The Board members asked a number of questions of Dr. Chuong directed at both whether the appellant's risk could be managed in a General Unit and whether the electronics supervision clause should be removed. These issues were fully addressed in the course of the hearing and in the submissions of counsel.
- [25] Second, I do not agree with the submission that the Board misinterpreted Dr. Chuong's testimony. Dr. Chuong testified that at the time of the hearing, the Hospital team was in the early stages of reassessing the appellant to determine where his risk would best be managed, taking into consideration the level of his auditory hallucinations, the factors that led to his elopements, and whether his unmanageable behaviours, such as verbal outbursts,

continued to escalate. While the Hospital's position at the hearing was that it was appropriate to continue the appellant's detention in a General Unit while he was being assessed, in response to a question from a Board member, Dr. Chuong stated that the treatment team and the Hospital had discussed the issue and would not be opposed to the Board making a decision about his placement.

- [26] I also do not agree that the Board's disposition reflects an improper reliance on the Victim Impact Statement, in particular the victim's request for the "strictest detention guidelines possible, including continuous monitoring, no physical contact with visitors and no excursions outside of the hospital."
- [27] Counsel for the Hospital specifically asked the Board to disregard this part of the Victim Impact Statement, in response to which the chairperson responded, "Well, it's a fine line. I think the Board can take that into consideration of ... the disposition" before asking counsel for the appellant and the Attorney General for their positions. Both lawyers said that they would leave it to the Board to determine what was relevant.
- [28] I acknowledge that the impugned passage fell outside the proper scope of s. 672.5(14) of the Criminal Code and that the chairperson was incorrect in suggesting that it could be considered in determining the appropriate disposition. And once the admissibility of the Victim Impact Statement was raised, the Board ought to have determined the issue.
- [29] However, as this court stated in response to similar circumstances in *Klem (Re)*, 2016 ONCA 119, 345 O.A.C. 79, "[w]hile it would have been preferable for the Board to tell the parties that it would only consider the admissible parts of the statements, or to direct the parties to redact the statements ... the Board's failure to do so [did not] automatically [render] the Board's decision unreasonable": at para. 58. In this case, as in *Klem*, I am not persuaded that the Board ultimately relied on the impugned passage from the Victim Impact Statement to arrive at its decision as to the appropriate disposition. The suggestion by the chairperson that the impugned passage could be relied upon was made during a colloquy with counsel before the board began deliberating, rather than in the decision. In its summary of the evidence at the hearing in the decision, the Board did not refer to any part of the Victim Impact Statement, and when considering the appropriate disposition, the Board only indirectly referred to the contents of the Victim Impact Statement by adverting to the "serious psychological harm" suffered by the victim, which the Board was entitled to consider under s. 672.5(14).
- [30] Contrary to the submissions of the appellant and the Hospital, the detention of the appellant in a Secure Unit was reasonable, and fully supported by the evidence.
- [31] The Board did not disregard evidence favourable to the appellant. It referred to the evidence that the appellant's physical conflicts had reduced, resulting from the appellant's work with a behavioural therapist. The Board also recognized that the appellant had made no apparent attempt to contact the victim since July 2018. That said, the Board noted that the appellant continued to have challenges with emotional regulation and impulse control, including

verbal altercations, a physical altercation with a co-patient, and conflicts with staff. And while the appellant claimed that his auditory hallucinations had declined by 90%, he also reported that the “loudest voice” was that of his victim, and he was telling her to “move on”.

- [32] The very recent elopements of the appellant from the Hospital, together with his condition and behaviour in connection with the elopements, suggested that his risk of re-offence was not in fact being adequately managed after his transfer to a General Unit. On the first occasion, the appellant absconded to his brother’s home while using indirectly supervised privileges, without receiving his antipsychotic medication. He told his brother he was discharged by the Hospital, and although he denied the use of substances, his urine tested positive for opiates and cocaine metabolites upon his return. He was also found to have breached the electronics supervision clause. When he returned to the Hospital, the appellant told staff that he had no intention of returning to the Hospital if he had not been located. He also stated that the unauthorized leave was “worth it” and that he would “do it again”. The elopement in January 2025 resulted from the appellant’s auditory hallucinations telling him to leave the Hospital to buy cigarettes. He was aggressive and agitated on his return, requiring placement in locked seclusion. He expressed that if he remained in a General Unit, he would “take off again.”
- [33] In my view, it was not unreasonable in all the circumstances for the Board to order the appellant detained in a Secure Unit, rather than to accede to the proposal that the appellant remain in a General Unit so that the Hospital could assess him and then determine the appropriate placement, triggering a restriction of liberty hearing if he were moved to a Secure Unit. The evidence before the Board supported the finding that the appellant’s risk had not been properly managed on a General Unit, having regard to the appellant’s offence history; the instability of his condition, including his recent report of worsening auditory hallucinations; and the circumstances of his two very recent elopements.
- (2) Clause 4(d): The Electronics Supervision Clause [34] With respect to clause 4(d) I note that, at the hearing before the Board the appellant and the Hospital sought the removal of this clause from the appellant’s disposition. The Attorney General agreed that the electronics supervision clause could be dropped if the appellant were detained in a Secure Unit.
- [35] On appeal, the appellant and the Hospital submit that the Board erred in departing from what was in essence a joint submission and that the electronics supervision clause was not reasonable. They contend that the electronics supervision clause is not necessary to protect the victim of the index offence or the public. The appellant had made no attempt to contact the victim in the past 6.5 years, even during a period of several months when the provision had inadvertently not been enforced and the appellant had unsupervised access to electronics. They point to Dr. Chuong’s evidence that even with the removal of clause 4(d), the Hospital would continue to supervise the appellant’s use of electronic devices, gradually reducing the supervision, and could start direct supervision again if they felt it was necessary to manage the risk.

- [36] The Attorney General contends that the Board was entitled to reject the joint submission and that the decision to retain the electronics supervision clause was reasonable and supported by the evidence.
- [37] I agree. As Laskin J.A. observed in *Osawe (Re)*, 2015 ONCA 280, 125 O.R. (3d) 428, at para. 33, “[t]he board has the undoubted authority, indeed the duty, to reject a joint submission if it is of the view that the joint submission does not meet the requirements of s. 672.54 of the Criminal Code.” As I have already indicated, the appellant does not suggest that the removal of the clause in the face of the apparent agreement of the parties was procedurally unfair, as the Board’s concerns were communicated, and the issue was fully canvassed in evidence and the parties’ submissions.
- [38] The Board considered as relevant the fact that the appellant’s hallucinations had worsened, including a specific hallucination involving the victim’s voice. Contrary to the appellant’s submission, the Board did not require the appellant to have no hallucinations before having unsupervised use of electronics, but reasonably stated that his auditory hallucinations should be brought under control. Although Dr. Chuong suggested that the treatment team could continue to supervise the appellant’s electronics for a transitional period and as needed, she acknowledged that the appellant might object to supervision in the absence of an order, and she agreed that it would be reasonable to keep such an order in place, which protects the public and does not create a conflict between the team and the patient.
- [39] I also agree with the Attorney General that, although the Board’s framing of its concern about unsupervised electronics access as an “onerous and unreasonable” expectation for the victim to report a breach was awkward, its underlying concern about the management of the appellant’s risk was legitimate. On multiple occasions, when the appellant contacted the victim while detained, staff were unaware of the appellant’s contact with the victim until they were informed by other parties, including the Crown or a clinical manager. In the circumstances that prevailed at the time of the hearing, it was open to the Board to conclude that the continuation of the electronics supervision clause was required for the protection of public safety.
- [40] Accordingly, I would not give effect to this ground of appeal.
- (3) Clauses 2(d), 2(g) and 2(h) [41] Finally, the appeal should be allowed to correct what appears to have been a misunderstanding by the Board. The Board removed clauses 2(d), 2(g) and 2(h) based on an erroneous belief that they were designed to support an abandoned recommendation for community living. The previous disposition did not provide for community living, and there was no basis for the removal of clauses 2(d), 2(g) and 2(h) which provided for indirectly supervised privileges on hospital grounds and in the community and accompanied passes into the community. Inclusion of these provisions in the current disposition is appropriate and reasonable.

E. Conclusion [42] I would therefore allow the appeal in part in accordance with these reasons and would otherwise dismiss the appeal.

Released: December 29, 2025 “K.M.v.R.”

“K. van Rensburg J.A.”

“I agree. David M. Paciocco J.A.”

“I agree. D.A. Wilson J.A.”

- [1] This clause prohibits the appellant from using the telephone, internet, mobile devices or any other means of electronic communication, except under the direct supervision of the Hospital.

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Prepared on 27 October 2026 · Esheria