

MEMORANDUM

R.

v.

**ROYAL OTTAWA HEALTH CARE GROUP,
A. LEYSHON-HUGHES AND
ONTARIO REVIEW BOARD
(OSCJ NO.12445 – MAY 31/07)**

RE: Leyshon-Hughes Part II

1.0 INTRODUCTION

Readers will recall my April 27/07 brief regarding this matter, wherein the Ontario Review Board (ORB) adjourned an annual hearing for six months, in order to obtain an independent assessment of the accused (attached).

For a variety of reasons, the ORB wanted an arm's length expert to assess the accused due to what it felt were discrepancies or shortcomings in earlier risk assessments. As outlined in this decision of the OSCJ, it appears the ORB arrived at that decision in camera, without hearing oral testimony from the author of the previous risk assessments.

Counsel for the accused not only objected to the assessment order and adjournment, but further asked that the panel recuse itself.

The matter proceeded to the Ontario Superior Court of Justice on judicial review. The accused argued the ORB had committed a jurisdictional error by violating the principles of natural justice and demonstrating a reasonable apprehension of bias.

The accused successfully sought the following orders:

- quashing the order/decision,
- prohibiting the same panel from hearing his annual review and
- requiring a new panel be constituted to hear his review;

The ORB sought intervener status in the Court. The Court limited its submissions to the following: the scope and proper exercise of the ORB's inquisitorial powers; the scope and exercise of the ORB's power to adjourn; the ORB's special procedures (rules).

The Court did not allow the ORB to be heard on the allegations of breach of natural justice or reasonable apprehension of bias as these issues were the very subject matter, or grounds, of the judicial review; and held that to do so would weaken the impartiality of the Board generally and specifically with respect to the accused:

“The issue of substantive unfairness in the conduct, procedures and decisions of the ORB is the very question before this Court. Submissions by the ORB on the merits of that issue would amount to an inappropriate additional opportunity to defend the merits of its decision and would not be helpful to the Court nor fair to (accused)”: par.25

The Court’s decision was rendered on May 31, 2007.

2.0 BACKGROUND FACTS

2.1 Procedural Steps Taken by the ORB Leading Up to the Dec 18/06 Annual Hearing

The ORB apparently convened two teleconferences prior to the hearing.

At the first hearing, Crown Counsel disclosed that he was considering asking for an independent assessment. Dr. B., whose assessment was central to this case, indicated he would expand his “disposition information” report to address the Crown’s concerns. The ORB made no mention of an independent assessment at that time. .

At a second teleconference, Crown indicated, and later confirmed in writing, he would (likely) not be requesting an independent assessment.

Dr. B.’s revised report addressed Crown’s issues as well as issues raised in previous Reasons for Disposition.

All parties were prepared to proceed with the scheduled annual hearing.

2.2 Dec 18/06 Annual Hearing and Order

Prior to commencing the hearing, the ORB panel had a lengthy in-camera discussion. Dr. B.’s report was filed. No other evidence was presented. The hearing was adjourned as set out in oral reasons and elaborated in later written reasons (dated January 23, 2007 and previously distributed). An independent assessment was “suggested” by the Board, which the Board thought would provide a “fresh perspective”. The ORB said its actions were dictated by its inquisitorial duties. The Board concluded as follows:

“In anticipation that Dr. Bradford’s evidence reflects the hospital report – which we should mark as Exhibit 1 today – and his evidence in prior hearings, this Board simply isn’t satisfied that it can have the in-depth analysis that it needs to evaluate the accused’s risk.

Without it this Panel could likely not come to an informed decision about Mr. Leyshon-Hughes’ risk”: para.51 of Court judgment.

The Panel adjourned the hearing for 6 months; the Chair refused to recuse himself as requested and declared the Panel seized of the matter.

3.0 FINDINGS OF THE COURT ON JUDICIAL REVIEW

The Court found that the ORB's adjournment to obtain further evidence announced at the commencement of the hearing (although after hearing submissions) came as a "surprise to all". Further, accused's counsel could not have been found to have consented to the adjournment. In fact, this would have been inconsistent with her request that the Chair recuse himself.

As I commented in my April 24/07 memo, the Court found that at the end of the hearing no party had actually agreed to be bound by the Board's rather timid "suggestion" for an independent assessment. The Court indicated that, in retrospect, it even appears that the accused would have had to fund the assessment.

The Court also found that without accused's consent, in what it labelled an "experiment", the Board's order was but a "suggestion" for an assessment: par.64.

3.1 Ruling re Authority for Adjournment

The Court found that the Board's adjournment of this matter for 6 months, and absent consent of parties, was without statutory jurisdiction: par. 81.

3.2 Ruling Re Scope of the ORB's Inquisitorial Powers

After quoting extensively from *Winko* regarding the inquisitorial nature and process of RB hearings, the Court ruled that the Board's determination regarding the (in)sufficiency of the evidence tendered, so as to trigger its duty to inquire, insofar as it occurred before the hearing and without first considering of all written and oral evidence, was premature. In doing so, the Court held that the ORB exceeded the permissible scope of its inquisitorial jurisdiction: par.82.

The Court went on to specifically refer to *Mazzei* (SCC) to support the unfettered breadth or scope of the Board's properly exercised inquisitorial powers. (It distinguished *Mazzei* on the obvious basis that the BCRB's disposition in that case was formulated "after the annual review hearing and all of the evidence had been presented".)

The Court concluded as follows:

"In sum, the jurisprudence clearly establishes that the ORB has the statutory authority to embark on such a broad scope of inquiry with respect to a NCR accused's past and present medical diagnosis and treatment in the course of its determination of whether that individual poses a significant risk to the public. It must, however, exercise all of these inquisitorial powers within the context of a hearing during which the NCR accused is accorded all his constitutional and statutory rights to procedural fairness. In conducting itself in the way it did in this matter, the ORB created substantial unfairness to Mr. Leyshon-Hughes." : par.88 of judgment.

The Court also commented critically on the ORB's suggestion that, as part of the "assessment", the accused submit to a trial withdrawal of his medication to test his diagnosis, as potentially unethical. Presumably might offend the "prescribing of treatment" threshold delineated in *Mazzei*.

3.3 Other Practices Adopted by the ORB

While the Court noted that pre-hearing conferences may be very useful, they become problematic if they result in decisions which in the absence of the accused affect his substantive or procedural rights. The Court placed great emphasis on the accused's right of reasonable notice of anticipated issues:

The pre-hearing conferences provided by the Rules of Procedure of the Board could have been an effective mechanism for providing reasonable notice of anticipated issues. In fact, that is the stated purpose of such conferences. In this case the conferences seemed to have been used for a dialogue between the parties, but not a dialogue on issues between the parties and the ORB. On the facts of this case this was a failing in the system: par. 101 of judgement

3.4 Reasonable Apprehension of Bias

The Panel's pre-judgement or conclusion as to the sufficiency of the evidence, prior to hearing and testing of that evidence, was unfair and created a reasonable apprehension of bias: par.102.

3.5 Costs

There is a real possibility that, in this case, costs of the judicial review application may be awarded against the ORB.

4.0 TENTATIVE CONCLUSIONS

- Seems to support the Board's common-law power to order an independent assessment, outside of S.672.121, in aid of its inquiry, as long as it is done at the appropriate juncture and with accused's consent.
- Reiterates limit of adjournment power (30 days): S.672.5
- Appears to clarify that notwithstanding Board's inquiry burden, it is to first rely on and consider the evidence adduced by parties; only after that evidence is declared insufficient, can the inquiry power properly be exercised. "Efficiency" concerns or objectives to override or trump procedural fairness. Always hear the evidence before reaching any conclusions about its adequacy.
- May allow Board to dispense with certain evidence parties wish to lead if after hearing from one it decides it does not need to hear more!
- May help further delineate the line between "treatment" and "assessment"?