DATE: 19990112
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COURT OF APPEAL FOR ONTARIO

BROOKE, OSBORNE and GOUDGE JJ.A.

BETWEEN:	**)**	
	)	
THE ADMINISTRATOR OF THE PENETANGUISHENE MENTAL HEALTH CENTRE and THE ADMINISTRATOR OF THE WHITBY MENTAL HEALTH CENTRE Administrator	**)**	**Jack Coop, for the Administrator of the Penetanguishene Mental Health Centre and for the of the Whitby Mental Health Centre, appellants**
Appellants	**)**	
- and -	**)**	
THE ATTORNEY GENERAL FOR ONTARIO	**)**	**Carl Mandrish, for the respondent Clement**
Respondent	**)**	**Eric Siebenmorgen, for the respondent The Attorney General for Ontario**
- and -	**)**	
RONALD CLEMENT	**)**	
Respondent	**)**	**Heard: October 15, 1998**

GOUDGE J.A.:

[1] On December 31, 1986 Ronald Clement, the respondent in this appeal, was found unfit to stand trial on charges arising out of serious attacks on his father and mother. He was diagnosed

as suffering from paranoid schizophrenia and has been detained since then in the Oak Ridge maximum security facility at the Penetanguishene Mental Health Centre. Eventually, in December 1997, he was found fit to stand trial and on March 3, 1998 he was found not criminally responsible on account of mental disorder.

[2] As a consequence, on April 9, 1998 the Ontario Review Board held a hearing concerning Mr. Clement, as required by s. 672.47(3) of the Criminal Code. The Review Board had before it the report of the Administrator of the Mental Health Centre dated November 24, 1997 together with an addendum dated April 1, 1998. It also heard evidence from Dr. Hector, Mr. Clement's attending psychiatrist, and Ms. P. Moody, his programme director.

[3] The Board rendered its decision on April 15, 1998, ordering that Mr. Clement be transferred to medium security and determining that this should be done by moving him to the Whitby Mental Health Centre. On May 22, 1998 the Board issued its reasons for this decision. The essence of those reasons was set out as follows:

> Having considered all the evidence adduced and submissions, the Board finds that

> after twelve years of not being a management problem, his risk could be equally managed in a medium security facility, however we recognize that his misidentification syndrome is a major risk to the public. Taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, and the other needs of the accused, the Board is of the unanimous view that the least onerous, least restrictive disposition is that the accused be transferred to a medium security facility in Whitby under a standard custodial order.

[4] The Administrator, supported by the Attorney General for Ontario, appeals from this decision. They raise two arguments:

1. The decision to transfer Mr. Clement to medium security is unreasonable and cannot be supported by the evidence.

2. The same is true of the direction that Mr. Clement be moved to the Whitby Mental Health Centre.

[5] For the reasons that follow I have concluded that the first argument is correct and that the appeal must therefore succeed.

[6] Two provisions of the Criminal Code are relevant to this matter. The first, s. 672.54, sets out the criteria to be applied by the Review Board in making its decision. It reads as

follows:

> 672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, 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 the least onerous and least restrictive to the accused:
> (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.

[7] The second, s. 672.78, describes the powers of this court on appeal from the Review Board. It reads as follows:

> 672.78 (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal 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.

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

(a) that paragraphs (1)(a), (b) and (c) do not apply; or

(b) that paragraph (1)(b) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

(a) make any disposition under section 672.54 or any placement decision that the Review Board could have made;

(b) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or

(c) make any other order that justice requires.

[8] Given its medical expertise, its specialized knowledge, and its advantage in observing the witnesses, the Review Board must be accorded curial deference on appeal. Within the broad review parameters set by s. 672.78 the Review Board can and should rely on its significant expertise to analyze and weigh the evidence before it and to come to its decision. However, if this court concludes that the decision appealed from is unreasonable and cannot be supported by the evidence, the Code requires that the court intervene: see R. v. Peckham (1994), 19 O.R. (3d) 766

(C.A.) at 777-78.

[9] In this case, it is my view that, having appropriate regard for the expertise and advantageous position of the Review Board, its decision to move Mr. Clement to a medium security facility is unreasonable and unsupported by the evidence. I say this for three reasons.

[10] First, the Review Board appears to have used the wrong test in reaching its decision. It ordered the transfer of Mr. Clement to a medium security facility because that constituted the least restrictive disposition for him in light of the need to protect the public from dangerous persons, his mental condition, and his other needs. However, as this court said in R. v. Pinet (1995), 23 O.R. (3d) 97 (C.A.) at 102, these considerations should only be applied in choosing among the three alternative dispositions in paras. (a), (b) and (c) of s. 672.54.

[11] Here, the Review Board was deciding upon the conditions that should attach to the detention of Mr. Clement in a hospital. In doing so the Code requires the Board to apply the conditions that it considers appropriate. While this standard of appropriateness may include consideration of the relative restrictiveness of conditions, it is not confined to that.

[12] It is not necessary in this case to proceed on the basis that the Review Board erred in law by using the wrong test. Rather, by adopting the approach it did the Review Board focussed only on the risk of escape to the exclusion of essentially all of the expert evidence. This led it, in my view, to a decision that is unreasonable and unsupported by the evidence.

[13] Second, because he had not been a management problem at Oak Ridge, the Review Board concluded that the risk Mr. Clement presented could be managed just as well in a medium security facility. In my view, this conclusion does not automatically follow. Indeed, the evidence concerning Mr. Clement was to the contrary. Both his attending psychiatrist and his programme director gave evidence that a move to a medium security facility with a more open environment and a new staff unfamiliar to him would be traumatic for Mr. Clement and would result in his displaying more behaviour indicative of paranoia.

[14] Third and most important, all the expert evidence before the Review Board was to the effect that a move of Mr. Clement from Oak Ridge to a medium security facility would be inappropriate. There was no evidence to the contrary. The decision to move

Mr. Clement is simply unreasonable on the basis of this record.

[15] The most recent report of the administrator recommended that he remain at Oak Ridge. That report indicates that throughout his stay there he has allowed staff almost no access to his inner feelings and thought processes. This report, tabled with the Review Board, concludes as follows:

> Until the Clinical Team is allowed enough access to Mr. Clement's inner psyche to allow for further assessment and treatment, the team believes that, in the absence of any evidence to the contrary, it must assume that the level of risk Mr. Clement posed at the time of the index offence remains unchanged. As such, it is the unanimous recommendation of the Clinical Team that Mr. Clement remain in Oak Ridge.

[16] The staff gave evidence that Mr. Clement has indicated that if he left Oak Ridge he would go off his medication.

[17] His psychiatrist testified that Mr. Clement believes that his parents are not his real parents and that this misidentification syndrome remains a major risk factor for assault in the future.

[18] Finally, as I have said, the staff were unanimous that a move would be disruptive and traumatic for Mr. Clement and would result in more behaviour indicative of paranoia.

[19] In summary, the decision to move Mr. Clement from Oak Ridge to a medium security facility is unreasonable. It is not supported by the evidence. I would therefore allow the appeal.

[20] Given that Mr. Clement will be subjected to an annual review within the next few months in any event, I would exercise the jurisdiction given to this court by s. 672.78(3)(a) and order that Mr. Clement continue to be detained in the Oak Ridge Division of the Mental Health Centre at Penetanguishene.

[21] Having thus disposed of this appeal, it is unnecessary to deal with the appellants' second argument, namely that the Review Board erred in directing that Mr. Clement be moved to the medium security unit of the Whitby Mental Health Centre. Suffice it to say that I do not view this as an issue of natural justice entitling the Whitby Mental Health Centre to notice prior to the order being made. However, I think it is appropriate to reiterate what this court said in R. v. Pinet, supra, at p. 103:

> The administrators agree in theory with the right of the Board to delegate authority to transfer, and they also agree in theory that the Board has the authority under s. 672.54(c) to name a specific hospital for detention of the accused. However, their counsel argues strongly that the Board, in naming a specific hospital, is now

> undertaking what was formerly an administrative decision, and that it should not do so without clear knowledge of the availability within that hospital of the required facilities necessary for housing, securing and treating the accused. Counsel for the administrators says that it may not have the appropriate facilities, and that the Board should order specific transfers only on the basis of clear information as to the appropriateness of such a transfer.
>
> The position of the administrators makes good sense. It would be of no assistance to anyone to have an accused arrive at a hospital where there was no room, inadequate security, and inappropriate treatment facilities to deal with him.

[22] Hence, it seems to me that a specific order like the order in this case requires either some evidence concerning the host facility or perhaps some showing by the Review Board in its reasons of information concerning the facility of which it is able to take official notice.

[23] In the result, I would allow the appeal and substitute the order I have indicated.

RELEASED: January 12, 1999