



## Ontario Review Board

**Re:** D. P.

**ORB File No:** 8368

**Hearing held:** In writing

**Pursuant to:** Section 672.47(1) of the *Criminal Code*

**Before:** The Honourable Michael Dambrot, K.C., Chair

**Counsel for the Applicant:** Jeff Marshman

### **REASONS FOR RULING**

(Dated September 28, 2023)

1. On August 2, 2023, D.P was found Not Criminally Responsible. The matter was then adjourned to the Ontario Review Board for a disposition hearing pursuant to s. 672.47(1) of the *Criminal Code*. That hearing is scheduled to proceed at the Waypoint Centre for Mental Health Care in Penetanguishene in October 2023. D.P. brings this motion for an order permitting his father to testify virtually at the hearing.

#### **The Statutory Context**

2. The Ontario Review Board makes and reviews dispositions for accused persons found not criminally responsible by reason of mental disorder or unfit to stand trial. The Board was created in 1992 as required by s. 672.38 (1) of the *Criminal Code*, which was enacted in 1991.
3. From the Board's inception until the COVID pandemic in 2020, panels of five members of the Board, consisting of the Chairperson of the Board or an alternate chairperson

designated by the Chairperson, a legal member, either two psychiatrist members or one psychiatrist member and one psychologist member, and a public member, have attended in person at the designated hospitals where accused persons are detained or attend pursuant to an assessment order or a disposition to conduct those hearings. The holding of in person hearings accords with the long-standing rule that criminal proceedings, by default, are held in person. There are sound policy reasons for this default position, including the importance that criminal proceedings be open to the public, and that a person whose liberty is in issue is entitled to face those who seek to or are empowered to place restrictions on that person's liberty.

4. The default rule that criminal proceedings should be held in person became a rule of law in 2019 with the enactment of s. 715.21 of the *Criminal Code*, which provides:

Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally.

5. Should there be any doubt that this provision applies to the proceedings of the Board, I refer to the decision of the Ontario Court of Appeal in *Woods (Re)*, 2021 ONCA 190, at para. 57, where the Court was clear that the Board's jurisdiction is limited by the default rule in s. 715.21 of the *Code*.
6. The long-standing practice of in person Board hearings was interrupted by the COVID pandemic. On March 16, 2020, all Ontario Public Service staff began working remotely, and on March 17, 2020, the government of Ontario, after consultation with public health advisors, declared a state of emergency and ordered the closure of schools and non-essential businesses as well. The Chief Justices of the Ontario Court of Appeal, the Ontario Superior Court of Justice and the Ontario Court of Justice also ordered the closure of their respective Courts on March 17, 2020, and the Chair of the Ontario Review Board followed suit. However, in order to fulfil its statutory obligation to conduct timely disposition and review hearings, the Board almost immediately put in place a system of virtual hearings, using Zoom as its platform. Indeed, the Board began conducting Zoom hearings ahead of the courts in Ontario.
7. This practice had an uncertain legal foundation. I have already referred to s. 715.21 of the *Criminal Code*, which mandates that except as otherwise provided in the *Code*, all participants must appear in person in proceedings under the *Code*, including Board hearings. Fortunately for the operation of the courts during the pandemic, the *Criminal Code* provides exceptions to s. 715.21 for criminal proceedings in courts. Sections 715.23 to 715.26 authorize courts to permit accused persons, participants, and even judges and justices to appear by audioconference or videoconference in certain circumstances. Perhaps by oversight, as was suggested by the Court of Appeal in *Woods*, no such explicit exceptions appear in the *Criminal Code* for Review Boards. The Court stated, at para. 59:

Parliament had the opportunity to expand remote appearances to Part XX.1 of the *Criminal Code* to grant the Board statutory authority to order an NCR accused

to appear by video. Parliament did not do so. This may well have been a legislative oversight. However, in the absence of an amendment, neither the Board nor this court has the authority to expand the Board's jurisdiction beyond the confines of Part XX.1.

8. Although there is no specific provision in the *Criminal Code* authorizing an exception to the requirement that Review Board hearings be conducted in person, the Ontario Review Board has relied on s. 672.5 (1) of the *Code*, which provides that, a disposition hearing held by the Review Board "... may be conducted in as informal a manner as appropriate in the circumstances" as a legal basis for it to hold virtual hearings, at least during a health crisis. Even then, the Ontario Court of Appeal has determined, in *Woods*, that this provision did not authorize a virtual hearing without the consent of the accused, even during the COVID emergency (see also s. 672.5 (9) and (10) of the *Code*).
9. Given that Zoom hearings were commenced solely in response to a community health emergency, and given the uncertain legal foundation for them, it should come as no surprise that conducting Board hearings by Zoom was considered, from the outset, to be a temporary measure. This is clear from various postings placed on the Board's website by the Honourable Mr. Justice Richard Schneider, the former Chair of the Board. The Board consistently acknowledged in those postings that there was no explicit authority for it to hold virtual hearings.
10. In the Chair's April 7, 2020, update on the Board's website, he asserted that, "we may look to the *Code*, our Rules, and jurisdiction found by way of 'necessary implication' to temper those provisions; the latter being powers or authority *implied* where necessary and essential." He went on to say that "[f]or those who have misgivings with respect to the Board's jurisdiction to conduct hearings employing this technology the alternative would be to apply to have the matter adjourned to a time when we might anticipate a resumption of on-site hearings."
11. The Board's position that virtual hearings were a temporary measure to ensure on-going access to justice while at the same time keeping the public safe during the COVID pandemic was repeated in the Chair's updates of May 25, 2020, and October 20, 2020. In the October 20, 2020, update, the Chair stated, "Questions have been asked as to when we will resume on-site hearings at the hospitals. At present there does not appear to be a logical target date for a resumption of on-site hearings. For the foreseeable future we will be holding all of our hearings remotely *via* audio-visual connection."
12. Next, in a website update in May 2023, in response to questions asked of the Board as to when the Board would be resuming on-site, in person hearings, the Chair indicated that during the following four months, the hospitals would return to in person hearings on an individual timetable, but that as of September 1, 2023, the Board would resume conducting its hearings in person at all the hospitals where accused persons were detained or reporting to. As a result, lawyers who appear regularly before the Board could not reasonably have

been in doubt that in person hearings would resume. More importantly, for close to four months, during the period of transition, they could not have been in doubt that in person hearings would resume in full force on September 1, 2023.

13. Immediately following this update, the Board received correspondence about the return to in person hearings. One writer stated that while they were pleased to hear that ORB panels would be convening in person at hospitals, they wished to make sure that these hearings would be “hybrid”. They went on to complain that “the defence bar was not consulted in advance of any decision to return to in person hearings of the Board, as we were not consulted when the decision to switch to Zoom was made.” By hybrid, I take the writer to be referring to an in person hearing where one or more participants are permitted to appear virtually. I have no doubt that there were others who did not write, but who shared the writer’s view about hybrid hearings.

14. On June 5, 2023, in his last website update, in light of this query, Justice Schneider provided additional clarification. He stated:

In the period until September 1, individuals who wish to participate in a hearing which is scheduled to proceed in person and are unable to do so, can request to appear electronically. Assuming the consent of the other parties and the host hospital’s ability to accommodate the request, the requestor can apply to the scheduled panel in advance of the hearing to join the hearing via tele-conference or by video.

15. On June 13, 2023, I succeeded Justice Schneider as Chair. I was immediately made aware that the resumption of in person hearings remained controversial with some members of the bar, and that despite the extensive notice provided by the Board, a few counsel had not taken timely steps to reschedule hearings that they could not attend in person after September 1, 2023, and instead were complaining about a lack of consultation with respect to a resumption of in person hearings, and were insisting on Zoom hearings. As a result, I felt that it was important to further clarify the Board’s resumption of in person hearings.

16. On August 1, 2023, I posted further guidance to interested persons about the Board’s post-September 1 procedure on the Board’s website. In that guidance, I stated:

In May of this year, after three years of conducting hearings remotely during the COVID pandemic, the Board announced that as of September 1, 2023, as was the case before the pandemic, Board hearings would be public, would presumptively be held in person, and that participants, witnesses and observers would be expected to attend in person absent exceptional circumstances, including undue hardship.

17. I added the following:

Where a participant or an observer contends that exceptional circumstances exist in a particular matter that might overcome the presumption of personal attendance in

respect of a person, they should make a request to the Board in writing seeking permission for that person to attend remotely and should include a statement of the reasons for the request. The request should be made well in advance of the hearing where feasible and will be determined either by the Chairperson of the Board or the Alternate Chairperson of the panel of the Board scheduled to hear the matter.

All such requests will be considered only on a case-by-case basis, except that parties living in northern communities who would otherwise face significant challenges in attending a hearing in Thunder Bay in person will continue to be permitted to attend that hearing virtually via the Ontario Telehealth Network (OTN), as has been the practice for many years.

18. Since that posting, I have clarified that Alternate Chairpersons conducting Pre-Hearing Conferences could also determine requests seeking permission for remote attendances and that platforms other than OTN were not excluded in Thunder Bay. In addition, having regard to the fact that some of the requests received by the Board seeking permission for remote attendances were incomplete, the Board developed a Virtual Appearance Request Form to make it easier for participants to make such requests. The form permits a person requesting permission to attend remotely to forward their request and the reasons for it to the Board in a simple document. The form is routinely provided to requestors by the Board's staff.
19. I note that while the details inevitably differ, the Board's approach is not dissimilar, in principle, with the approach taken by the courts in respect of criminal proceedings. For example, in the Consolidated Provincial Practice Direction for Criminal Proceedings in the Ontario Superior Court of Justice effective June 15, 2023, in PART VIII: MODE OF PROCEEDING: Guidelines to Determine Mode of Proceeding in Criminal, para. 1(iv), which is entitled "In person hearings important", the following is stated:

While the continued use of virtual proceedings increases efficiency at many stages in the litigation process, the Court also recognizes the importance of in person interaction and hearings for more substantive attendances. For these matters, in person advocacy and participation will remain an essential feature of our justice system.
20. As a result, by virtue of para. 1(v) of Part VI of the Practice Direction, judge alone trials in the Superior Court are required to be held in person unless the accused and Crown consent and the Court approves, and by virtue of para. 1(vi), jury trials are always required to be held in person. I note that both paragraphs authorize the trial judge to permit a witness to testify virtually.
21. Similarly, the Ontario Court of Justice's Revised Guidelines re Mode of Appearance for Ontario Court of Justice Criminal Proceedings, which was last updated on June 30, 2023, provides that trials and preliminary inquiries are held "[i]n person for all participants (witness, counsel, accused), unless a judge has ordered otherwise (*emphasis in original*)."

22. As of September 18, 2023, all hearings of the Board in eight of our hospitals have been held in person, with the members of the Board present at the hospitals where the hearings are held. While the Board no longer offers Zoom hearings at those hospitals, in several cases, it has permitted a participant to appear virtually in one way or another. The three remaining hospitals will complete their transition to fully in person hearings over the next few weeks.
23. With regard to the complaint that has been made about a lack of consultation, I will simply say this. The Board has adopted a consultation policy as required by s. 4 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. The Board's policy recognizes that consultation can play an important role in the mandate of the Board to protect the public interest, particularly when considering changes to rules or policies. Consultation in this context is defined as a genuine exchange of information and points of view concerning policies or rules of practice of the Board between the Board and stakeholders prior to a policy or rule being adopted or amended. It has been and remains the view of the Board that its resumption of in person hearings is not the adoption of a new policy or rule. It is simply a return to its pre-pandemic procedure. Moreover, the Board's adherence to the dictates of s. 715.21 of the *Criminal Code*, which provides that except as otherwise provided in the *Code*, all participants must appear in person in proceedings under the *Code*, including Board hearings, is not a policy or rule at all. It is nothing more than doing what the law requires, which is obviously not a matter that can be the proper subject of consultation.
24. In addition, well before September 1, those who disagreed with the Board's approach to the resumption of in person hearings had made the Board fully aware of their views through repeated correspondence. They continue to do so. I take note of the fact that the Board's consultation policy contemplates consultation using a range of mechanisms, including but not limited to, meetings, surveys, web-based feedback, fax, mail and phone.
25. A final word on consultation. In my short time on the Board, I have come to realize that it would be valuable to institute a process that provides for consultation with a modest but representative number of counsel acting on behalf of accused persons, hospitals and the Attorney General on a periodic basis to discuss issues of concern to the Board and the bar. Such a process is commonplace in the courts, as well as in some boards and tribunals. I hope to organize such a meeting on a trial basis later this fall.
26. I turn next to the circumstances of this matter.

### **The Circumstances**

27. Counsel for the accused submitted a Virtual Appearance Request Form to the Board in which he asks for an order that the father and mother of the accused be permitted to attend his annual review virtually so that his father can be called as a witness at the hearing.

28. D.P.'s parents are in their late 60's. They live in Toronto. They both suffer from chronic obstructive pulmonary disease, or COPD. COPD is a disease that causes airflow blockage and breathing related problems. In the case of both parents, COPD makes travelling long distances difficult for them and puts them at increased risk of serious health consequences from other respiratory illnesses. They have both been hospitalized this year for lung issues. Neither of them will be able to attend the hearing at Waypoint if the Board does not make accommodations to permit their remote appearance. Both the accused and his counsel will be attending the hearing in person.

### **Analysis**

29. I recognize that the following analysis extends beyond what is required to resolve the issue raised by this motion, but in the absence of any other decision of the Board concerning in person hearings, I hope that a slightly extended discussion will provide helpful guidance to participants in the Board's hearings.
30. As I have explained, the Board takes the view that participants, witnesses and observers are expected to attend hearings in person absent exceptional circumstances, including undue hardship. It is, of course, not possible to simply list the circumstances that would be considered exceptional. The identification of exceptional circumstances is nuanced and case specific. The Board must consider the totality of the circumstances of the case and must take a sensitive approach in balancing all relevant factors. It is possible, however, to identify some of the considerations that might be taken into account, and to identify some circumstances that would be unlikely to be considered exceptional.
31. With respect to witnesses, the relevant circumstances might include:
- (1) the location of the witness;
  - (2) the personal circumstances of the witness, including health considerations;
  - (3) the costs that would be incurred if the witness had to appear in person;
  - (4) the nature of the witness' anticipated evidence;
  - (5) the suitability of the location from which the witness proposes to give evidence;
  - (6) any potential prejudice to the parties if the Board were to order the evidence to be given by audioconference or videoconference;
  - (7) any obstacle to decision making by the panel hearing the matter if the evidence of the witness was received by audioconference or videoconference; and
  - (8) the host hospital's ability to accommodate the request.
32. With respect to counsel, the circumstances might include:
- (1) the personal circumstances of counsel, including any significant health concerns;
  - (2) the distance that counsel would have to travel to appear in a remote location;
  - (3) hardship to the accused if the proceedings would otherwise have to be adjourned for a lengthy period of time; and
  - (4) the host hospital's ability to accommodate the request.

33. By way of guidance, I note that I would be very slow to permit counsel to appear virtually simply because they have scheduling conflicts, even if the conflict arose through no fault of their own, for the following reasons. First, since most Board hearings are scheduled long in advance, counsel will usually have ample time to resolve such conflicts; and second, the conflict can usually be resolved by rescheduling the Board hearing, and the Board can usually accommodate a new hearing date within a reasonable period of time.
34. I would also be slow to permit counsel to appear virtually simply because that counsel practices a considerable distance from the place of a hearing, except when the hearing will be held in a particularly remote location. Counsel who choose to take on cases that will be heard at a location that is a considerable distance from where they reside or regularly work should be prepared to travel to those locations, as they regularly do in the courts. The right to counsel of choice does not include the right of counsel to choose a mode of appearance that best conveniences them. The right to counsel of choice has its limits.
35. With respect to members of the panel, I find it hard to envision any circumstances where a virtual appearance would be necessary. A member who cannot attend a hearing on short notice can usually be replaced expeditiously, and in any event, the panel can usually proceed with four members where necessary. Of course, if Ontario again experiences a pandemic-related shutdown, the Board could once again quickly pivot to video hearings.
36. With respect to observers, once again, I would be slow to permit them to watch Board proceedings virtually. As with court proceedings, although hearings are public, they are not ordinarily televised or broadcast for reasons that need not be rehearsed here. During the pandemic, when hearings were conducted by Zoom, hearings could only be made public by permitting non-participants to listen to them or watch them virtually. However, now that in person hearings have resumed, this compromise is no longer necessary.
37. In this case, it is no difficult task to reach the conclusion that exceptional circumstances have been made out. The exceptional circumstances include: the fragile health of the proposed witness, making it impossible for him to appear in person in Penetanguishene, a location that is a long distance from his home; the taking of his evidence even by audioconference, if necessary, would cause no prejudice to the parties nor be an obstacle to decision-making by the Board; and D.P. should not be deprived of his right to adduce the evidence of a witness who has relevant evidence to give but is unable to appear in person when it is possible to adduce that evidence virtually.



**Disposition**

38. The motion is granted. I order that the accused be permitted to adduce the evidence of his father virtually, by such means as counsel for the Hospital, the Board and D.P. are able to agree on to make that possible. In that event, I see no reason why the accused's mother cannot witness the proceedings with the accused's father. In the unlikely event that counsel are unable to agree on the means, I may be addressed again.

DATED this 28<sup>th</sup> day of September 2023, at the City of Toronto, in the Region of Toronto.

The Honourable Michael Dambrot, K.C.  
Chairperson



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Office of the Registrar  
Ontario Review Board