Ontario Review Board

Re:	Christopher Ducharme (DOB: 23.01.92)
ORB File No:	7202
Hearing held on:	Tuesday, September 7, 2021
Place of hearing:	Waypoint Centre for Mental Health Care Via Zoom Video Conference
Pursuant to:	Section 672.81(1) of the *Criminal Code*

Before:

Alternate Chairperson:	Mr. W.B. Donaldson
Members:	Dr. P.L. Darby Dr. S. Swaminath Ms. J. Mills Ms. R. MacIntyre

Parties Appearing:

Accused:	Christopher Ducharme	
	Counsel:	Ms. A. Szigeti
	Counsel:	Ms. M. Kotob
The person in charge of Waypoint:	Counsel:	Ms. J.L. Lefebvre
The person in charge of Waypoint:	Counsel:	Mr. J.P. Thomson
Attorney General of Ontario:	Counsel:	Ms. C. Ross

REASONS FOR RULING ON MOTION
(Dated October 21, 2021)

Introduction

1. Mr. Christopher Ducharme was found not criminally responsible on account of a mental disorder (“NCR”) on two occasions, both in the province of Quebec. On March 2, 2015, he was found NCR on charges of failing to comply with a recognizance, obtaining food fraudulently, possession of stolen property, car theft, reckless driving, attempting to leave the scene of an accident, and death threats (x2). On December 5, 2016, Mr. Ducharme was found NCR again, on a single charge of assault. He was transferred from Quebec to

Ontario pursuant to the Attorney General of Ontario's consent for interprovincial transfer dated January 12, 2018.

2. On January 29, 2020, the Ontario Review Board ("Board") ordered Mr. Ducharme detained at Waypoint Centre for Mental Health Care ("Waypoint" or "the hospital").

3. On June 11, 2020, Mr. Ducharme was placed into locked seclusion where he remained until April 24, 2021. Waypoint did not give notice pursuant to s.672.56(2) of the *Criminal Code* of Mr. Ducharme's seclusion, nor did Waypoint inform the Board of Mr. Ducharme's move to seclusion in excess of seven days until January 19, 2021.[1]

4. Subsequently, Mr. Ducharme ("the Applicant") filed a Motion pursuant to Rule 8 of the Ontario Review Board ("the Board") Rules of Procedure to determine the narrow legal question of whether seclusions exceeding seven days require formal notice under s. 672.56 (2) of the *Criminal Code* in all cases. The Applicant seeks a ruling with respect to the following:

    (i) a finding that Waypoint's failure to provide formal notice of Mr. Ducharme's seclusion on June 18, 2020, was in violation of s. 672.56(2) of the *Criminal Code,*

    (ii) a Restriction of Liberty hearing to be convened by the Board to review the period of locked seclusion from June 11, 2020, to April 24, 2021.

5. At a Pre-Hearing Conference ("PHC") dated August 11, 2021, on consent, the parties agreed to the process to be followed on the Motion, including the documents to be filed and the fixing of time limits for oral submissions.[2]

6. Counsel for the Attorney General for the Province of Ontario ("AG") took no position with respect to the subject matter of the Motion and did not file materials, nor did she make oral submissions

Submissions of the Applicant

7. Counsel for the Applicant relied on the Applicant's Amended Factum[3] and submitted that the Applicant had been placed in locked seclusion for a period of 317 days, from June 11, 2020 – April 24, 2021, and no notice had been given to the Board with respect to his seclusion. On January 19, 2021, Waypoint provided the Board with a letter in accordance with *Campbell (Re)*, 2018 ONCA 140, informing the Board of the Applicant's seclusion (a *Campbell* letter). This letter was sent after the Applicant complained to the Board, and outlines Waypoint's position with respect to his seclusion, highlighting their position that the Applicant's seclusion did not require a s. 672.56(2) notice.[4] Counsel for the Applicant submitted that all seclusions in excess of seven days

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[1] Exhibit 1
[2] PHC Report, August 11, 2021
[3] Exhibit 2
[4] Exhibit 1

require a notice to the Board pursuant to s. 672.56(2) of the *Criminal Code*, and that Waypoint's policy that a locked seclusion is not a significant restriction of an individual's liberties such to invoke the provisions of the *Criminal Code* is not in keeping with the caselaw. Further, there is a duty on the person-in-charge (PIC) of a hospital to make the least onerous and least restrictive decision with respect to an NCR accused who is secluded for a period of greater than seven days and that notice is required.

8. Counsel reviewed the provisions of the *Mental Health Act (MHA)* noting that section 25 is permissive and includes forensic patients such as the Applicant. Counsel further submitted that the permissive language "may seclude" indicates the *MHA* contemplates the hospital "may seclude" a Board patient but that the language in the *MHA* did not have the effect of "ousting" the Board's jurisdiction. Counsel submitted it is settled law that a seclusion in excess of seven days requires formal notice to the Board pursuant to s. 672.56(2) and relied on *R. v. Faichney*, 2007 ONCA 613, *Conway (Re),* 2012 ONCA 519 and *Campbell (Re),* supra, at paragraph 69, in support of the Applicant's position. Counsel also referred the Board to *Ince (Re),* [2012] O.R.B.D. No. 2338, in which the Board had followed the direction set out in *Faichney* with respect to the requirement for notice to the Board arising from Mr. Ince's seclusion in excess of seven days.

Submissions of Respondent

9. Counsel for the hospital submitted that s. 672.56(2) does not require the PIC to give notice to the Board for each seclusion lasting longer than seven days because the ability to seclude an individual is not delegated by the Board to the PIC. Counsel submitted that mandatory notices are only required in response to delegated authority. Counsel submitted that seclusions are the result of an order from a physician pursuant to th*e MHA* and relied on *Hassan (Re)*, 2020 ONCA 696 for the proposition that the consequence of requiring hospitals to provide notice to the Board in every instance of seclusions longer than seven days would result in a resource issue for hospitals and doctors. Counsel submitted that Young *(Re),* 2011 ONCA 432 clearly outlined the Board's lack of jurisdiction with respect to the issue of seclusion. Counsel emphasized that the Board cannot delegate the power to seclude a person when the Board itself does not have authority to seclude a person. Counsel submitted that the so-called *Campbell* letter was sufficient to discharge the duty of the hospital with respect to notice.

10. Counsel noted that the *Young (Re)* case post-dated *Faichney* and set out clear guidelines for the Board. Counsel emphasized that the *MHA* authorized seclusions of individuals, including those subject to a detention order. Counsel also emphasized that although the hospital was in agreement that the Board was entitled to receive information with respect to an NCR accused who had been secluded for longer than seven days, the Board's jurisdiction did not extend to ordering treatment and a legislative amendment would be required to provide such jurisdiction. Counsel noted that neither the Board (nor the Consent and Capacity Board (CCB)) had authority to end seclusions. Counsel submitted that Mazzei *v. British Columbia (Director of Adult Forensic Psychiatric Services),* 2006 SCC 7 (CanLII), [2006] 1 SCR 326, supported the *Hurst (Re), 2014 Carswell Ont 159 (Ont. Rev. Bd.)* decision of the Board clearly identifying that the Board's jurisdiction did

not extend to ordering treatment of a forensic patient. Counsel submitted that neither *Conway* nor *Ince* had addressed the issue of jurisdiction of the Board, and there were insufficient facts in those cases to support the submission of the Applicant that the Board has jurisdiction with respect to seclusions greater than seven days. Counsel submitted that *Young (Re)* should govern the issue and that the seclusion of the Applicant at Waypoint was not reviewable by the Board.

Ruling

11. For the following reasons the Board finds that:

(i) the Board has jurisdiction to review significant increases on restriction of liberties, whether for treatment purposes or not;

(ii) not every restriction of liberty in excess of seven days requires notice pursuant to s. 672.56(2) of the *Criminal Code;*

(iii) pursuant to *Campbell (Re)* hospitals are required to undertake an assessment of the NCR accused's liberty norm prior to the restriction to determine whether a notice pursuant to s. 672.56(2) is required;

(iv) if after assessing the NCR accused's liberty norm the hospital does not consider it necessary to issue notice pursuant to s. 672.56(2), the hospital must inform the Board of the NCR accused's restriction (a *Campbell* letter);

(v) if the accused does not agree with the assessment of the hospital, the accused can invoke the practice direction of the Board to determine if an early review is necessary and appropriate; and

(vi) this procedure applies to any restriction of liberties including seclusions, for greater than seven days.

12. The Board further finds that in the particular circumstances of the Applicant, notice pursuant to s. 672.56(2) should have issued and a restriction of liberty hearing should have been held.

13. Section 672.56(2) is as follows:

Delegated authority to vary restrictions on liberty of accused

- **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.

- **Marginal note: Exception — high-risk accused**

  (1.1) If the accused is a high-risk accused, any direction is subject to the restrictions set out in subsection 672.64(3).

- **Marginal note: Notice to accused and Review Board of increase in restrictions**

  (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.

Analysis

REASONS FOR THE MAJORITY
(Mr. W.B. Donaldson, Ms. J. Mills, Ms. R. MacIntyre)

14. As part of its mandate the Board delegates power to the hospital to "create a program for the detention in custody and rehabilitation of the accused."[5] Notwithstanding, the Board retains broad supervisory powers over its dispositions. In *Mazzei* the Supreme Court held that the scope of the Board's supervisory power, "… *would arguably include anything short of actually prescribing that treatment be carried out by hospital authorities. It would therefore include the power to 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."* As part of its supervisory role, the Board has the jurisdiction to ensure that an NCR accused's significant restriction of liberty complies with the objectives of Part XX.1, which may include a review of the hospital's conduct during the significant restriction of liberty.

15. Furthermore, in *Campbell (Re)* at paragraph [81] the court found that treatment can be a restriction of liberty: *"While I accept the fact that the hospital's decisions were made in an effort to protect the appellant's well-being, I reject the majority view that the fact that these decisions could be described as treatment justified a lack of notice. I agree with the minority's position that "treatment" can result in a significant increase in restrictions on liberty. Like the minority, I agree that whether a change to an NCR accused's liberty norm is for treatment or not does not answer whether it constitutes a significant increase in restrictions on liberty."*

16. The hospital submits that because seclusions are the result of an order from a physician pursuant to the *Mental Health Act (MHA),* the Board lacks the jurisdiction to review them

[5] Disposition, dated January 29, 2020.

as significant restrictions of liberty. The hospital relies on *Young (Re)* as authority for the Board's lack of jurisdiction. In *Young (Re*) the Court found that the Board does not have jurisdiction to review (as a restriction of liberty) the admission to hospital under the *MHA* of an NCR accused who is subject to a Conditional Discharge.

17. In the Board's view, the impact of *Young (Re)* is not to "oust" the jurisdiction of the Board's oversight of a person detained in hospital pursuant to a detention order disposition, simply because the authority to seclude a patient is derived from the *MHA*. Rather, unlike in *Young (Re)*, if the NCR accused is detained in a hospital by virtue of the Board's disposition (as is the case of the Applicant), the Board has jurisdiction over that person and must exercise its supervisory role. In the Board's view, this finding does not preclude reliance on the relevant provisions of the *MHA* by a hospital to ensure that a patient is secluded within the parameters of the *MHA*. The provisions of the *Criminal Code* and the *MHA* can act in tandem to ensure that the liberty interests of the NCR accused are met.

18. In *Campbell* (Re), the Court discussed at length the issue of seclusion in the context of a significant restriction of liberty and when notice should issue. The Court acknowledged a lack of clarity and the conflicting case law on this issue. The Court discussed s.672.56(2) and the procedures in the *Criminal Code* enacted to protect the liberty interests of an NCR accused. The Court also referred to the importance of allowing hospitals to treat an NCR accused without unnecessary interference in the day-to-day flexibility that treatment necessarily requires. The Court found that for each NCR accused a contextual approach should be taken and that the NCR accused's liberty norm prior to the restriction of their liberty must be analyzed to determine whether a reasonable person would consider the change in the NCR accused's liberty status to represent a significant restriction.

19. Arguably, locked seclusion would *prima facie* be seen by a reasonable person as a significant restriction on an NCR accused's liberty and in *Campbell (Re)*, the Court stated that, "*Equally, where an NCR accused residing in a general unit and accessing multiple privileges is placed in a secure unit or <u>in isolation for more than seven days, this will almost always trigger the need for notice</u>. (Emphasis added*). Counsel for the Applicant submits that *Campbell (Re*) stands for the proposition that locked seclusion for longer than seven days will always necessitate notice of a Restriction of Liberty. In *Campbell (Re),* the Court clearly articulated the liberty norm analysis that must be undertaken by a hospital in determining whether notice pursuant to s. 672.56(2), should issue. The Court did not carve out a category of circumstances where such an analysis was unnecessary. The Court held that, "*These are only examples. While Board decisions and appeals can drive the application of the test, an individualized assessment is still required in each case.*"

20. Put another way, because the NCR accused was in seclusion for longer than seven days this does not dispense with the need for the hospital to embark upon an analysis of the accused's liberty norm prior to the seclusion and to make a determination whether notice should issue. For these reasons we find that seclusion for longer than seven days does not automatically trigger the requirement for notice to issue pursuant to s. 672.56(2). In our opinion; however, in any situation where the seclusion of a patient exceeds seven days, a

Campbell informational letter should be sent by the hospital to the Board and parties.

21. *Campbell (Re)* goes on to hold that regardless of whether a notice issues pursuant to s.672.56(2), which will inevitably trigger a restriction of liberty hearing, the Board must be kept informed of any restriction on an accused's liberty. This has come to be known as a '*Campbell', or 'informational'* letter, wherein the hospital outlines the status of the patient, the reasons for the seclusion and their review with respect to the patient's liberty norm, and their reasons for considering that the restriction is not significant.

22. In response to direction from the Court of Appeal and in recognition that only a hospital can issue notice under s.672.56(2) and trigger a restriction of liberty hearing, the Board has developed a Practice Direction[6] (PD) which allows the accused to challenge the hospital's characterization of the restriction, and which may in some circumstances trigger the need for an early hearing pursuant to s.672.81(2). In the Board's view, this allows for an additional layer of protection for the NCR accused who disputes the hospital's characterization of his or her restriction.

23. In the Applicant's case, the hospital failed to provide either notice pursuant to s.672.56 (2) or a *Campbell* letter (until prompted to do so by the actions of the Applicant) and the Board was not informed of the Applicant's seclusion (and possible significant restriction) until seven months after it was implemented. In the Board's view, the circumstances of the Applicant's seclusion make clear the need for a *Campbell* letter to issue in every case after seven days of a restriction (in this case a seclusion). The hospital's failure to provide either notice pursuant to s. 672.81(2) or a *Campbell* letter effectively stripped the Board of its ability to exercise its supervisory role and to ensure that the liberty interests of the NCR accused are met.

24. Having regard to the failure of the hospital to have complied with the requirements to either inform the Board of the Applicant's seclusion after seven days or to have issued a notice under s. 672.56(2), the Board finds that in the particular circumstances of the Applicant and the ensuing length of his seclusion is *prima facie* evidence of a significant restriction of his liberties on June 10, 2020 and notice pursuant to s. 672.56(2) should have issued.

25. In the result, the Board finds that the Applicant's Motion is successful in part. The Board has no jurisdiction to order the hospital to issue a s.672.56(2) notice, However, based on the *Campbell* letter that was sent seven months after the Applicant's seclusion commenced the Board finds that there is sufficient evidence before it to suggest a significant restriction of liberty took place. For these reasons, pursuant to the practice direction of the Board (as set out below), we would order an early review hearing for the Applicant. We understand that the annual review is now overdue and to be scheduled shortly pursuant to a PHC. We expect that the instant restriction will form a central part

[6] Practice Direction Concerning Restrictions on the Liberty of an Accused, Nov. 19, 2020

of that review.

"Practice Direction Concerning Restrictions on the Liberty of an Accused

B. "Campbell Letters"

Where the ORB receives a 'Campbell Letter', the ORB will acknowledge receipt, with a copy to the parties. This may result in:

(i) The parties taking no issue with the actions of the hospital, requiring no response;

(ii) A party asserting that the restriction of liberty was significant. Where a party asserts that the increase in restriction of liberty was so significant that a notice under s. 672.56(2) should have been provided, the party should request an early hearing pursuant to ss.672.82(1). In that event, the ORB will ask the requesting party to provide submissions which set out the basis for the request. Once the requested information is received, the ORB will invite input from the parties. If the parties are not ad idem, the ORB will then determine whether an early review should be convened. If an early review is to be convened the ORB will then determine whether the matter should be referred to a Pre-Hearing Conference ("PHC").

At the PHC, the Alternate Chair will hear submissions in order to identify what issues should reasonably be put before the panel and what evidence will be required. With that, the Alternate Chair will determine the required hearing time."

CONCURRING OPINION OF THE MINORITY
(Dr. P. Darby Dr. S. Swaminath)

26. The minority of the panel agree that, in the circumstances of this particular case, a Restriction of Liberty hearing is required and we do not believe that seclusion for greater than seven days always and necessarily involves a requirement that the hospital issue notice to the Board pursuant to section 672.56 (2).

27. In *Campbell Re* para 42, the Court notes "The number of permutations and combinations of possibilities impacting liberty are impossible to calculate. Each NCR accused is unique, with complex individual needs that must be accommodated in the context of a complex hospital setting. Accordingly, while certain type of restrictions of liberty will act as likely predictor of the need for notice, an individualized assessment is called for in each case.

28. The Court notes that "Certain circumstances will emerge which, by their very nature will suggest a significant increase in restrictions of liberty that they would point towards the probable need for notice". The Court notes that "Where an NCR accused is residing in a general unit and accessing multiple privileges is placed in a secure unit or in isolation for more than seven days, this will almost always trigger the need for notice. However, "an

individualized assessment is still required in each case". *Campbell* also indicates that "The change in liberty status must be so significant that a reasonable person, considering all of the circumstances, will think that the Board should be called on to consider whether the hospital properly applied the least onerous and least restrictive test ahead of the next annual review". This direction has been formalized by a Practice Direction from the Board.

29. The cases of *Faichney, Conway* and *Ince* all precede the individualized approach to restrictions of liberty outlined in *Campbell*.

30. The minority of the panel are not convinced that a decision to place someone in seclusion flows from the authority vested in the Person in Charge by the *Criminal Code*. All forensic hospitals have rigorous processes in place to review the ongoing necessity for seclusion. Such processes are not derived from or governed by the authority of the Person in Charge.

31. The minority does believe that, in light of *Campbell*, the Board should be notified of seclusions greater than seven days. *Campbell* encourages the hospital that "when in doubt notice should be given" and that "This kind of responsible notice is encouraged".

32. The minority strongly agrees with the rest of the panel that Waypoint Centre for Mental Health Care should have issued a *Campbell* letter when Mr. Ducharme had been secluded for more than seven days in June 2020. If such a letter had been written, it would have been open to the Board, either of its own motion, or at the request of counsel, to hold a Restriction of Liberty hearing, taking into account the circumstances and justification for the seclusion described by Waypoint Centre for Mental Health Care.

33. The minority of the panel concur with the decision of the majority that a Restriction of Liberty hearing should be held.

DATED this 21st day of October, 2021, at the City of Toronto, in the Region of Toronto.

Mr. W.B. Donaldson
Alternate Chairperson

Office of the Registrar
Ontario Review Board