

Ontario Review Board

Practice Direction Concerning Restrictions on the Liberty of an Accused

The Ontario Review Board (“ORB”) reviews, not less than annually, all accused who have obtained verdicts of unfit to stand trial or not criminally responsible on account of mental disorder. A Disposition is made at the end of every review, the terms of which provide the hospital to which the accused reports or is detained with discretion to ensure day-to-day management of the accused without continuous ORB approval. Where a hospital significantly restricts the liberty of an accused for more than seven days, it has a statutory obligation to provide notice to the ORB as soon as practicable (ss.672.56(2)(b)) whereupon the ORB will convene a Restriction of Liberty Hearing (“ROL”) to review the hospital’s discretion as soon as practicable (ss.672.81(2.1)). This notice is provided where the hospital is of the view that the threshold under s.672.56(2)(b) has been met *or* if it is in doubt. It is only the hospital that is authorized to give notice pursuant to these specific contingencies.

However, with the Court of Appeal’s decision in *Campbell (Re)*, 2018 ONCA 140, the hospital has what is now recognized as a common law obligation to notify the ORB where it has imposed a restriction upon the accused’s liberty which deviates from their ‘liberty norm’¹ but the hospital is of the view that it is not so significant that the threshold under ss.672.56(2)(b) has been met. The Court indicates that the purpose of this notice to the ORB is “...by way of information only and does not constitute official notice under ss.672.56(2)(b)”.

A. “ROL’s”

Where the ORB receives notice from a hospital pursuant to the provisions of ss.672.56(2)(b) that an accused’s liberty has been significantly restricted for more than seven days it will convene a ROL hearing pursuant to the provisions of ss.672.81(2.1). The ORB will schedule a hearing as soon as practicable.

B. “*Campbell* Letters”

Where the ORB receives a ‘*Campbell* Letter’², the ORB will acknowledge receipt, with a copy to the parties. This may result in:

¹ See: *Campbell, infra*, at para 65.

² In the wake of *Campbell (Re)*, [2018] O.J. No. 803 the ORB is now receiving notice (which have come to be known as ‘*Campbell* Letters’) from the Hospitals where the liberty interests of the accused have been impacted upon but not to an extent that notice pursuant to ss.672.56(2)(b) is warranted. These letters are provided to the ORB for informational purposes only.

- (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.

A hearing panel will not engage in a formal ROL hearing pursuant to s.672.81(2.1) where no notice pursuant to that provision is included in the Notice of Hearing. It is essential that concerns regarding ‘*Campbell* letters’ be addressed at a PHC in advance of the hearing (if granted). Unanticipated applications made impromptu at a hearing will generally not be entertained in that 1) all parties may not be prepared to proceed, and 2) appropriate hearing time may not have been considered. A typical hearing day provides four hearing slots that cannot be encroached upon by a hearing running over-time as a result of a party’s failure to give notice.

In such circumstances the matter of restriction of liberties will be adjourned and a PHC will be scheduled. While often heard together, hearings regarding restrictions of liberties are separate and distinct from reviews of dispositions. Accordingly, where the latter situation emerges the panel may elect to proceed with the scheduled review, as indicated on the Notice of Hearing, and leave the matter of restriction of liberties to be determined at a later date.

The Hon. Mr. Justice Richard D. Schneider, Chair
November 19th, 2020