Case Name:

Manitoba (Attorney General) v. Wiebe

Between
The Attorney General of Manitoba, Respondent, and
Earl Joel Wiebe, (Accused) Appellant

[2006] M.J. No. 345

2006 MBCA 87

269 D.L.R. (4th) 577

[2006] 12 W.W.R. 66

205 Man.R. (2d) 208

211 C.C.C. (3d) 161

70 W.C.B. (2d) 513

2006 CarswellMan 250

Docket No. AR 05-30-06098

Manitoba Court of Appeal

Monnin, Steel and Hamilton JJ.A.

Judgment: July 31, 2006.

(105 paras.)

Administrative law -- Natural justice -- Duty of fairness -- Procedural fairness -- Right to be heard -- Right to respond -- Appeal by the accused from the Manitoba Review Board's decision ordering that the appellant be detained in custody in hospital under certain conditions -- Appeal dismissed -- Four-month delay in the Board rendering its decision was not so substantial as to affect the fairness of the hearing -- Appellant was given a reasonable and meaningful opportunity to respond to the evidence presented at the hearing -- Condition imposed was lawful delegation -- Criminal Code, s. 672.56.

Criminal law -- Elements of the offence -- Mens rea -- Insanity or mental disorder -- Finding of not criminally responsible -- Appeal by the accused from the Manitoba Review Board's decision ordering that the appellant be detained in custody in hospital under certain conditions -- Appeal dismissed -- Appellant was found not criminally responsible on a charge of murdering his stepmother -- Four-month delay in the Board rendering its decision was not so substantial as to affect the fairness of the hearing -- Appellant was given a reasonable and meaningful opportunity to respond to the evidence presented at the hearing -- Condition imposed was lawful delegation.

Appeal by the accused from the Manitoba Review Board's decision ordering that the appellant be detained in custody in hospital under certain conditions. In December 2001, the appellant was found not criminally responsible on a charge of murdering his stepmother. The matter was referred to the Manitoba Review Board for an appropriate disposition. The Review Board was a tribunal established under Part XX.1 of the Criminal Code to make and review "dispositions" of persons found by a court to be unfit to stand trial or not criminally responsible on account of mental disorder. In February 2005 the Board issued the order appealed from. On appeal, the appellant submitted that the Board failed to meet the duty of fairness in conducting the hearing. He alleged that the Board should have made further inquiries with respect to a physician's report and should have ordered an independent assessment of the appellant. He further alleged that to allow documentation to be submitted at the end of the hearing precluded appellant's counsel from effectively preparing his cross-examination. The appellant also alleged that the Board took too long in rendering its decision.

HELD: Appeal dismissed. Given the difficulty of the case, as well as other factors, the four-month delay in the Board rendering its decision was not so substantial as to affect the fairness of the hearing. The hearing before the Board was conducted in a fair manner. The appellant was given a reasonable and meaningful opportunity to respond to the evidence presented at the hearing. The Board had gathered additional evidence in preparation for the hearing in addition to the report it had been provided with. The Board had also attempted to conduct an independent assessment of the appellant, but the appellant had refused to cooperate. The condition which the appellant opposed, that he be in compliance with the rules of the hospital and, if in the opinion of the treatment team he was mentally stable, his privileges could include access to all areas of the forensic unit of the hospital, was reasonable. The condition struck a reasonable balance between the liberty interests of the accused and the need of the hospital to protect its patients and staff. Further, the condition was a lawful delegation. Section 672.56 of the Code permitted the Board to delegate to hospital administration the authority to vary restrictions imposed on the appellant.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 672.38(1), s. 672.39, s. 672.45, s. 672.47, s. 672.54, s. 672.55, s. 672.56, s. 672.78, s. 672.81

Counsel:

G.G. Brodsky, Q.C. and A.H. Dalmyn for the Appellant

C.D. Deegan and C.A. Devine for the Respondent

S.D. Boyd for Manitoba Review Board

J.M. Mann for Selkirk Mental Health Centre

The judgment of the Court was delivered by

1 STEEL J.A.:-- This appeal concerns the interpretation of Part XX.1 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the *Code*); in particular, delegation under s. 672.56, the power of a Review Board to order medical treatment for persons found "not criminally responsible on account of mental disorder" (NCR) and the fairness of the hearing provided by the Board.

FACTS

2 In December 2001, Earl Joel Wiebe (Wiebe) was found not criminally responsible on the charge of murdering his stepmother, [2001] M.J. No. 572. The matter was referred to the Manitoba Review Board to make an appropriate disposition. The Review Board is a tribunal established under Part XX.1 of the *Code* to make and review "dispositions" of persons found by a court to be unfit to stand trial or not criminally responsible on account of mental disorder.

3 Wiebe was transferred to the Selkirk Mental Health Centre (the Centre) in August 2002. The Centre appointed Dr. J. Willows as the psychiatrist responsible for Wiebe's treatment program. Since that time, Wiebe has been subject to a number of orders from the Review Board.

4 The issues in this appeal arise as a consequence of a hearing by the Review Board on October 25, 2004, which resulted in a disposition order, with conditions, dated February 28, 2005. The Review Board made an order under s. 672.54(c) of the *Code* that Wiebe be detained in custody in a hospital under the following condition, among others:

> 1. That, provided he is in compliance with the rules of the hospital and in the opinion of the treatment team he is mentally stable, his privileges may include access to all areas of the forensic unit of the hospital.

5 It is important to note what is not being contested. The threshold determination under s. 672.54 of the *Code* is whether an NCR accused represents a "significant threat to the safety of the public." If such a threat exists, the Review Board must order that the accused be discharged conditionally or detained in custody in a hospital, subject to such conditions as the court or the Review Board

considers appropriate (s. 672.54(b) and (c) of the *Code*). See *Mazzei v. British Columbia (Adult Forensic Psychiatric Services, Director)* (2006), 264 D.L.R. (4th) 10, 2006 SCC 7, at para. 19. In this case, the Review Board's disposition order was made under s. 672.54(c) of the *Code*. Wiebe does not contest this decision, but rather challenges the conditions surrounding his detention in the hospital.

6 Although there were many stated grounds of appeal in Wiebe's notice of appeal, at the hearing the issues became two-fold - procedural and substantive.

7 Procedurally, Wiebe alleges that the Review Board failed to meet the duty of fairness in conducting the hearing. It is alleged that the Review Board should have made further inquiries with respect to a report by a Dr. Hill and should have ordered an independent assessment of Wiebe, that to allow documentation to be submitted at the end of the hearing precluded Wiebe's counsel from effectively preparing his cross-examination and that the Review Board took too long in rendering its decision. Given the difficulty of the case, and other factors, I do not find the four-month delay in the Review Board rendering its decision so substantial as to affect the fairness of the hearing. I would dismiss this ground of appeal.

8 Substantively, Wiebe makes two arguments. First, the Review Board applied the wrong legal test when considering which disposition to order with respect to Wiebe. Wiebe argues that, as a result, the conditions imposed by the Review Board are both unreasonable and unlawful. Second, Wiebe also alleges that the Review Board should have included conditions as to the types of psychiatric treatment to be provided to him. This raises the question of whether the Review Board has the jurisdiction to order the Centre to provide a specific course of treatment for Wiebe.

9 The remedy sought is that the conditions attached to para. 1 of the Review Board's order be struck and that the conditions be amended to require the Centre and the Attorney General to present a treatment plan giving Wiebe access to psychotherapy from a supportive practitioner and access to group therapy, or to identify another reasonable option to give Wiebe a reasonable chance to live in the least restrictive conditions with access to treatment.

OVERVIEW OF THE STATUTORY FRAMEWORK

10 Part XX.1 of the *Code* (*1) is a response to the Supreme Court of Canada's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, striking down the previous system dealing with mentally disordered accused. Section 672.38(1) of the *Code* provides that a Review Board shall be established or designated for each province. The Supreme Court of Canada addressed at length and on several occasions the constitutionality of the provisions of Part XX.1 of the *Code* and the jurisdiction of Review Boards. See, for example, *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, and, more recently, *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33,*Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20 (also referred to as *Tulikorpi*), and *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21.

(*1) Amendments to ss. 672.54 and 672.55 effective January 2, 2006, do not affect the interpretation of Part XX.1 for the purposes of this appeal.

11 The Review Board functions quite differently from criminal courts and most administrative tribunals. Proceedings before the Review Board are inquisitorial in nature. The membership of a Review Board is designed to bring legal and medical/psychiatric knowledge and expertise to matters before the Review Board. At least one of the Review Board members must be entitled to practise psychiatry and another must be either similarly qualified or be qualified to practise medicine or psychology (s. 672.39). The chair of the Review Board is required to be a judge, retired judge or person qualified to be appointed as a judge (s. 672.4(1)).

12 After holding a Review Board disposition hearing, s. 672.54 of the *Code* gives the Review Board the power to choose between one of three dispositions. Section 672.54 of the *Code* provided: 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.

13 Under this section, the Review Board must consider whether the NCR accused is a "significant threat to the safety of the public" and then make the disposition that is "the least onerous and least restrictive to the accused." If the Review Board is of the opinion that the NCR accused does not pose such a significant threat, the person must be discharged absolutely. If a person is not to be discharged absolutely, the Review Board must find, on the evidence, that the NCR accused represents a real risk of physical or psychological harm to members of the public that goes beyond the merely trivial or annoying and is criminal in nature. See *Winko*.

14 The Review Board must hold hearings not later than 12 months after making a disposition to review every disposition made (other than an absolute discharge) in respect of an NCR accused (s. 672.81(1)). This results in at least a yearly review for every NCR accused who has not been discharged absolutely. A number of parties may appear to make submissions and call evidence at a Review Board hearing. These include the NCR accused, the Crown and, where applicable, the hospital. The Review Board must provide to all the parties (subject to considerations of relevance to

the proceedings) access to all the "disposition information."

15 In order to perform its statutory mandate, the Review Board not only considers the disposition information and hears evidence from the parties, it can also seek out any evidence it requires to carry out its mandate. The Review Board may consider a broad scope of evidence, including evidence of the past and anticipated courses of treatment, the present mental state of the NCR accused, the NCR accused's own plans for the future, the existence of appropriate support services in the community and expert assessments.

16 The Review Board often is required to make dispositions that require an NCR accused to be detained in custody in a hospital where the NCR accused may be assessed and treated. The conditions imposed can include specific restrictions such as access to the grounds of the facility and passes into the community. A hospital in this context is a designated mental health care facility, and in Manitoba, there are only two such facilities for adults - the Selkirk Mental Health Centre and the PsycHealth Centre at the Health Sciences Centre.

STANDARD OF REVIEW

17 The standard of appellate review of a disposition order of a Review Board is set out in s. 672.78 of the *Code*. Under s. 672.78(1), the court may set aside an order of a Review 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.

See *Owen*, at para. 31, and *Pinet*, at para. 24.

18 In this case, the grounds of appeal address the reasonableness of the conditions attached to the disposition, the legality of the conditions and breaches of natural justice amounting to an error in law.

19 The first branch of s. 672.78 adopts a reasonableness standard of review. See *Owen*, at paras. 33-34, *Mazzei*, at para. 17, and *Manitoba (Attorney General) v. Wiebe* (2004), 187 Man.R. (2d) 181, 2004 MBCA 109, at para. 16. This standard recognizes a review board's expertise in mental health disorders and attendant safety risks, its specialized knowledge and advantage in observing witnesses, and its familiarity with the situation of a specific NCR accused based upon its annual review of the status of each NCR individual under s. 672.81(1) of the *Code*. These factors require deference to a review board's risk assessment of an NCR accused and its disposition order: ... [*Penetanguishene Mental Health Centre v. Magee*, [2006] O.J. No. 1926 at para. 51 (C.A.), *per* Cronk J.A.]

20 The Supreme Court of Canada discussed the "reasonableness" standard generally in *Law Society of New Brunswick v. Ryan*, 2003 SCC S.C.R. 247, 2003 SCC 20. The court stated, *per* Iacobucci J., that the standard involves the court determining whether "[a]fter a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" (at para. 47).

21 In applying the standard of reasonableness to the order of a Review Board, a court should not attempt to micromanage the conditions attached to a specific disposition. Rather, recognizing the difficult task of the Review Board in reconciling the various objectives of s. 672.54, the court must evaluate the conditions collectively and determine whether "the least onerous and least restrictive" requirement has been properly applied to the package as a whole. See *Owen*, at para. 69, and *Tulikorpi*, at paras. 71-73.

22 The second branch of s. 672.78 deals with a wrong decision on a question of law. A question of law attracts the correctness standard of review. See *Mazzei*, at para. 16, *Tulikorpi*, and *Wiebe*, at para. 16. If an error of law is established, the onus then shifts to the respondent to show that no substantial wrong or miscarriage of justice occurred and the Review Board, acting reasonably, and properly informed of the law, would necessarily have reached the same conclusion had the legal error not taken place. See *Pinet*, at paras. 24-28.

PROCEDURAL ISSUES

23 Wiebe alleges that the hearing before the Review Board was conducted in an unfair manner. Moreover, he says that the allegation of procedural flaws must be viewed within the context of the alleged difficult relationship between Wiebe and his psychiatrist. Wiebe alleges that Dr. Willows wanted him discharged to another institution or a correctional facility. Therefore, the necessary therapeutic trust between a patient and a doctor was simply not present in this relationship.

24 At the hearing of the Review Board, Wiebe was represented by counsel, who was given copies of all the disposition information. Everyone, especially the members of the Review Board, was very much aware that this hearing was taking place as a result of a decision of this court that held the Review Board had not fulfilled its obligations under the *Code* at the last hearing and had ordered that another hearing take place. See *Wiebe*. Specifically, the point at issue was the failure of the Board to obtain other evidence as to the possible treatment options for Wiebe. At the last hearing, the only evidence presented to them was the evidence of Dr. Willows, who had indicated that there was no appropriate treatment available in the Centre.

25 At the time of the hearing in this case, Wiebe had just returned to the Centre after having been detained in correctional facilities for approximately 20 months. He had only returned two weeks prior and had refused any of Dr. Willows' attempts to conduct an intake assessment. Pending the completion of that intake assessment, he was being held in the four-bed, high-security area of the forensic unit.

26 Counsel for the Centre points out that Wiebe had only just returned to the Centre and that

Wiebe was deferring answering any of Dr. Willows' questions or participating in an assessment until after the Review Board hearing. Therefore, there was very little for Dr. Willows to report, and Dr. Willows did not deliver a written report before the hearing. Given those circumstances, I find it was reasonable for Dr. Willows not to have submitted a written report before the meeting.

27 Dr. Willows did give evidence at the hearing. Dr. Willows' diagnosis that Wiebe suffered from an anti-social personality disorder, as well as his primary diagnosis of borderline personality disorder, was not new and unexpected. I reject counsel's arguments to the contrary. Dr. Willows had testified to that at the 2003 hearing. In fact, the reasons of the Review Board in April 2003 refer to this diagnosis of anti-social personality disorder. Counsel for Wiebe did not express surprise, nor did he ask for an adjournment to prepare his cross-examination.

28 It is true that notes from Dr. Willows' files were introduced as evidence at the end of the hearing. For the most part, they contained nothing new. They related to the complaints that had led to criminal charges being laid against Wiebe and his recent detention at the Winnipeg Remand Centre and Headingley Correctional Institution until those charges were stayed. The evidence supporting those charges, the fact that they were stayed and the weight that should be put on that evidence were amply discussed at the hearing. In the end, in its reasons, the Review Board stated that it was not accepting the allegations that led to those charges being laid as reliable and was not placing any weight on them.

29 Even so, and appropriately so, counsel for Wiebe was sent a copy of those notes and was told that he would have the opportunity for further submissions if he wished. In fact, the Board specifically commented that if counsel wished to make further submissions based upon this evidence, he should notify the Review Board as soon as possible. After receipt of the notes, counsel for Wiebe sent a letter to the Review Board indicating that the material was dated. He did not request the opportunity to make further submissions.

30 In view of the above, I find that the Review Board gave Wiebe a reasonable and meaningful opportunity to respond to the evidence presented at the hearing.

31 Counsel for Wiebe provided the Review Board with a report by Dr. Hill. Dr. Hill's report of November 4, 2003, was based on an interview with Wiebe at the Winnipeg Remand Centre. Dr. Hill had testified for Wiebe at trial and had the opportunity to read Dr. Shane's and Dr. Ellis' reports, also submitted at trial. Therefore, he was familiar with Wiebe and his background. However, he did not have the reports from the PsycHealth Centre at the Health Sciences Centre, the Centre or the Winnipeg Remand Centre, so the information that formed the basis of his report came from Wiebe himself, a fact that the Review Board was entitled to take into account when determining the weight to be given to the report and whether it wished to question Dr. Hill in person.

32 In addition, Dr.n Hill used terminology that was not relevant to the situation in Manitoba. That is, he suggested that Wiebe could function in a minimum-security, open-ward unit. The forensic unit at the Centre, which is the only long-term hospital in Manitoba for forensic patients, is a

locked, medium-security unit. The Centre also has its regular open wards for individuals who are not forensic patients.

33 Wiebe submits that the Review Board ought to have contacted Dr. Hill to obtain clarification as to his terminology, whether he had access to other medical reports and whether he was relying entirely upon Wiebe's self-reports in arriving at his opinion.

34 Given the findings of the Review Board, I find it was reasonable not to call Dr. Hill to give evidence in person. Dr. Willows agreed with Dr. Hill's suggestion that Wiebe should be exposed to psychotherapeutic opportunities. That was not a disputed issue. It was unnecessary to cross-examine Dr. Hill on a point with which everyone was in agreement. What was disputed was the ability of the Centre to provide that treatment. This will be discussed later in this judgment.

35 The Review Board also agreed with Dr. Hill that it was not necessary to keep Wiebe in seclusion. The Review Board indicated that "when Mr. Wiebe is stable he would be able to function well within the open ward of the forensic facility where he would mingle with other patients and staff."

36 The Review Board did not agree that Wiebe could function adequately in a minimum-security, open-ward facility if that implied an ability to come and go as he pleased. This was Dr. Hill's second and alternative suggestion. There was more than ample evidence for the Review Board to come to that conclusion, including Dr. Hill's comment "that with other perceived stressful situations further excessive, illogical reactions will be shown by Joey."

INDEPENDENT ASSESSMENT

37 This court suggested in its previous decision that the Review Board should appoint an independent consultant to aid in establishing a treatment plan. This was not done. Wiebe argues that the Review Board's reasons are not responsive to the order made by the Court of Appeal at the last hearing. Moreover, it is argued that the failure to order an independent assessment can be linked to a general concern raised by the Review Board over its budget.

38 In Wiebe's previous appeal, this court held that the Review Board had not fulfilled its mandate to carry out its inquisitorial function and gather, on its own accord, the necessary evidence to conduct a full and fair hearing. At the previous hearing, as characterized by this court, the problem stemmed from the position taken at the time by the treating psychiatrist that Wiebe was essentially not treatable. Given the inadequate medical evidence before it, the Review Board did not have enough information to reach a conclusion on the nature, degree and appropriateness of the conditions imposed on Wiebe.

39 That was not the situation at this hearing. The Review Board made efforts to gather additional medical evidence. Those efforts included an attempt to have another assessment of Wiebe conducted by another psychiatrist, Dr. Vattheuer. However, Wiebe did not consent to this

assessment and indicated that he was later advised by his counsel not to consent. The Review Board discussed this refusal in its reasons for decision: In January of 2004, prior to the decision of the Court of Appeal, the Board endeavoured to have Mr. Wiebe assessed by Dr. Vattheur [*sic*]. Mr. Wiebe refused to cooperate with this assessment, initially while he sought legal advice and subsequently after he had received such advice. During the course of the hearing, counsel for Mr. Wiebe indicated that Mr. Wiebe would not consent to an assessment by Dr. Vattheur [*sic*] because Dr. Vattheur [*sic*] was not independent and was either employed by or had a very close relationship with the forensic psychiatrist operating in the two designated hospitals in Manitoba. ... As to the question of the independence of Dr. Vattheur [*sic*], in the absence of compelling evidence to the contrary, the Board accepts that Dr. Vattheur [*sic*] is qualified, capable of, and under no impediment that would impede or prevent him from, giving an independent psychiatric assessment of Mr. Wiebe. Nonetheless, if possible, the Board would endeavour to have that independent assessment, if required, undertaken by a psychiatrist acceptable to Mr. Wiebe.

40 While the Review Board does have a duty to obtain and review sufficient evidence relating to the matter at issue before it, it is a factor of some significance that the Review Board's attempts to obtain such evidence were frustrated by the refusal of Wiebe to participate in the assessment it had arranged. The Review Board considered the argument that Dr. Vattheuer was not independent and held that there was no compelling evidence to substantiate the allegation. It accepted that Dr. Vattheuer was capable of giving an independent psychiatric assessment of Mr. Wiebe.

41 Nonetheless, despite the lack of a new assessment by a third party, the Review Board did gather and hear other new evidence that it found to be of assistance and which it determined was sufficient in order for it to discharge its duty. The Review Board heard evidence from Mr. Wardrop and Mr. Hale, the Assistant Superintendent at Headingley Correctional Institution and the psychiatric nurse at the medical unit respectively. These two individuals dealt with Wiebe while he was at Headingley Correctional Institution from December 2003 until August 2004, when he was transferred back to the Remand Centre.

42 The Review Board had Dr. Hill's report in front of them, and as previously mentioned, Dr. Willows testified that the Centre would be supportive of an independent assessment or in support of any efforts to have Wiebe sent to another facility which had the ability to offer him the kind of treatment that was being suggested; that is, group psychotherapy with individuals who suffered from a similar disorder. The Review Board also heard from Dr. Barchet, Acting Medical Director of the Centre.

43 The Review Board's reasons demonstrate that its members directed their minds to this duty and to the nature and quality of the new evidence. The Review Board stated: ... In any event, as the hearing proceeded, their [*sic*] was no assessment by Dr. Vattheur [*sic*] but there was additional evidence the Board had not heard, including the evidence of Dr. Hill and Dr. Barchet. From the perspective of diagnosis, there appears to the Board to be no disagreement amongst any of the professionals. All of the doctors have indicated that Mr. Wiebe suffers from borderline personality

disorder. This is the main diagnosis. There is also no disagreement amongst any of the doctors that this is a legitimate illness and recognized in DSM-IV. As stated, although the Board did not have an assessment by Dr. Vattheur [sic], the Board did have the opportunity to review and consider the assessment report provided by Dr. Wood Hill, as well as the additional evidence of Dr. Willows and the evidence of Dr. Barchet. In addition, the Board undertook another detailed review of the previous medical reports including those of Dr. Ellis, Dr. Shane and Dr. Wood Hill and of the hospital records and nurses notes.

44 The reasons make it clear that the Review Board directed its mind to its obligation to obtain not just some evidence, but the evidence necessary to fulfill its statutory mandate. The disposition and reasons indicate that the Review Board determined that it did have sufficient evidence to proceed. Its decision to do so was reasonable in the circumstances.

45 Wiebe also alleges that the Review Board declined to order an assessment of him due to budgetary constraints. First, it should be remembered that the Review Board did attempt an independent assessment by Dr. Vattheuer, but Wiebe refused to cooperate. In its reasons, the Review Board stated: The Selkirk Mental Health Facility has indicated a willingness to have Mr. Wiebe assessed by other doctors and to cooperate in all respects with such assessments, but that cannot be accomplished without the cooperation of Mr. Wiebe.

46 Second, while the Review Board reviewed the issue of the costs of an assessment and its duty to facilitate such an assessment when the circumstances required it, it concluded that it was not necessary to facilitate a further assessment because it did have sufficient evidence to conduct a full and fair hearing and make a fair disposition of Wiebe's case. The Review Board stated: There are a limited number of psychiatrists in Manitoba who practice in the area of forensic psychiatry and most of those psychiatrists have significant connections to the designated hospitals and the treatment teams in those hospitals. The Review Board has a limited budget and the costs of retaining psychiatrists in private practice in Manitoba to undertake such assessments is an issue. The Review Board does not have sufficient resources to retain psychiatrists from other Provinces to carry out such assessments. Nonetheless, given the decisions in *Winko* and our Court Appeal [*sic*] in the Wiebe case, it is clear that this Board has the obligation to obtain the necessary evidence and, if the circumstances required such action to meet that obligation, this Board would appear to have no alternative but to order such an assessment and the payment of the related costs. ...

47 In summary, therefore, with respect to the arguments as to the flaws in the procedure, they are either not supported by the evidence or they did not affect the fairness of the hearing.

SUBSTANTIVE ISSUES

48 The Review Board made its order conditional on Dr. Willows completing an intake assessment and upon the opinion of the "treatment team" as to Wiebe's mental stability. Wiebe submits that these conditions were unreasonable in the circumstances and unlawful.

WERE THE CONDITIONS REASONABLE?

49 In making a disposition order under s. 672.54 of the *Code*, the Review Board must consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society and the other needs of the accused. After taking these factors into account, the Review Board must make a disposition that is "the least onerous and least restrictive" to Wiebe. See *Mazzei*, at para. 19.

50 It is not correct to say, as Wiebe has submitted, that the Review Board must impose the least restrictive conditions considered in isolation. Rather, it is a weighing of several factors in the context of the individual case. See *Tulikorpi*, at paras. 45 and 67. The Review Board must impose the least restrictive conditions, taking into account public safety as well as the other factors mentioned in the *Code*.

51 The Centre argued that since Wiebe had been away from the facility for a significant period of time, he should be assessed, initially placed in the high-security unit and slowly, based on a step-down procedure, earn each and every additional liberty as a reward for good behaviour. As Dr. Willows describes it, the patient would first be given guidelines of appropriate behaviour. Then once a week, he would be told if his behaviour had been satisfactory that week. If it had, then his privileges would be increased; if not, then his privileges would remain the same or would be decreased.

52 Wiebe argues that he was earning privileges before the criminal charges were laid. Now that the charges have been stayed, he is entitled to the least restrictive disposition. Therefore, he should be placed immediately with the general forensic patient population and returned to the high-security unit only if he misbehaves.

53 The Review Board, in its disposition, took a middle ground. Its final conclusion was that Wiebe represented "a significant threat," but [a]ccordingly, in our Order we have indicated that Mr. Wiebe should be detained in custody in a hospital, but that he should have normal access to the general forensic unit except when he is not mentally stable or not complying with the rules of the hospital in which case he might properly be kept in the secluded area. The Board has provided pass privileges for Mr. Wiebe to attend other hospitals for purposes of assessment and treatment and for extended pass privileges if arrangements can be made, with Mr. Wiebe's consent, for him to undergo treatment at other facilities such as Penetanguishene.

54 In effect, the Review Board agreed that Wiebe may have access to the less secure area of the forensic unit provided that:

(1) Wiebe first undergoes an assessment of his mental condition;
(2) Wiebe is in compliance with the rules of the Centre; and
(3) in the opinion of the treatment team, Wiebe is mentally stable.

55 With respect to the first condition, the Review Board agreed with the Centre that it was necessary to undertake an assessment of Wiebe's condition prior to moving him from the secluded area of the forensic unit. Wiebe had been in the correctional system for 20 months prior to his return to the Centre and he had not been assessed during that time. Wiebe's prior behaviour warranted an assessment of his mental stability.

56 The evidence before the Review Board was that, in normal circumstances, upon his return to the Centre, Wiebe would be placed in the high-security area until he was assessed and that the assessment would not take long. However, as at the date of the Review Board hearing (two weeks after Wiebe returned to the Centre), Wiebe was resisting the efforts of the treatment team to undertake an assessment. The Review Board concluded: The Board concurs that, upon admission of a patient with a history like that of Mr. Wiebe, care should be taken to safeguard both the patient and other patients until an assessment of his mental condition can be concluded. However, that should be a priority and, as soon as it appears that a patient is mentally stable, is complying with the requirements of the hospital and it is safe, he or she should be allowed into the general forensic unit with access to all of the areas accessible to forensic patients.

57 There is nothing unreasonable about this condition, nor is there anything unreasonable about requiring Wiebe to be in compliance with the rules of the Centre before being allowed out of the four-bed, high-security area and into the general forensic ward.

58 Lastly, the Review Board ordered that when he was allowed access to the general forensic ward, he be mentally stable in the opinion of the treatment team.

59 Viewed from the standard of reasonableness, I find this condition was also reasonable in the circumstances. The condition was crafted to address the very nature of Wiebe's condition - his unpredictability and dangerousness, both of which were substantiated by the evidence.

60 The Review Board reviewed Wiebe's behaviour while at the Manitoba Youth Centre, Health Sciences Centre, the Centre and Headingley Correctional Institution and noted a number of disturbing incidents. After reviewing this information, the Review Board found that Wiebe "requires close supervision due to the unpredictability of his behavior, which unfortunately manifests itself in angry outbursts sometimes accompanied by physical aggression."

61 In addition, Dr. Willows testified that Wiebe is easily stressed out and easily agitated. His anger and rage are sporadic and episodic. Reports from the Manitoba Youth Centre from May 2000 to February 2002 indicated that Wiebe's behaviour showed dramatic fluctuations, ranging from calm and friendly to extreme anger and rage. His behaviour vacillates between compliance and "times of agitation and aggressive behavior directed towards staff and other patients." The Review Board summarized the assessment of several medical practitioners when it stated in its reasons for decision: There is unanimity in the medical reports that Mr. Wiebe is ill, unpredictable, potentially violent and a significant threat.

62 I appreciate Wiebe's argument that, given Dr. Willows' previous testimony, allowing the treatment team to determine when Wiebe was mentally stable would, in effect, give decision-making power to an individual "who was determined to keep Mr. Wiebe locked up." However, the Review Board did not accept that submission. The relationship between Dr. Willows and Wiebe was the subject of evidence and argument in front of the Review Board. The Board held that there was no evidence to suggest that Dr. Willows was determined to keep Wiebe in the high-security area indefinitely or that Dr. Willows would abuse his power. On the contrary, Dr. Willows' evidence was: ... I would certainly not want to keep Mr. Wiebe in high secure area with minimal privileges if his behaviour was appropriate, if he was communicating with the treatment team and he wasn't threatening other patients.

63 The Review Board's order reinforces that conclusion and is repeated in its comments with respect to Dr. Hill's report when it stated: If Dr. Hill means by an open ward that Mr. Wiebe is not required to be in seclusion, the Board is generally in agreement provided at any relevant time his mental condition is stable and he is complying with all of the rules of the hospital.

64 In my view, this condition signals to the Centre the decision of the Review Board that Wiebe may reasonably access the general area of the forensic unit, but grants to the Centre the discretion to deal with Wiebe's unpredictable behaviour on a day-to-day basis. It strikes a reasonable balance between the liberty interests of Wiebe and the need of the Centre to protect its patients and staff. It is the least restrictive and least onerous manner to handle Wiebe given the unpredictable nature of his behaviour and the significant threat he poses to staff and the other patients at the Centre.

WAS THE CONDITION LAWFUL?

65 However, Wiebe argues further that allowing him access to all areas of the forensic unit of the Centre only when "in the opinion of the treatment team he is mentally stable" was an illegal condition because it was an inappropriate delegation of power to the Centre. Wiebe's argument is essentially that the Review Board has, pursuant to s. 672.54, given the treatment team the ability to increase Wiebe's restrictions of liberty in a way contemplated only by s. 672.56(1).

66 It is submitted the Review Board should have made the order under s. 672.56 of the *Code*. That section contemplates that the Review Board may delegate the power to increase or decrease significant restriction on the liberty of the patient to the "person in charge of the hospital authority." Moreover, it protects the patient's liberty interest by providing a remedy if the institution unduly restricts the liberty of the patient. Any significant restriction must be recorded and if imposed for more than seven days, must be communicated to the Review Board and gives rise to an automatic review under s. 672.81.

67 By wording the condition in the manner it has, Wiebe argues, the Review Board delegates to the treatment team the power to return Wiebe to the high-security unit if he becomes mentally unstable or breaks any of the Centre's rules, but Wiebe is deprived of an automatic review if his liberty is significantly restricted. Thereby, the Review Board failed to ensure that Wiebe would be

able to live under the least onerous and least restrictive conditions necessary to serve the purpose of the NCR designation.

68 In response, the Centre argued that to hold that the Review Board must formally delegate authority to the Centre to make this type of decision would mean that the Review Board could potentially be micromanaging a patient's care at the Centre. Moreover, it could interfere with the Centre's treatment of the patient (because a treatment regime may include the granting or withdrawal of privileges). The proviso was worded in that way because it was clear to the Review Board that Wiebe should be detained and since his behaviour is unpredictable, the Centre must be able to manage his behaviour.

69 Where the Review Board orders a conditional discharge or makes a detention order under s. 672.54 of the *Code*, the Review Board may also delegate to hospital administration the authority to vary restrictions placed on the accused. Section 672.56 reads as follows: 672.56 (1) A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b) or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board. (2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall (a) make a record of the increased restrictions on the file of the accused; and (b) give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board.

70 Also relevant to our discussion is s. 672.81(2)(a), which, at the time (*2), read as follows:

> (*2)The subsection was replaced by s. 672.81(2.1) on January 2, 2006, by S.C. 2005, c. 22, s. 27.
>
> (2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend
>
> (a) has increased the restrictions on the liberty of the accused significantly for a period exceeding seven days; ...
>
> .. .. .

71 A review of the legislative history indicates that the section seems to be a codification of a practice that developed under the previous system, designed to allow the hospitals some flexibility in the nature of the NCR accused's detention.

72 Under the previous system based on Lieutenant Governor's warrants (LGW), once the initial

warrant was in place, only the Lieutenant Governor could vary its terms. The provincial advisory boards reviewed warrants on a yearly basis and a practice developed where, if appropriate, the terms of the warrant were loosened so that an individual could be gradually reintegrated into the community before a warrant was actually vacated: This practice of "loosening warrants" appears to have been adopted in some provinces for two reasons. First, if the individual is technically in custody, he or she may be monitored through a review system that only applies to persons who are in custody. Second, if an individual being gradually reintegrated into the community needs to again be confined, this may be done administratively under the existing warrant without having to act under s. 545 to impose a new warrant. At present, there is no clear statutory authority in the Code for this practice of "loosening" or "tightening" of warrants, nor for the delegation of authority to hospital personnel to permit greater or lesser freedom - a practice used in some provinces. [Canada, Department of Justice, *Mental Disorder Project, Criminal Law Review: Discussion Paper* (Ottawa: Department of Justice, September 1983) at 211]

73 In proposals and discussions for change with respect to reviews of the initial disposition order, there was an attempt to balance the liberty concerns of an accused with the gradual nature of the process of rehabilitation. Consequently, it was recommended that the informal practice of "loosening warrants" be expressly adopted in the *Code* with a similar range of options as those set out for the initial disposition. Two of the rules or procedures recommended were: .. .. .

> (r) where a "loosened" order or warrant is "tightened" significantly, there should be provision for an automatic early review;
> (s) the Code should contain specific power to allow the board to delegate its authority regarding detention and release to the hospital or place where a person is being held or attached, but only in the context of "loosened" warrants wherein the board sets the general parameters for gradual release as part of the rehabilitation process, with an implementation plan permitting such gradual release to be decided upon by the hospital or place; ...
>
> .. .. .
>
> [Canada, Department of Justice, *Mental Disorder Project, Criminal Law Review: Final Report* (Ottawa: Department of Justice, September 1985) at 55]

74 The goal to formally adopt the practice of "loosening warrants" was achieved in s. 672.54 by requiring that conditional discharges and detention orders be "subject to such conditions as the court or Review Board considers appropriate." The practice under the LGW system of allowing the decision-maker to delegate its authority to hospital administration to determine the manner of custody imposed was also seen as an option which should be legislated so long as certain protections were in place. These concepts appear to be reflected in ss. 672.56 and 672.81.

75 Since its enactment in 1992 as part of the comprehensive statutory changes in relation to mentally disordered offenders in criminal proceedings, s. 672.56 has not been the subject of much judicial discussion. What comment there has been in the case law supports the concept that s. 672.54 sets out the general parameters of the nature of the NCR accused's detention, while the day-to-day fluctuations are delegated to the hospital. When the fluctuations become substantial and in force for more than seven days, a review is mandated.

76 So, for example, in *Tulikorpi*, the main issue in the case was whether the conditions attached to a disposition under s. 672.54(b) or (c) were required to be "the least onerous and least restrictive." However, with respect to the purpose of s. 672.56, the Supreme Court stated (at paras. 68-69): Moreover, the Crown's argument that allowing this appeal would result in excessive rigidity overlooks s. 672.56 of the *Criminal Code*, which permits the Review Board to delegate to the person in charge of the hospital "authority to direct that the restrictions on the liberty of the [NCR] accused be increased or decreased within any limits and subject to any conditions set out in that disposition ...". Thus, within the outer envelope established by the Review Board order, a hospital administrator may move to restrict the detainee's liberty if circumstances warrant, although if the restriction is significant and lasts longer than seven days, the Review Board must be notified and a hearing held: see "Wording of Custodial Disposition Orders", s. 4 in *Manual of Operating Guidelines for Provincial Psychiatric Hospitals* (June 1995). If problems arise, such as a deterioration in the mental condition of a hospital detainee permitted residence in the community, the detainee can be returned to the hospital without the need of any prior order of a court or the Review Board. The delegated authority, of course, must be exercised having due regard to the detainee's liberty interest in light of the twin goals of public safety and treatment, but it permits a degree of day-to-day fine tuning that, if properly exercised, will prevent the "least onerous and least restrictive" requirement from compromising achievement of treatment objectives.

77 These comments indicate that part of the purpose of s. 672.56 is to provide a degree of day-to-day fine-tuning that otherwise would not be possible without some degree of delegation. The NCR accused's liberty interest is preserved by the proviso that where the exercise of the discretion results in a significant increase in restrictions on the liberty of the accused, then notice must be given to the Review Board, which is then required to hold a review hearing as soon as is practicable. It is also protected by the fact that "[t]he delegated authority, of course, must be exercised having due regard to the detainee's liberty interest in light of the twin goals of public safety and treatment" (*Tulikorpi*, at para. 69).

78 In the case of *R. v. Lepage* (D.L.) (1997), 103 O.A.C. 241, aff'd [1999] 2 S.C.R. 744, the majority of the court regarded s. 672.56 as a mechanism to enhance the flexibility of Review Board orders. After commenting on the flexibility that could be achieved by conditions imposed under s. 672.54, the majority went on to state that "[t]he flexibility built into conditional discharges and hospital detention orders is enhanced by s. 672.56" (at para. 65). Later, the court stated that the disposition scheme permits the Review Board to "tailor orders to the specific needs of each case and to make those orders sufficiently flexible to respond quickly where circumstances warrant a

variation of the disposition" (at para. 66). See also, *Forensic Psychiatric Institute (B.C.) v. Johnson et al.* (1995), 66 B.C.A.C. 34 at para. 51.

79 It seems clear that this is the kind of situation the Review Board had in mind here when it decided that insofar as his placement was concerned, Wiebe should have access to all areas of the forensic unit and then delegated to the treatment team the discretion to take that privilege away on specified conditions. It would seem that the Review Board was attempting to tailor its order to make it sufficiently flexible "to respond quickly where circumstances warrant a variation of the disposition."

80 It is true that there is no explicit reference in the order to s. 672.56. However, having applied a contextual and purposive analysis to the legislation (see *Mazzei*, at para. 9), I am of the view that the section is intended to cover all discretion given to the director. An explicit reference to the section is not necessary. The order and conditions made by the Review Board in this case under s. 672.54 expressly give the treatment team discretion. It can only be pursuant to s. 672.56. There is no other appropriate section. The court should look to the substance of what the Review Board intended and not require a specific formal wording. My conclusion is the same with respect to the fact that the condition refers to the "treatment team" and not to "the person in charge" of the Centre, the language used in the section. Obviously, the intention of the Review Board was to give the individuals in authority at the Centre the discretion to act quickly if Wiebe became unstable or disobeyed rules, while offering him the least restrictive option. To hold otherwise would be to place an unduly technical interpretation on the language of the sections. If it were necessary to do so, I would order the words "the person in charge of the Selkirk Mental Health Centre" substituted for the words "treatment team" in the challenged condition.

81 Obviously, there are certain matters that cannot be delegated either expressly or impliedly, and to do so would be an error in law. For example, the Review Board cannot delegate such fundamental decisions as the NCR accused's core level of security. In provinces where there are different psychiatric hospitals at different levels of security, the choice of hospital and level of security can be crucial to the NCR accused. Even in provinces where those choices are not available, the conditions of detention are just as crucial. See *Tulikorpi*, at paras. 29-34, and *Johnson*, where the British Columbia Court of Appeal held that the Review Board erred when it ordered a conditional discharge subject to conditions that delegated to the director the discretion to confine the NCR accused to a hospital.

82 However, within that outer envelope, just as obviously, certain things, in the discretion of the Review Board, may be delegated to allow for rapidly changing circumstances. I note that in the *Tulikorpi* decision, the Supreme Court did not take issue with the fact that the Review Board had delegated to "the person in charge" the discretion to decide whether to permit the accused to attend outside the hospital for necessary medical, dental or compassionate purposes, as well as the discretion to allow the accused hospital and grounds privileges, even though there was no express reference to s. 672.56. See para. 11.

83 In this situation, the Review Board determined that Wiebe should have access to all areas of the forensic unit so long as he was in compliance with the Centre's rules and mentally stable, as determined by the Centre or "treatment team" at any particular time. That was a reasonable condition for all the reasons mentioned previously. To hold otherwise would not only be micromanaging every fluctuation in the patient's course of treatment, it would also leave hospital staff without recourse if a patient with Wiebe's volatile history became dangerous to other patients or staff. One should not expect the hospital to wait for a Review Board hearing should a change of circumstances arise.

84 On the other hand, it cannot be denied that the Review Board delegated decision-making in regard to restrictions of liberty. Whether s. 672.56 is mentioned expressly or not, there is no other mechanism under Part XX.1 of the *Code* for the Review Board to delegate such decision-making to the hospital. To hold otherwise would deprive the NCR accused, in cases of significant changes, of the automatic review mechanism provided for in the *Code*.

85 I find that the disputed condition is, in substance, an implicit delegation to "the person in charge of the hospital authority" and subject to the conditions set out in s. 672.56. Therefore, it protects the liberty interest of the accused by giving him access to a hearing if the restrictions on his liberty were significantly increased for more than seven days.

86 Under s. 672.56(2), it is only when restrictions on the liberty of the accused are increased "significantly" that the person in charge of the hospital authority must make a record of the increased restrictions on the file of the accused, give notice to the accused and, if the restrictions continue for more than seven days, give notice to the Review Board. The Review Board must then hold a hearing as soon as is practicable after receiving the notice. See s. 672.81. The Review Board may decide that the increased restrictions were justified. See, for example, *Vale (Re)* (30 September 1997), British Columbia Review Board, where the NCR accused's loss of day leaves while in a custodial disposition were found to be a substantial deprivation in the circumstances, but nonetheless justified as a result of the accused's behaviour.

87 Counsel for the Review Board argues that the difference between the four-bed, high-security "seclusion" area of the forensic unit and the general forensic unit next door in the same facility is not a "significant" change in liberty. Rather, such a change was one which a hospital had to be able to make in its daily management of the hospital and its patients. Otherwise, with respect to a patient who is unpredictable and volatile, there might be a change in restriction every month, particularly since the evidence indicated that Wiebe's unstable periods occur somewhat frequently, especially when he is in a more stressful setting. It cannot be that Parliament intended for a review to occur potentially that frequently, it is submitted.

88 What is a "significant" restriction on an NCR accused's liberty requires a contextual analysis or, in other words, the law must be applied in a common sense and pragmatic fashion to the facts of a particular case. The importance of the NCR accused's liberty interest must be balanced with the

need to craft a set of conditions that allows sufficient flexibility to cope with the unpredictable nature of mental illness and the safety interests of the public.

89 While the Review Board cannot delegate to the director its paramount responsibility for ensuring that a proper balance is maintained between these interests, there is a power to delegate certain decisions within the parameters of the Review Board's "outer envelope" that allows the hospital to respond to changing circumstances.

90 Having said that though, to decide at this point that the passage through the door of the general forensic unit to the high-security unit is a "significant" decrease in the liberty of the accused in this particular case is premature. I have already held that it was reasonable in the circumstances to require an intake assessment to be completed before access to the general forensic unit is allowed. At the time of the Review Board hearing, Wiebe was resisting that assessment. When and if a "significant" decrease in the liberty of Wiebe occurs for more than seven days after that point, the matter can be determined on the basis of the specific facts of that occurrence within the context and nature of the facility in which he is detained. If, based on that evidence, a significant increase in restrictions has occurred, a determination must still be made by the Review Board whether the increased restriction was justified in the circumstances. TREATMENT

91 Wiebe has asked this court to consider the issue of whether the Review Board has the power to order a specific course of treatment. Wiebe submits that the Review Board is empowered to review treatment and to ensure that a patient has access to appropriate treatment within contemporary professional standards by making access to such treatment a condition of detention. Specifically, he argues that the Review Board should have included conditions as to the type of psychiatric treatment to be provided to him.

92 The Review Board's position is that its jurisdiction under the provisions of Part XX.1 of the *Code* does not allow it to make the orders that Wiebe alleges it should have made. The Centre and the Attorney General take the same position. This court held in Wiebe's previous appeal that neither the courts nor the Review Board have the jurisdiction, nor ought they, "to prescribe a specific course of medical treatment" (at para. 32). The treating psychiatrist and the facility's treatment team are in the best position to deal with treatment issues and it would be inappropriate for the Review Board to make dispositions relating to treatment. This was also the view of the British Columbia Court of Appeal's decision in *Mazzei* (2004 BCCA B.C.A.C. 79, 2004 BCCA 237).

93 Since the filing of those submissions and the hearing of the appeal, the Supreme Court of Canada has released its decision in *Mazzei*. Both Wiebe and the Review Board provided this court with copies of that decision.

94 The Supreme Court of Canada decision in *Mazzei* represents a clarification of Review Board powers. The central question in this case was the scope of the Review Board's power to make conditions binding on hospital authorities and, in particular, conditions related to the provision of medical treatment. The court concluded that Review Boards have the power to bind hospital

authorities and to impose binding conditions regarding or supervising (but not prescribing or imposing) medical treatment for an NCR accused. The fact that the director and the treatment team and hospital administration by implication are bound by Review Board orders and conditions is not in dispute in this case.

95 With respect to medical treatment, it is the role of a Review Board to ensure that opportunities for medical treatment are provided to an NCR accused where necessary and appropriate, but it cannot require hospital authorities to administer particular courses of medical treatment. That would be an inappropriate interference with provincial legislative authority, with hospitals' treatment plans and practices and with a hospital's discretion concerning the provision of medical services. See *Mazzei*, at paras. 31-33, and *Wiebe*, referred to in *Mazzei* at para. 36.

96 As part of its mandate in supervising medical treatment, Review Boards may require hospital authorities and staff to question and reconsider past or current treatment plans or diagnoses and explore alternatives which might be more effective and appropriate, especially where no progress has been made or is likely to be made. See *Mazzei*, at paras. 39-44.

97 While the line between supervising and imposing medical treatment may be difficult to draw in many cases, that is not the situation before us.

98 The reasons of the Review Board confirmed that there seemed to be unanimity among the doctors as to Wiebe's main diagnosis of borderline personality disorder. There also seems to be unanimity as to the nature of the appropriate treatment. While the evidence indicated there was no cure for this disorder, there were some innovative treatments being tried. So, for example, the recognized treatment for borderline personality disorder is long-term psychotherapy treatment; in particular, long-term group psychotherapy conducted in a group of individuals with a similar diagnosis.

99 This cannot be done at the Centre since Wiebe is the only patient in the facility with that primary diagnosis. Dr. Barchet, Acting Medical Director of the Centre, reviewed the situation and concluded that the Centre could not provide this type of treatment for Wiebe. The Centre does not have a forensic psychologist on staff capable of treating a person with a primary diagnosis of borderline personality disorder. It has neither the resources nor the programming to conduct the type of psychotherapy required. However, the evidence indicated that, aside from group therapy, the Centre has attempted over the past years to offer treatment to Wiebe. It is not the best treatment for Wiebe's condition, but it is the best treatment that can be offered by the Centre. Wiebe has a treatment team at the Centre who will provide counselling therapy to him (if he chooses to partake), and Wiebe is encouraged to take responsibility for his actions. He has access to treatment, but he may not have access to the best treatment for his disorder.

100 The Centre has explored alternatives. Outside of Manitoba, in larger mental institutions, there are sufficient patients with that diagnosis, so group therapy is an option. Dr. Barchet testified that the Oak Ridge Division of the Penetanguishene Mental Health Centre in Ontario is structured to

care for individuals with borderline personality disorders. Not only did it have trained staff and a specialized team, but it was an appropriately secure facility. Dr. Barchet recommended placement in either Penetanguishene or a similar facility in Port Coquitlam. He indicated that the Centre would be willing to facilitate a transfer.

101 The Review Board attempted to provide opportunities for medical treatment by providing for a treatment plan to be developed and implemented with access to other mental health facilities or hospitals. In its conditions, the Review Board provided pass privileges for Wiebe to attend other hospitals for purposes of assessment and treatment and for extended pass privileges if arrangements can be made, with Wiebe's consent, for him to undergo treatment at other facilities, such as Penetanguishene.

102 I agree with the Review Board that no treatment is not an option. As the Supreme Court observed in *Tulikorpi* (at para. 67): Section 672.54 directs the Review Board to have regard to "the other needs of the accused" (emphasis added). At the forefront of these "other needs" is the need for treatment.

103 *Mazzei* elaborates on that theme by pointing out that while a Review Board cannot order medical treatment, it can examine the treatment modalities which are offered and, if not satisfactory, require efforts from those responsible to consider other possibilities.

104 Unfortunately, while the Review Board can provide opportunities for Wiebe to be treated at other facilities, for example by providing passes to Penetanguishene, that facility is not a designated hospital to which the Review Board can order Wiebe. Although the Centre can initiate such transfers itself and is willing to do so in this case, it requires Wiebe's consent. Such consent has not been forthcoming because Wiebe wishes to remain in Manitoba, near his family. Within that constraint and in the context of the evidence before the Review Board at that time, I find the Review Board fulfilled its mandate as set out by the Supreme Court of Canada in *Mazzei*.

105 While I agree with Wiebe that the disputed condition is a delegation under s. 672.56, it is nonetheless lawful, and therefore, and for the reasons given above with respect to the other grounds of appeal, the appeal is dismissed.

MONNIN J.A.:-- I agree.
HAMILTON J.A.:-- I agree.

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