COURT OF APPEAL FOR ONTARIO

CITATION: Marmolejo (Re), 2021 ONCA 130
DATE: 20210302
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Tulloch, Paciocco and Harvison Young JJ.A.

IN THE MATTER OF: Alfredo G. Marmolejo

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Alfredo G. Marmolejo, acting in person

Anita Szigeti and Maya Kotob, for the appellant

Lisa Fineberg, for the respondent, Attorney General of Ontario

Leisha Senko and Michele Warner, for the respondent, Person in Charge of Centre for Addiction and Mental Health

Heard: August 21, 2020 by video conference

On appeal from the disposition of the Ontario Review Board dated September 25, 2019, with reasons reported at *Marmolejo (Re)*, [2019] O.R.B.D. No. 2378.

Tulloch J.A.:

A. OVERVIEW

[1] The appellant appeals from the September 25, 2019 disposition of the Ontario Review Board (the "Board"), which continued the appellant's conditional discharge. That conditional discharge was one of several annual conditional discharges that followed an August 2010 determination that the appellant was not

criminally responsible on account of mental disorder (“NCR”) in relation to two index offences.

[2] The Board released its reasons for disposition on October 16, 2019. It determined that the appellant remained a significant threat to the safety of the public. It further concluded that the only way to manage that threat was a continuation of a conditional discharge with a new term requiring the appellant to submit urine samples for alcohol and drug screening.

[3] The appellant argues that the Board erred in law and arrived at an unreasonable disposition. First, the appellant contends that the Board erred in its application of the significant risk test by simply accepting the evidence and not offering any analysis. Second, and along a similar vein, the appellant submits that the Board’s reasons for disposition are insufficient. The appellant submits that the proper application of the significant risk test does not support the Board’s determination on this issue. The appellant seeks an order for an absolute discharge. Alternatively, he asks this court to remit the matter to the Board for a re-hearing before a differently constituted panel.

[4] For reasons that follow, I agree with the appellant’s position. The Board did not conduct a proper assessment of whether the appellant met the significant risk threshold, as evident by the complete lack of analysis on this point. The evidence before the Board could not support a finding that the appellant constituted a

significant risk to the public. He was therefore constitutionally entitled to an absolute discharge.

[5] In ordinary circumstances, an absolute discharge would be the appropriate disposition. However, a month after this appeal was heard, the Board convened for the appellant's 2020 annual disposition review hearing. On November 2, 2020, it held that the appellant no longer represented a significant risk to the public and granted an absolute discharge: *Marmolejo (Re),* [2020] O.R.B.D. No. 2277. In other words, the appellant's request for relief is now moot. I would nonetheless address the merits of this appeal in order to provide guidance to the Board.

B. FACTUAL BACKGROUND

(1) The Appellant's Psychiatric History

[6] The appellant's psychiatric history dates back to 1987 when he was a teenager. He was first hospitalized at age 15 when police found him "wandering in the streets" and "crossing in traffic." His mother reported that he experienced symptoms of paranoia and suspiciousness in the years following his hospitalization.

[7] In September 2005, the appellant was found NCR for a charge of arson. A doctor diagnosed him with schizophrenia and depression. He was transferred to a minimum secure unit in November 2005. By September 2006, he was spending weekends with his parents. After a hearing in November 2006, the Board issued a

minimum-security detention order with community living privileges. In December 2006, he was discharged to live in an apartment in the community. Just under a year later, in November 2007, the Board issued a conditional discharge. The appellant's mental status remained stable and he was compliant with his medications.

[8] At his 2008 annual disposition review hearing, the Board granted the appellant an absolute discharge. The appellant reported that he stopped taking his medication approximately one year after his discharge. Between 2009 and 2010, he was hospitalized pursuant to the *Mental Health Act*, R.S.O. 1990, c. M. 7 on three occasions.

(2) The Index Offences

[9] In April 2010, the appellant was convicted of one count of criminal harassment and one count of failing to comply with a probation order. On August 24, 2010, the appellant was found NCR for these offences. At the time, the appellant was delusional, paranoid, and verbally aggressive. He was treated with medication and sentenced to a period of incarceration, followed by a period of probation for two years. These two index offences form the subject matter for the disposition of the Board that is now at issue.

(3) The Board's Dispositions Between 2010 and 2019

[10] On November 8, 2011, the appellant was discharged to live in an apartment at a temporary transitional housing facility. Eleven months later, he moved in with his family. By 2012, his medication was reduced.

[11] In 2013 the appellant was briefly hospitalized when his parents reported he was experiencing auditory hallucinations. His medications were increased. He returned to live with his parents, and then moved into an apartment shortly thereafter.

[12] The Board issued a conditional discharge on May 20, 2014. His medications were decreased. His mental status remained stable and he continued to adhere to his medication regime. He continued to live independently and began working for his brother on a part-time basis.

[13] At annual disposition reviews conducted from 2015 to 2018, the appellant unsuccessfully sought to receive an absolute discharge: each time the Board found that he continued to pose a significant threat, and either added or removed conditions of his discharge.

[14] From 2018 to 2019 the appellant continued to reside independently in his subsidized apartment in Toronto without incident. He received financial support through the Ontario Disability Support Program ("ODSP") and from his parents. He

maintained his relationship with his girlfriend. There were no changes to his medication.

(4) The 2019 Hearing Before the Board

[15] In 2019, the Board released its sixth consecutive disposition continuing the conditional discharge, this time reinserting a term requiring the appellant to submit urine samples for alcohol and drug testing. That disposition is the subject of this appeal.

[16] At the 2019 hearing, the Board received written and oral evidence by way of the Hospital's report to the Board and the testimony of Dr. Choptiany, who is the appellant's outpatient psychiatrist.

[17] Dr. Choptiany testified that the appellant had been compliant with his reporting requirements and accepts that he has schizophrenia. Dr. Choptiany also testified that the appellant has stated that he would continue to take his medication in the event that he was granted an absolute discharge.

[18] Dr. Choptiany expressed concern regarding the appellant's "attitude" toward his index offences. In particular, Dr. Choptiany opined that the appellant had downplayed the significance or severity of the behaviours that occurred at the time of the index offences. The Hospital's report also noted that the appellant was "unable to link his illness to his behaviours at the time of the index offence."

[19] Both the Hospital's report and Dr. Choptiany also noted that the appellant's therapeutic relationship with his psychiatric team deteriorated significantly over the course of the reporting year. It appeared that at least part of the reason was that the appellant was frustrated with his continued supervision by the Board, and the fact that he still had not received an absolute discharge. In his testimony, Dr. Choptiany suggested that it might be helpful if the Board's disposition required the appellant to submit to urine sampling. He was of the view that such testing could assist the psychiatric team in determining why the appellant's demeanor changed.

[20] Dr. Choptiany opined that the appellant still posed a 'significant threat' based on the diagnosis of schizophrenia, along with the appellant's history of non-compliance with medication, substance abuse, aggressive behavior, and limited insight into his situation.

[21] Dr. Choptiany further observed that if the appellant were no longer under the jurisdiction of the Board, he would discontinue his medications, likely use alcohol or illegal substances, and again become psychotic, which would put the public at risk of harm.

C. THE DECISION OF THE BOARD

[22] In the reasons for disposition of the Board dated October 16, 2019, the Board set out a brief summary of the two index offences, the appellant's personal

history, and the legal and psychiatric history. The Board then summarized the appellant's progress over the past year in four paragraphs, which consisted mainly of a lengthy quote from the Hospital's report.

[23] In dealing with the issue of whether the appellant posed a "significant threat", the Board stated only the following:

> 18. The Hospital's report contains information concerning the issue of significant threat to the safety of the public including:
>
> > *"If Mr. Marmolejo were to reoffend, it would flow from noncompliance with antipsychotic medication potentially exacerbated by the use of substances. Mr. Marmolejo has demonstrated limited insight into the specific benefit of a reduced risk for violent or harassing* behaviour *as emanating from ongoing compliance with antipsychotic medication. While he has reported that he would continue taking his medications if no longer under the ORB, it is considered likely that he would stop or reduce the dose of his medication if no longer under the ORB. Risk of violent behaviour would gradually arise as a result of noncompliance. The risk would be exacerbated in the event of his reverting to use of cannabis, which has historically contributed to a paranoid state of mind and the emergence of other psychotic symptoms in Mr. Marmolejo."*
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> 19. In his oral testimony Dr. Choptiany confirmed that Mr. Marmolejo remains a significant threat to the safety of the public because he has limited insight into the nature of his illness. He has a past history of substance

> use. When he is unwell, he is aggressive and is capable of physical and psychological harm. If he did go off his medication, he would fall away from care and decompensate particularly since his therapeutic relationship with his clinical team has deteriorated so badly in the last year.

[24] The Board then concluded as follows:

> 21. The evidence in this case establishes that Mr. Marmolejo continues to represent a significant threat to the safety of the public. This panel accepts that evidence. This panel is also satisfied that the only way to manage the threat is by the maintenance of the conditional discharge with the addition of a urine screen for alcohol and the nonmedical use of drugs. In our view, this is the necessary and appropriate order. It is also the least onerous and least restrictive order in the circumstances of this case. [Emphasis added.]

D. POSITION OF THE PARTIES

[25] The appellant submits that the Board's disposition was unreasonable and rested on an error of law. He argues that the Board failed to conduct a proper assessment as to whether the appellant was a significant threat to the safety of the public. The appellant submits that he does not meet the threshold of significant risk. He takes issue with the imposition of a conditional discharge, as well as the addition of a new condition requiring him to submit urine samples.

[26] The appellant also argues that the Board provided insufficient reasons. In particular, he notes that there is no "analysis" section: the Board simply states its conclusion that the appellant posed a significant risk. The Board failed to explain

how it applied the statutory test, how it dealt with the material evidence before them, or how it reached its conclusion that the appellant remains a significant threat to the safety of the public.

[27] The respondents submit that the Board made no error in its application of the significant threat test; there was sufficient evidence before the Board to reach its conclusion; and the reasons provided by the Board were legally sufficient.

E. ANALYSIS

(1) Standard of Review

[28] This court may set aside an order of the Board only where it is of the opinion that: (a) the decision is unreasonable or cannot be supported by the evidence; (b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or (c) there was a miscarriage of justice: *Criminal Code*, R.S.C., 1985, c. C-46, s. 672.78(1); *R. v. Owen*, 2003 SCC 33, 174 C.C.C. (3d) 1, at para. 31.

[29] The standard of review under s. 672.78(1)(a) is one of reasonableness. The court should ask itself 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: *Owen*, at para. 33, citing *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, at para. 56.

[30] If the Board's decision could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene: *Owen*, at para. 33. As this court explained in *Sokal (Re),* 2018 ONCA 113, at paras. 12-13:

> An appellate court must always recall the difficulty of assessing whether a given individual poses a significant threat to public safety: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 61. The appeal court does not make its own judgment on the question of significant threat and use that judgment as the benchmark for assessing the reasonableness of the Board's decision. Nor does the court re-weigh the considerations that were before the Board: *Wall (Re)*, 2017 ONCA 713, at para. 21.
>
> The reasonableness of the Board's decision must be evaluated by considering the reasons it proffers in the context in which the decision is made. At issue is whether the Board reached an acceptable and defensible outcome, keeping in mind the need to protect the liberty of the NCR accused as much as possible, while also protecting society: *Wall*, at para. 22. [Emphasis added.]

[31] However, the standard is not as high as the "unreasonable verdict" in criminal cases. As stated by this court, "the standard of reasonableness enacted by s. 672.78(1)(a) involves respectful attention, though not submission to the Board's reasons": *Mental Health Centre Penetanguishene v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 65.

[32] The standard of review under s. 672.78(1)(b), with respect to errors of law, is one of correctness: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services*), [2006] SCC 7, [2006] 1 S.C.R. 326, at para. 16. An erroneous application of the significant threat test is an error of law: *Hammoud (Re),* 2018 ONCA 317, at para. 9.

(2) The Significant Risk Requirement Under Section 672.54

[33] Review Boards derive their jurisdiction from Part XX.1 of the *Criminal Code*. Pursuant to s. 672.54, the Board must make a disposition that takes into account the safety of the public, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. That section empowers the Board to order the following dispositions:

> 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.

[34] Accordingly, the role of the Board is first to determine whether an NCR accused represents a significant threat to public safety. If the answer to that question is "no" or uncertain then the NCR accused must be discharged absolutely: *Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625, at pp. 659-661, 669. If the NCR accused does present a significant threat, the Board must either conditionally discharge or detain the individual: *Winko,* pp. 662, 669.

[35] It is important to bear in mind that the Board's responsibility to grant an absolute discharge is non-discretionary in the event that it harbours any doubt about whether the NCR accused represents a significant threat: *Carrick (Re),* 2018 ONCA 752, at para. 16. As the majority of the Supreme Court emphasized in *Winko,* at pp. 652-653: "Once an NCR accused is no longer a significant threat to public safety, the criminal justice system has no further application."

[36] Individuals with mental disorders are not inherently dangerous: *Winko,* at p. 653. There is no presumption of dangerousness and no burden on the NCR accused to prove a lack of dangerousness: *Winko,* at pp. 660-661, 662. Rather,

the legal and evidentiary burden of establishing significant threat rests on the Board or the court: *Winko,* at p. 663.

[37] The threshold for significant risk is “onerous”: *Carrick (Re)*, 2015 ONCA 866, 128 O.R. (3d) 209, at para. 17. A significant threat to the safety of the public means a foreseeable and substantial risk of physical or psychological harm to members of the public: *R. v. Ferguson,* 2010 ONCA 810, at para. 8. The conduct must be of a serious criminal nature: *Ferguson,* at para. 8. A very small risk of grave harm will not suffice, nor will a high risk of trivial harm: *Ferguson,* at para. 8. The threat must be more than speculative in nature; it must be supported by evidence: *Winko*, at p. 665; *Pellett (Re),* 2017 ONCA 753, 139 O.R. (3d) 651, at para. 21.

(3) The Disposition of the Board – Significant Threat

[38] As explained above, the Board’s conclusion on the significant threat issue was devoid of any analysis, a point I will return to below. It rested solely on a flat acceptance of the evidence before the Board. In examining whether the Board erred in finding that the appellant posed a significant threat to the safety of the public, I will assume that the Board based that finding on conclusions found in the Hospital’s report and the evidence of Dr. Choptiany that was before the Board.

[39] The evidence pertaining to significant threat, as summarized by the Board’s reasons at paras. 18-19, included the following general conclusions: (1) the appellant has limited insight into the nature of his illness; (2) when he is unwell, he

is capable of physical and psychological harm; (3) he would decompensate if he went off his medication; and (4) the risk of decompensation is heightened due to the deterioration of his therapeutic relationship with his clinical team and his history of substance use: *Marmolejo (Re),* [2019] O.R.B.D. No. 2378, at paras. 18-19.

[40] None of these factors, taken alone or together, support the Board's finding that the appellant presented a significant threat to the safety of the public. More specifically, the general conclusions relied upon by the Board address neither the degree of the risk nor the gravity of the apprehended harm. An appropriate significant threat finding cannot be made without considering these questions. A finding of significant threat based on the aforementioned factors without such evidence would have been an error in law because it would amount to a failure to apply the proper test to the evidence adduced at the hearing: *Hammoud,* at para. 9. It would also have been an unreasonable disposition. I will examine each of the factors identified in evidence before the Board, in turn.

[41] The fact that an accused lacks insight into their condition is but one factor for consideration, and it must be used with care. In *Kalra (Re)*, 2018 ONCA 833, at para. 52, this court examined the role of insight in relation to significant risk and found that a lack of insight must be evaluated in its proper context:

> Whether an NCR accused has insight into his or her mental illness, and the extent of that insight, is only part of the analysis in determining if there is a significant

> threat to the safety of the public. While insight is a treatment goal, it is one some persons living with mental illness may be unable to fully achieve. In some instances, particularly where the contemplated harm falls at the lower end of the spectrum, it may be unreasonable to require, as the Board did here, that an NCR accused's insight into his or her illness be "entrenched on his consciousness" in order to obtain an absolute discharge. [Emphasis added.]

[42] This analysis is equally applicable to the circumstances at hand. A lack of insight alone cannot form the basis of a significant threat finding without analysis of how that lack of insight factors into the risk the NCR accused will pose. Due to the brevity of the Board's reasons, the extent to which this factor contributed to the finding of significant risk is unclear. Yet the appellant's lack of insight has been a running and dominant theme throughout the appellant's dispositions over the years. It also figured prominently in the Hospital's report and Dr. Choptiany's testimony. Needless to say, the Board must be cautious in inferring that an NCR accused comprises a significant risk without consideration of how that lack of insight poses a risk in the circumstances of the case at hand.

[43] Furthermore, the fact that the appellant may be capable of physical and psychological harm when he is unwell is likewise insufficient to ground a finding of significant risk. That is not the threshold. There needs to be a foreseeable and substantial risk of significant physical or psychological harm; that is, the NCR

accused must pose a risk of *serious* criminal conduct. Anything less is an insufficient basis to deny entitlement to an absolute discharge.

[44] Additionally, a finding that a person might discontinue their medication must be supported by evidence and be linked in a reasoned way to the finding that the NCR accused poses a significant threat to the public. In *Pellett,* at para. 32, this court noted that the onerous substantial threat standard was not met by the risk that an NCR accused could cease taking her medication, which would result in a worsening of her condition. This is so even where there is considerable likelihood that the NCR accused would discontinue their medication: *Hammoud,* at para. 9; *Ferguson,* at paras. 1-3. As this court noted in *Hammoud*:

> There was no doubt that for three decades the appellant has suffered, as she continues to suffer, from a serious mental disorder. Equally, there was no doubt that, presented with the opportunity to do so, the appellant would discontinue her medication. But these are not the risks at which the "significant threat" threshold in s. 672.5401 is directed. In our view, read as a whole, the reasons of the Board reveal legal error — the failure to apply the proper test for "significant threat to the safety of the public" to the evidence adduced at the hearing. [Emphasis added.]

[45] In the present case, the appellant has complied with his medication regimen for years and has repeatedly indicated that he would continue taking his medication upon his absolute discharge. Although he stopped taking his medication after he received his 2008 absolute discharge, there is no evidence

that this would happen again. His liberty cannot be beholden to a mistake made over a decade ago.

[46] Nor can one equate the deterioration in the appellant's relationship with his psychiatric team with significant threat. The team did not observe any overt psychiatric symptoms. Admittedly, the change in temperament remains unexplained. However, uncertainty does not ground a finding of significant threat, even when considered along with the other conclusions that emerge from the evidence that was before the Board.

[47] Finally, it is well recognized that a risk of substance abuse does not justify the denial of an absolute discharge unless that substance abuse would pose a significant threat to the public: *Carrick (Re),* (2015), at para. 39; *Wall (Re),* 2017 ONCA 713, 417 D.L.R. (4th) 124, at paras. 25, 29-30; *Sokal*, at para. 25. An NCR accused cannot be under the Board's jurisdiction indefinitely because of substance use. The evidence before the Board failed to offer insight into the degree of the risk that substance abuse posed to the appellant's behavior and was therefore of marginal utility.

[48] In sum, the Board erred in law by not engaging the appropriate legal standards required for a significant risk finding. If the Board's finding was, in fact, based on the conclusions put before it in evidence, viewing these factors in light of the concerns raised above the finding was also unreasonable. The evidence

before the board leads me to a different outcome than the Board: I am satisfied that the totality of this record does not permit a finding that the appellant posed a significant threat to the public. The appellant was entitled to an absolute discharge.

(4) The Need for Robust Reasons on the Significant Threat Issue

[49] In every case, the Board is required to explain why the disposition is necessary and appropriate in the circumstances: *Marchese (Re)*, 2018 ONCA 307, 359 C.C.C. (3d) 408, at para. 16. A cursory consideration of the question of significant risk will not suffice where an individual's liberty is on the line: *Carrick (Re),* (2018), at para. 20. As noted above, the Board's disposition must be able to withstand a "somewhat probing examination" in order for the conclusion on significant threat to be upheld as reasonable. As this court observed in *Marchese*, at para. 8: "To conduct a 'somewhat probing examination' this court must have something to probe."

[50] In *Marchese*, this court contemplated the difficulty posed when the Board fails to provide sufficient reasons. In that case, the Board's analysis on the key issue of significant threat was confined to one paragraph at the end of five pages of reasons. Brown J.A., writing for the court, commented that: "This brevity led the Board to treat material evidence without the rigour one would expect from a specialized tribunal such as the Board."

[51] Nevertheless, the court ultimately upheld the Board's disposition. After remarking on the insufficiency of reasons, the court reviewed the record before the Board. It concluded that there was evidence that supported the Board's finding on the significant threat issue, notwithstanding the clear deficiency in reasons. For example, Ms. Marchese was re-admitted to the hospital for seven months due to a deterioration in her mental status during the period under review: *Marchese*, at para. 13. While in seclusion at the hospital, she also exhibited "escalated behaviour" that risked harm to herself and others: *Marchese*, at paras. 13-14. At the hearing, there was also some indication that Ms. Marchese had further contact with the hospital in the interim. Thus, the court declined to interfere with the Board's finding that Ms. Marchese remained a significant threat.

[52] However, in so doing, the court identified a trend besetting Ontario Review Board cases: "Yet, too often this court sees reasons from the Board that go on at considerable length to recite submissions, only to conclude with a cursory analysis of the key issue: is the appellant a significant threat to the safety of the public?" Brown J.A. provided the following helpful commentary for Board going forward:

> Cursory analysis is difficult to probe. It also risks failing to provide justification, transparency, and intelligibility for the resulting decision. To avoid that risk, in every case the Board's reasons should clearly explain what evidence in the record leads it to conclude that the condition and conduct of the NCRMD accused creates a significant threat to the safety of the public, both in the sense that there exists a real, foreseeable risk of physical or

> psychological harm occurring to individuals in the community and in the sense that this potential harm must itself be serious: *R. v. Ferguson*, 2010 ONCA 810, 264 C.C.C. (3d) 451 (Ont. C.A.), at para. 8. The Board's reasons must clearly deal with the likelihood of a risk materializing and the seriousness of the harm that might occur: *Carrick (Re)*, 2015 ONCA 866, 128 O.R. (3d) 209 (Ont. C.A.), at para. 16. [Emphasis added.]

[53] He further noted that the Board's reasons must identify the material evidence which it relies on and explain how the evidence is linked to the issue of significant threat: *Marchese*, at para. 11. A conclusion is not an explanation; and whether that conclusion falls within "a range of possible, acceptable outcomes" cannot be assessed in light of the absence of any analysis: *Marchese*, at para. 17.

[54] Another case that grapples with a similar issue is *Magee (Re)*, 2020 ONCA 418. Although the case is factually distinguishable, the Board's reasons for dismissing Mr. Magee's request suffered from the same defects that are present here: namely, an absence of meaningful reasons. On appeal, this court ordered a new hearing on the basis that the Board's disposition was unreasonable. Harvison Young J.A., writing for the court, held that the reasons failed to reflect an adequate engagement with the requirement that it make the least onerous disposition: *Magee*, at paras. 24, 30-32; 40-42. She noted that the Board failed to explain its disposition in light of the supporting evidence: *Magee*, at para. 25. In doing so, she reminds us of the following helpful comment in *Vavilov*, at para. 127: "The principles of justification and transparency require that an administrative decision

maker's reasons meaningfully account for the central issues and concerns raised by the parties" (emphasis added).

[55] More broadly, to succeed on an appeal based on inadequate reasons, an appellant must show that the reasons are so deficient that they foreclose meaningful appellate review, and the deficiency has occasioned prejudice to the exercise of the appellant's legal right to an appeal: *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25, *R. v. Sheppard,* 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 33, and *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, at para. 31.

(5) The Disposition of the Board – Insufficient Reasons

[56] In some ways, the facts of this case align with those in *Marchese*. The decision of the Board sets out the history of the matter, and quotes at length from the Hospital's report. The Board discussed that report, and the evidence of Dr. Choptiany, in a cursory manner. The decision of the Board does not clearly set out why the condition and conduct of the appellant creates a significant threat to the public.

[57] In fact, the Board does not even mention the appellant's position when making its determination that the appellant posed a significant risk to the public. There is no analysis at all. There is no indication as to why the appellant might stop taking medication when he states that he would continue to take it, and he had

taken in for years. There is no analysis as to why the potential risk posed by the appellant was “serious” as opposed to relatively trivial harm.

[58] I am satisfied that the Board’s reasons are so deficient that they foreclose meaningful appellate review. Likewise, the deficiency would have occasioned prejudice to the exercise of the appellant’s legal right to appeal.

[59] Notably, this case departs from *Marchese* in a crucial way: here, the evidence before the Board does not appear to support a finding of significant threat. Accordingly, I do not have the same hesitations about interfering with the Board’s disposition. As explained above, the appellant was entitled to an absolute discharge.

F. CONCLUSION AND DISPOSITION

[60] Accordingly, the appeal is allowed. As noted above, in light of the Board’s 2020 disposition, there is no need for further relief at this point in time.

Released: March 2, 2021 “M.T.”

“M. Tulloch J.A.”
“I agree. David M. Paciocco J.A.”
“I agree. Harvison Young J.A.”