Case Name:

Leyshon-Hughes v. Ontario (Review Board)

Between
Her Majesty the Queen, Respondent, and
The Royal Ottawa Health Care Group, Respondent, and
Ernest John Andrew Leyshon-Hughes, Applicant, and
The Ontario Review Board, Intervener

[2007] O.J. No. 2157
Court File No. 12445

Ontario Superior Court of Justice
M.T. Linhares de Sousa J.

Heard: April 4 and 5, 2007.
Judgment: May 31, 2007.
(117 paras.)

Administrative law — The hearing — Procedure — Adjournments — Ontario Review Board breached rules of natural justice and operated with a reasonable apprehension of bias by adjourning annual review for six months without consent of parties — Criminal Code, s. 672.5(11).

Administrative law — Boards and tribunals — Capacity or status — Ontario Review Board given intervenor status on proceedings on consent, but not permitted to make submissions to the extent sought with regard to fairness and bias.

Criminal law — Elements of offence — Mens rea — Insanity or mental disorders — Finding of not criminally responsible — Offender who had been detained for 21 years appeared before Ontario Review Board for annual hearing — Board breached rules of natural justice and operated with a reasonable apprehension of bias by adjourning annual review for six months without consent of parties — Criminal Code, s. 672.5(11).

In 1986, Leyshon-Hughes was found not guilty by reason of insanity of first degree murder — He was ordered detained in a mental health centre and became subject to annual review by the Ontario Review Board — Leyshon-Hughes continued to be assessed at high risk until 1998 when he came under the care of Dr. Bradford — By 2005, he wsa conditionally discharged into the community — For the 2006 review, Leyshon-Hughes sought an absolute discharge, which was supported by Bradford — At a pre-hearing conference, Crown Counsel indicated that he would be requesting a continuation of the conditional discharge and an independent assessment order — Roberts subsequently confirmed that he would not be seeking an independent assessment — At the commencement of the hearing, the Board

expressed concern that the sole evidence was being given by Bradford — It adjourned the matter for six months to allow the parties to obtain an independent assessment, having regard to specified issues — The Board remained seized of the matter and the Panel Chairperson refused to recuse himself — Leyshon- Hughes applied for orders quashing the decision to adjourn the proceedings, prohibiting the panel from re-convening and requiring the Board to establish a new panel to proceed forthwith with his annual hearing — A preliminary issue was the extent of the Board's intervenor status — HELD: Application allowed — Court made an order of certiorari quashing the adjournment decision, an of prohibition prohibiting the panel from re-convening — Also made order of mandamus directing the Board to establish a new panel to proceed forthwith — The Board was not permitted to make submissions respecting fairness and bias — These were the very questions before the court, and submissions would amount to an inappropriate additional opportunity to defend the merits of its decision and would not be helpful or fair to Leyshon-Hughes — The Board violated Leyshon-Hughes's rights to natural justice and procedural fairness, and operated with a reasonable apprehension of bias — It committed a reversible error by adjourning the hearing without consent of the parties for more than 30 days, which was not permitted under s. 672.5(13.1) of the Criminal Code — It also erred by concluding that the evidence was insufficient without permitting Leyshon-Hughes the right to exercise all of his procedural rights at the hearing relating to the presentation and testing of all of the evidence — The Board lost jurisdiction because the decision created a reasonable apprehension of bias that it had pre-judged the evidence and the conclusions to be drawn from it without giving Leyshon-Hughes the opportunity to be heard — It clearly reached conclusions about Bradford's evidence without knowing its full extent.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 672.5(11), s. 672.5(13.1)

Counsel:

David E. Roberts, for the Crown Respondent.

Gregory P. Kelly and Caroline C. Failes, for the Respondent, The Royal Ottawa Health Care Group.

Marlys Edwardh, for the Applicant.

David W. Scott and Dina Logan, for the Intervener.

REASONS FOR JUDGMENT

M.T. LINHARES de SOUSA J.:—

INTRODUCTION

¶ 1 The Applicant, Ernest John Andrew Leyshon-Hughes brings this application for *Habeas Corpus* with *Certiorari* and *Mandamus* in aid. At the commencement of the hearing, Mr. Leyshon-Hughes withdrew his claim for *habeas corpus* and the request for his immediate release. Mr. Leyshon-Hughes also abandoned his claim for costs against the Crown and sought to amend his application to seek a claim for costs against the Ontario Review Board (ORB), which request is granted.

¶ 2 Mr. Leyshon-Hughes seeks the following orders from this Court:

(1) An order quashing the decision of the ORB arising from proceedings before it on December 18, 2006 wherein it adjourned Mr. Leyshon-Hughes' annual Review Board hearing, an adjournment which it made on its own motion;
(2) An order quashing the December 18, 2006 decision of the ORB;
(3) An order prohibiting the panel of the ORB as constituted on December 18, 2006 from re-convening to conduct Mr. Leyshon-Hughes' Review Board hearing; and
(4) An order requiring the ORB to establish a new panel of the Review Board to proceed forthwith with Mr. Leyshon-Hughes' annual Review Board hearing.

¶ 3 Mr. Leyshon-Hughes bases his application on the grounds that the ORB by its actions and decision on December 18, 2006, which was followed on January 23, 2007 by further written reasons which expanded upon its earlier oral reasons and handwritten endorsement of December 18, 2006, made a jurisdictional error. Mr. Leyshon-Hughes submits that by conducting the hearing in the manner which it did, the ORB violated the principles of natural justice and demonstrated a reasonable apprehension of bias.

STANDARD OF REVIEW

¶ 4 All of the parties agree that breaches of natural justice and the creation of a reasonable apprehension of bias are jurisdictional errors to which the standard of correctness applies. This is supported by the case law (see *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 at paragraph 28). Correctness, then is the appropriate standard by which this Court must assess both the conduct and the decision of the ORB in this case.

INTERVENER APPLICATION OF THE ONTARIO LAW REVIEW

¶ 5 The ORB brings an application to intervene in this matter. Pursuant to an agreement between the parties, which was filed as exhibit #2 at the hearing, it was agreed that the ORB would intervene in this matter in order to address issues concerning the ORB's jurisdiction to make the order in question in this application as well as the procedure and practice adopted and followed by the ORB on December 18, 2006.

¶ 6 The ORB also requested that it be permitted to intervene to make additional submissions

addressing the following additional matters raised by the Applicant in this proceeding, namely,

(a) The Applicant's allegation of a breach of the principles of natural justice;
(b) The Applicant's allegation regarding whether the conduct of the Alternative Chairperson's conduct gave rise to a reasonable apprehension of bias; and
(c) The Applicant's allegation that Mr. Leyshon-Hughes' *Charter* rights have been violated.

¶ 7 This part of the ORB's application to intervene was objected to by counsel for Mr. Leyshon-Hughes. Among other reasons, Ms. Edwardh submitted that the questions raised in this application, issues of natural justice and reasonable apprehension of bias, are well within the competency of this Court which determines these issues on a regular basis. In fact, there is no entity more competent to determine these constitutional issues than this Court.

¶ 8 It was argued by Ms. Edwardh that the ORB does not possess any particular expertise with respect to the issues of natural justice or bias raised by the Applicant. Furthermore, if it entered into such a discussion, which in this case implies an assessment of its own conduct, then it runs the risk of losing its impartiality and creating prejudice to Mr. Leyshon-Hughes in any subsequent proceedings before the ORB in which he may find himself.

¶ 9 Ms. Edwardh further submitted that in contrast to this, she could take no issue with the fact that the ORB possesses both knowledge and expertise with respect to persons suffering from mental illness and in assessing the medical, legal and social factors that must be considered in making a disposition under section 672.54 of the *Criminal Code of Canada*. She also acknowledged that the ORB has specialized knowledge and expertise with respect to the scope of its legislative inquisitorial powers and jurisdiction, under what conditions and how such powers are exercised and any specialized procedure adopted and followed by the ORB in the disposition hearings held pursuant to section 672.54 of the *Criminal Code of Canada*. That, however, should be the limit of its intervention in this matter.

¶ 10 Counsel for the ORB, Mr. Scott, argued that the raised allegation of breach of the principles of natural justice and apprehension of bias, are so "inextricably linked" with the procedural and jurisdictional issues addressed in the application, as to justify allowing the ORB to intervene to address those issues Mr. Scott submitted that the procedural fairness and bias issues are important to the ORB's ability to exercise its statutory inquisitorial jurisdiction. Furthermore, any limits imposed on its jurisdiction to exercise its inquisitorial powers would have a significant impact on the ORB's role in the ongoing assessment and management of individuals in Mr. Leyshon-Hughes' position.

¶ 11 All parties were content that I reserve my decision on this question until all of the arguments on the merits of the application, including those of the ORB, were completed.

¶ 12 It is the decision of this Court that the participation of the ORB as an intervener in this matter shall be limited to the agreement between the parties as reflected in the consent filed as exhibit #2 in this

hearing. More specifically, its participation is limited to the following issues:

(1) Issues concerning the ORB's jurisdiction to make the order at issue in the application, namely:

(a) the scope of the ORB's inquisitorial powers and jurisdiction, the conditions precedent for its exercise and when and how such powers of jurisdiction are properly exercised;
(b) the scope of the ORB's powers and jurisdiction to adjourn the annual review hearing, the conditions precedent for the exercise of this power and how such powers and jurisdiction are properly exercised; and
(c) any specialized procedure adopted and followed by the ORB.

It will take no position on the merits of this application. In particular, it will not take a position on the allegations of breach of natural justice and reasonable apprehension of bias made against it in this case and which are the very subject matter of this application.

¶ 13 I come to this conclusion for the following reasons. Unlike other Ontario administrative tribunals, which are entitled to party status in judicial review proceedings from their decisions by virtue of statutory provisions, the ORB is not entitled to participate as a party in this proceeding without leave of the Court. It obtains such right, at the discretion of the Court, pursuant to Rule 27.06 of the *Criminal Proceedings Rules* which reads as follows:

> 27.06 Any person interested in a proceeding between other parties may by leave of the judge presiding over the proceeding, or by leave of the Chief Justice or a judge designated by him or her, intervene therein upon such terms and conditions and with such rights and privileges as the judge, the Chief Justice or his or her designee may determine.

¶ 14 There is substantial jurisprudence to guide the Court in the exercise of its discretion on this question. Two main criteria were established by the Supreme Court of Canada in the decision of *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335. They are that the proposed intervener must have sufficient interest in the proceedings and it must make submissions which are based on a history of involvement in the issues giving the applicant an expertise that can shed fresh light or provide new information on the matter.

¶ 15 In *R. v. LePage*, [1994] O.J. No. 1305 (Gen. Div.), the Ontario Divisional Court listed other criteria that the Court should consider in exercising its discretion to grant leave to a party to intervene in a proceeding such as,

(a) a possible adverse effect upon the proposed intervener of the judgment or ruling;
(b) a commonality of legal or factual issues with one or more of the parties;

(c) the relevance and usefulness of its intended contributions to the constitutional issues raised;
(d) the ability of the proposed intervener to offer a perspective even slightly different from that of the existing parties;
(e) the intervention will not cause injustice or prejudice to the immediate parties;
(f) the timing of the intervention and its evidentiary implications and consequences;
(g) whether the proposed intervener possesses or has access to specialized knowledge and expertise in the subject matter to contribute;
(h) whether the proposed intervener's interest and evidence are necessary to a properly informed adjudication of the issues and not likely to be fully represented or advanced by the existing parties; and
(i) whether the interest of the proposed intervener would likely be affected by a particular determination of an issue or issues in a way not common to other citizens.

¶ 16 On the questions of scope of inquisitorial powers, jurisdiction and the specialized procedures adopted and followed by the ORB, there is no question that the ORB meets most if not all of the criteria listed above. However, with respect to the two allegations that form the grounds for this application, breach of natural justice and reasonable apprehension of bias, I am persuaded by the Ms. Edwardh's arguments that the ORB does not possess specialized knowledge and expertise on these questions to justify its being permitted to address the Court on these two questions.

¶ 17 Furthermore, to permit the ORB to intervene on the questions of natural justice and reasonable apprehension of bias with respect to its decision and conduct, the very issues before this Court, would put the ORB in the unseemly position of justifying its own actions and of making arguments defending the substantive merits of its decision because it is the ORB which is under examination in this hearing.

¶ 18 To allow such intervention in this case would, in my view, create the mischief of weakening the impartiality of the ORB in general and specifically with respect to Mr. Leyshon-Hughes who continues to be subject to the ORB's management. This was the mischief which Estey J. indicated should be avoided when courts are considering what standing to give administrative tribunals in judicial review proceedings. In his decision *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 at pp. 709-10, Estey J. indicated for a unanimous Court:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [...] Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* [(1958), 18 D.L.R. (2d) 588, at pp. 589, 590:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. [...]
In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. In *Canada Labour Relations Board v. Transair Ltd. et al.* [1977] 1 S.C.R. 722, Spence J. speaking on this point, stated at pp. 746-7:

> It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of certiorari and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review.

¶ 19 The principles enunciated by Estey J. when applied to the facts of this case point to the need to confine the ORB's intervention in this matter to a discussion of it scope of inquisitorial powers and jurisdiction, how such powers are exercised and any specialized procedures adopted and followed by it.

¶ 20 I agree with counsel for the ORB that Mr. Leyshon-Hughes, by his application in which he alleges procedural unfairness against the ORB is challenging its procedures and practices as carried out

in this matter. This is only part of the application because the substance of the ORB's decision is also being challenged. The ORB, given the responsibilities with which it has been assigned under Part XX.1 of the *Criminal Code of Canada*, should be granted standing to make submissions to defend it practices and procedures for the reasons discussed earlier (see also *Re Consolidated Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69* (1985), 20 D.L.R. (4th) 84 (Ont. Div. Ct.), rev'd on the merits (1986), 15 O.A.C. 398 (Ont. C.A.); aff'd [1990] 1 S.C.R. 282). However, in my view, that defence is given appropriate and complete latitude, within the principles established in *Northwestern Utilities Ltd. v. Edmonton (City), supra*, by permitting it standing with the conditions provided for in the parties' agreement found in exhibit #2. The appropriate latitude for the ORB's participation in this hearing is one referenced exclusively to its statutory obligations and the statutory context of its creation (see *R. v. Swain*, [1991] 1 S.C.R. 933; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625).

¶ 21 Consequently, I am not persuaded that the allegations of substantive unfairness which are in issue here are inextricably linked to the jurisdictional issues relating to the Board's inquisitorial powers, the scope of those powers and their exercise and the ORB's practices and procedures. The ORB need not make submissions on the merits of its decision from the point of view of substantial unfairness and bias in order to defend its conduct and decisions from the point of view of its statutory obligations.

¶ 22 This distinction is easily made and has been made by other Courts faced with this question. In *Canada (Attorney General) v. Canada (Human Rights Tribunal*) (1994), 76 F.T.R. 1, Madame Justice Reed, in an application for judicial review of two decisions of the Canadian Human Rights Commission permitted the tribunal to participate in the proceedings in a manner comparable to that of a party after finding that it was the procedure which the Commission followed which was under review and that the merits of the particular tribunal decision were not engaged.

¶ 23 The Ontario Court of Appeal also recently made that distinction in an endorsement by Chief Justice McMurtry in the case of *Her Majesty The Queen (Respondent) Respondent-and-Dennis Lucien LePage (Appellant) Respondent-and-Administrator, Mental Health Centre, Penetanguishene (Respondent) Respondent-and- Ontario Review Board Applicant/Moving Party*, dated October 3, 2006. The issue at the time of the endorsement, which issue did not go ahead subsequently, was an allegation of apprehension of bias, in part, on the composition of the ORB panel. The ORB sought to intervene on the issue of reasonable apprehension of bias. It was granted such leave by the Ontario Court of Appeal to intervene. It was permitted to make submissions "explaining the general practices of the Board in relation to the assignment of panel members to conduct hearings and the reasoning underlying such assignments ..." It could not, however, take a "position as to the merits of the appeal" generally or in particular as to the bias or lack of due process alleged in relation to the hearing under appeal. Furthermore, any reference to its practices had to be without reference to the particular panel whose conduct was being examined on the appeal.

¶ 24 As brief as this endorsement is, in my view, it is, in its result, very consistent with the principles enunciated in *Northwestern Utilities Ltd. v. Edmonton (City), supra,* and the many other cases that have

followed it. The attempt of counsel for the ORB to distinguish this endorsement was not persuasive.

¶ 25 The issue of substantive unfairness in the conduct, procedures and decision 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 this Court nor fair to Mr. Leyshon-Hughes.

¶ 26 In conclusion, the ORB is granted leave to intervene in this application. Its participation and submissions are limited to the issues listed in 1(i)(a)(b) and 1(ii) of exhibit #2 filed at the hearing.

FACTUAL BACKGROUND

¶ 27 In Part II of his Factum, the Applicant has provided substantial detail of the factual background of this case. It was generally agreed to by the other parties. Counsel for the Attorney-General, Mr. Roberts has provided some additions and modifications to the case history in Part I of his Factum. That historical detail need not be repeated here. However, by reference it is incorporated into these reasons.

¶ 28 In order to briefly situate the ORB hearing which is under review the following facts are mentioned. On September 15, 1986, Mr. Leyshon-Hughes was found not guilty by reason of insanity on a charge of first degree murder. Following this Mr. Leyshon-Hughes was detained in the maximum secure Penetanguishene Mental Health Centre, Oak Ridge Division. He became subject to the annual review of his situation by the ORB as provided for in Part XX.1 of the *Criminal Code of Canada*.

¶ 29 On July 8, 1992, he was transferred to the medium secure unit of the Kingston Psychiatric Hospital. During this whole time Mr. Leyshon-Hughes' actuarial risk assessments continued to be high.

¶ 30 By 1998, Mr. Leyshon-Hughes was at a "veritable therapeutic impasse" in that "no progress in his treatment or further rehabilitation could occur" (see paragraph 11 of the Applicant's Factum). In that same year, Mr. Leyshon-Hughes underwent an independent assessment at the Royal Ottawa Hospital (ROH) performed by Dr. John Bradford. Based on the results of this testing Dr. Bradford made a different diagnosis and prescribed certain medication for Mr. Leyshon-Hughes. While under the care of Dr. Bradford and while taking this medication, Mr. Leyshon-Hughes experienced demonstrable improvements.

¶ 31 In 1999, Mr. Leyshon-Hughes had a very lengthy annual ORB hearing, during which, with the help of his counsel, Ms. Edwardh, Mr. Leyshon-Hughes challenged his historical diagnosis, his scores on the actuarial risk assessment tools and the reliability of the actuarial risk assessment. Needless to say there was some controversy surrounding these in light of Dr. Bradford's assessment and treatment.

¶ 32 At the end of the hearing the Kingston Psychiatric Hospital acceded to Mr. Leyshon-Hughes being transferred to the Royal Ottawa Hospital upon Dr. John Bradford's personal undertaking to be Mr. Leyshon-Hughes' attending psychiatrist who would supervise his progress and treatment. Furthermore, it

was a further condition of the transfer that if for any reason Dr. Bradford was unable to continue in the capacity of Mr. Leyshon-Hughes' attending psychiatrist he was to notify the ORB.

¶ 33 Since his transfer to the ROH, Mr. Leyshon-Hughes has been continuously under the care of Dr. Bradford and his progress can only be described as positive. As Mr. Roberts points out in his Factum, since being transferred to the Ottawa facility Mr. Leyshon-Hughes' re-integration into the community has been slow and cautious beginning with strict conditions monitoring him in the community imposed by the ORB progressing to a loosening of those conditions so that his life in the community could have a resemblance of full independent living. Under the care of Dr. Bradford Mr. Leyshon-Hughes also established and accomplished various rehabilitation goals to further his education and to obtain full-time employment. This progress is reflected in the numerous annual reports of Dr. Bradford to the ORB from December 1999 to his most current one dated November 29, 2006 (see Application Record of the Respondent The Royal Ottawa Health Care Group, Tab A).

¶ 34 The slow and cautious approach taken by the ORB to the release of Mr. Leyshon-Hughes into the community is also reflected in the various ORB dispositions following Mr. Leyshon-Hughes' annual review hearings before the ORB (see Applicant's Application Record Volume 2 of 2, Tabs O, B, C, D and E).

¶ 35 After Mr. Leyshon-Hughes' December 2005 annual Review Board hearing the ORB once again continued Mr. Leyshon-Hughes' conditional discharge into the community, but further loosened some of the conditions of the previous years. The Alternate Chairperson on the December 2005 annual Review Board hearing was Mr. C.M. MacIntyre, who was also the Alternate Chairperson at his 2006 annual Review Board hearing which is under examination in this application.

¶ 36 Mr. Leyshon-Hughes did not have legal representation at the December 2005 hearing. After the hearing, Mr. MacIntyre telephoned Dr. Bradford to inform him that he was going to review some of the matters raised at Mr. Leyshon-Hughes' lengthy 1999 annual Ontario Review hearing. This information was passed onto Mr. Leyshon-Hughes by Dr. Bradford.

¶ 37 In its Reasons for Disposition in respect to the December 2005 hearing the ORB made it clear that in addition to Dr. Bradford's annual report they had also considered documentation dating back to Mr. Leyshon-Hughes' 1999 hearing, including documents relating to the controversy surrounding Mr. Leyshon-Hughes' risk assessments and his release into the community at the time of his transfer to the ROH under the personal care of Dr. Bradford. They also undertook an extensive review of the Hospital Report. The lack of clarity of it all with respect to Mr. Leyshon-Hughes' conduct during the index offence was also raised in their reasons (see page 11 tab E Applicant's Application record Volume 2 of 2). They further found that Dr. Bradford's evidence at the hearing was "ambivalent" on the question of significant threat. Nonetheless, the ORB concluded that based solely on Dr. Bradford's evidence at the hearing, the Review Board would have little choice but to discharge the accused absolutely.

¶ 38 The ORB did not, however, discharge absolutely Mr. Leyshon-Hughes. His conditional

discharge was continued. The ORB recognized the "excellent" progress that Mr. Leyshon-Hughes had been making. It was not, however, on the basis of all the information it had examined and on the basis of all of the questions which remained about the circumstances surrounding the index offence, satisfied that without the "significant umbrella of security still provided by Dr. Bradford and the other members of the hospital team" Mr. Leyshon-Hughes would not succumb to "impulsive acts" and "outbursts of aggression" (see page 16 Tab E, Applicant's Application Record Volume 2 of 2). They concluded at page 17 of their Reasons for Disposition:

> Until a greater degree of separation or independence from the hospital can be achieved, the Board must find that the accused remains a significant threat to the safety of the public. The intimacy between the accused and the hospital support which has been so instrumental in bringing him this far so successfully, is in the Board's view so closely identified with him that it cannot at this time separate the accused from the hospital when establishing his level of stability. As in the past year he continues to be a significant threat based on his history and the nature of his psychiatric condition.

¶ 39 The ORB further suggested that Mr. Leyshon-Hughes be represented by counsel at his next annual review hearing and that, that counsel have available the October 26, 1999 Reasons for Disposition of the ORB.

¶ 40 Acting on that last suggestion Mr. Leyshon-Hughes retained Ms. Edwardh to represent him at his 2006 annual review hearing which was set for two days. At that hearing, Mr. Leyshon-Hughes was requesting an absolute discharge and Dr. Bradford was supporting his request.

¶ 41 Leading up to the December 18, 2006 annual review hearing, two pre-hearing teleconferences were held with a member of the ORB who did not participate in the panel hearing the matter on December 18, 2006. At the first of those two teleconferences, Crown counsel, Mr. Dave Roberts indicated that he would be requesting of the ORB a continuation of Mr. Leyshon-Hughes' conditional discharge with a further loosening of conditions. There is no question that Mr. Roberts was alive to and wished to respond to the issues raised by the ORB in its 2005 Reasons for Disposition concerning the historical questions surrounding the index offence.

¶ 42 At that same teleconference Mr. Roberts informed the parties that he was considering requesting that the ORB order Mr. Leyshon-Hughes to undergo an independent assessment in light of the fact that Mr. Leyshon-Hughes was seeking an absolute discharge. In response to this Dr. Bradford, at that same meeting, indicated to Mr. Roberts that he would expand his 2006 Hospital report to address Mr. Roberts' voiced concerns, which he did.

¶ 43 There was also a discussion between the parties regarding what documents, historical and recent, would be filed at the hearing as well as what issues, historical and current, would be raised at the hearing. Mr. Roberts indicated that he would not be referring to or filing exhibits beyond the most recent Reasons for Disposition and Hospital Records and that he would not be re-visiting the issues raised in

1999 about the actuarial risk assessment tools. No mention of an independent assessment was ever raised by or on behalf of the ORB.

¶ 44 There was a second pre-hearing teleconference held on November 28, 2006. The parties were still awaiting Dr. Bradford's final Hospital Report. At that teleconference Mr. Roberts informed the parties that it was unlikely that he would be requesting that there be an independent assessment of Mr. Leyshon-Hughes. In fact, this decision to not seek an independent assessment of Mr. Leyshon-Hughes was made and confirmed in writing by Mr. Roberts on December 7, 2006 after he had received Dr. Bradford's final report dated November 29, 2006. In that report Dr. Bradford specifically addressed the issues raised by Mr. Roberts at the teleconference as well as the issues raised by the ORB in its last Reasons for Disposition (see Tab 1A, pages 49 to 55 of the Application Record of the Respondent The Royal Ottawa Health Care Group). At the second teleconference Mr. Roberts also expressly indicated that he would not be seeking to introduce any independent expert evidence at the 2006 hearing. This issue was not raised by the member of the ORB member presiding at the teleconference.

¶ 45 When questioned at the December 18, 2006 hearing about this decision to abandon his request for an independent assessment, Mr. Roberts indicated that he had a sense that Mr. Leyshon-Hughes was not going to be made available personally for the assessment and that from a practical perspective anyone else's assessment "was going to pale in comparison" with Dr. Bradford's views based on his long-term and close knowledge of Mr. Leyshon-Hughes' medical situation (see Transcript of Proceedings pages 18 to 19, Applicant's Application Record, Tab 3).

¶ 46 In his oral submissions and at paragraph 10 of his Factum Mr. Roberts explained what his final determination had been regarding his abandoning his request for an independent assessment. He states:

> 10. The Respondent indicated that in declining to seek another assessment in advance of the hearing, and being alive to the issues raised by the Board in its most recent reasons for disposition, the Crown was relying on the interpretation of the law as set out in Winko, to give the Board an option of seeking new evidence after a full and robust cross-examination of Doctor Bradford by all parties.

¶ 47 At the end of the second teleconference all parties were prepared to proceed to the hearing scheduled for December 18, 2006.

DECEMBER 18, 2006 ORB HEARING

¶ 48 On December 18, 2006, all parties were present and ready to commence Mr. Leyshon-Hughes' ORB hearing. Mr. Leyshon-Hughes had his employer and his parents, who had traveled from British Columbia, present and ready to testify at the hearing on his behalf. Prior to the commencement of the proceedings the ORB panel, chaired by the Alternate Chairperson, Mr. C. MacIntyre, held a lengthy in-camera meeting. This was followed by the verbal exchange between the Chairperson, counsel and Dr.

Bradford which was transcribed and forms part of the Applicant's Application Record Tab 3, Volume 1 of 2.

¶ 49 No evidence was presented at the hearing although Dr. Bradford's Hospital Report, dated November 29, 2006, was filed as exhibit #1 and the hearing did not proceed. It was adjourned for reasons given orally by the Chairperson (see pages 55 to 60, Tab 3 of the Applicant's Application Record Volume 1 of 2). Briefly, those reasons expressed the panel's "concern or discomfort about the completeness of the evidence it would like to hear and the fact that the only expert medical evidence that it will hear is from Dr. Bradford." Of equal concern to the Board was that Dr. Bradford seemed to be "dismissive of other experts' conclusions and test results without concomitant reconciliation of their's with his own to the satisfaction of the Board." The Board could not ignore the legitimate medical controversy.

¶ 50 The Board went on to conclude at page 57 that it "is suggested, and it would be preferred if Mr. Leyshon-Hughes' medical history be subject to a qualitative review by another expert, less close to Mr. Leyshon-Hughes' circumstances and who is not part of the diagnostic disagreement and who can simply provide a fresh perspective." While recognizing that it did not have the power to order an assessment under section 672.12(1), it stated that its inquisitorial duties dictated that it seek a broader medical perspective in Mr. Leyshon-Hughes' case.

¶ 51 The Board concluded with the words,

> 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.

¶ 52 The panel then adjourned the hearing for six months or to an earlier date upon agreement of the parties. The Panel remained seized of the matter and the Panel Chairperson refused to recuse himself from hearing the matter as requested by Ms. Edwardh based on her submissions that he should do so because of a reasonable apprehension of bias.

¶ 53 The oral reasons were accompanied with a short handwritten endorsement entitled "Reasons for Adjournment." The adjournment endorsement recognized the fact that the Board at the commencement of the hearing expressed concern about the sufficiency of the evidence it expected at the hearing. It also recognized that the adjournment of six months (with the possibility of an earlier resumption with the consent of the parties) was "to allow the parties to obtain additional evidence suggested by the Board to consist of an independent overview of the accused's entire history, his diagnosis and risk, treatment and the medical controversy which surrounded these factors at the time of the accused's transfer to Dr. Bradford's care."

¶ 54 The existing disposition order was to remain in effect and the panel remained seized of the matter (see Tab 5 I of the Applicant's Application Record Volume 2 of 2).

¶ 55 On January 23, 2007, the ORB released, as it said it would, more detailed Reasons for Adjournment. In those reasons the ORB reiterated much of what has been summarized above (see Tab 5 (J) of the Applicant's Application Record Volume 2 of 2).

¶ 56 It went on, however, to provide the expert who may be chosen by the parties to conduct a review with a list of nine bullets of issues "to assist in the review" which are as follows:

* Reconciliation of the issue of whether Mr. Leyshon-Hughes' index offence was sexually motivated. We respect Dr. Bradford's efforts to dispose of this issue, but we do not feel he did this to a sufficient enough degree so as to allay our concerns about the potential for behaviour so severe as occurred at the time of the index offence.
* Clarification/ratification of Mr. Leyshon-Hughes' diagnosis. In this regard, Dr. Bradford maintains a current Axis II diagnosis of "personality disorder - NOS", and yet does not describe the personality features that go along with this diagnosis. Are we dealing with organic personality difficulties, amply described in Dr. Bradford's report, or non-organic personality pathology, or both (if there is such a thing). The distinction is not unimportant.
* Reconciliation of the discrepancies between the original scoring of Mr. Leyshon-Hughes' PCL-R, and Dr. Bradford's score. An expert should have access to primary source documents or created by Penetanguishene in this regard. The discrepancy (between 14 and 34) is so considerable that it is insufficiently explained by dismissively rejecting Penetanguishene's scores as wrong, in favour of Dr. Bradford's (and Ms. Forth's) scoring as right.
* Postulation of a differential diagnosis of the potential motivations for the behaviour that resulted in the index offence.
* Mr. Leyshon-Hughes's childhood and adolescent histories are replete with antisocial behaviour, impulsivity and violence. Are they all to be explained by organicity?
* A number of Mr. Leyshon-Hughes's past behaviours were impulsive, but a significant number of past acting out and criminal behaviours impressed as calculated. Is this consistent with organicity?
* Dr. Bradford used the term, "state dependent deviant sexual behaviour" as a posited explanation for the sexual behaviours perpetrated by Mr. Leyshon-Hughes towards the victim of the index offence. Is this categorization unique to Dr. Bradford, based on clinical and anecdotal experience, or is there a scientific and/or clinical literature on sexual improprieties attributable to the organic pathology that Dr. Bradford suggests explains Mr. Leyshon-Hughes's behaviour that specifically use this term; and

* Dr. Bradford suggests that paroxetine is a pivotal biological/ psychopharmacological intervention that changed things for Mr. Leyshon-Hughes. And expert could be asked whether it is scientifically worthwhile and ethically responsible, from both moral and risk management perspectives, to do a trial withdrawal of the paroxetine to see what happens to Mr. Leyshon-Hughes, both clinically and electroencephalographically. This could support or refute the organic diagnosis. If there was to be such a trial, it would obviously need to be carried out or started on an inpatient unit; and
* To reconcile Mr. Leyshon-Hughes's disclaimer of any sexual fantasies towards the victim in question. Mr. Leyshon-Hughes was a 15 or 16 year old male who had befriended an attractive 25 year old female, with whom he stayed with from time-to-time. A disclaimer of sexual fantasies about her at that point in his life, and in those circumstances, while possible, is highly unlikely. It raises serious concerns about Mr. Leyshon-Hughes's credibility, especially having regard to the fact that he has maintained it consistently over time, even in the presence of what has been characterized as an excellent therapeutic alliance with Dr. Bradford.

¶ 57 From my examination of the above evidence presented on this application, I make the following findings of fact. On December 18, 2006, the ORB preference for an adjournment to obtain further evidence announced at the commencement of the hearing came as a surprise to all parties. The ORB did not make its final decision concerning the adjournment until it had given all of the parties an opportunity to be heard on the question.

¶ 58 Mr. Leyshon-Hughes' counsel cannot be found to have consented to the adjournment at any point of the proceedings. In fact, she recognized that she could not consent to an adjournment, thereby seizing the panel of the matter, and at the same time request the Alternate Chairperson to recuse himself and plan to request the Chairperson of the ORB, Justice Carruthers to ensure that a new Board is constituted which as she stated she intended to do.

¶ 59 Ms. Edwardh made the following statement on page 26 of the transcript, made after obtaining instructions from her client:

> We do not want any change in the warrant. We are content that the warrant continue for the next six months and would ask that the Board re-convene within a six month period.

In the context of the whole verbal exchange that went on that day, this statement nor any other made by Ms. Edwardh, cannot be interpreted, in my view, as a consent to a six month adjournment of the hearing. It was rather an attempt to resolve the status of her client and the conditions to which he would be subject until the matter was finally resolved.

¶ 60 Given the fact that Mr. Leyshon-Hughes' counsel had prepared for the hearing to proceed and

had arranged for the presence of witnesses, some of whom had traveled long distances to testify at the hearing, the adjournment of the hearing did cause Mr. Leyshon-Hughes some prejudice. In addition to this, Dr. Bradford expressed professional concern for the continued success of his patient's rehabilitation if the review process was unduly dragged out.

¶ 61 Before leaving the hearing on December 18, 2006 no party agreed explicitly to be bound by the Board's suggestion for an independent review. Mr. Roberts was clearly more receptive to the suggestion. Nevertheless, both Ms. Edwardh and Mr. Roberts at the end of the hearing continued to have questions concerning the exact nature and scope of the independent review being suggested by the ORB and the effect it would have on Mr. Leyshon-Hughes' rehabilitation. Ms. Edwardh certainly had questions about who would fund such a review. It appears now after some inquiry that it would be Mr. Leyshon-Hughes who would have to fund the review.

¶ 62 In his discussion on December 18, 2006 of the independent review, the ORB Alternate Chairperson, I find, was vague. He used terms like "comprehensive review of Mr. Leyshon-Hughes' file from the start to now", "objective appraisal", "psychiatric amicus curiae for the Board", "a qualitative review by another expert", a "fresh perspective", a "broader medical perspective" and "review of the diagnosis", a "second opinion." The Board also expressed the opinion that this review could be accomplished without much, if any, disruption to Mr. Leyshon-Hughes' schedule or lifestyle.

¶ 63 The written endorsement of December 18, 2006 made reference to a much more comprehensive examination of Mr. Leyshon-Hughes' medical history. It referred to "an independent overview of the accused's entire history, his diagnosis and risk, treatment and the medical controversy which surrounded these factors at the time of the accused's transfer to Dr. Bradford's care."

¶ 64 In releasing its written Reasons for Adjournment on January 23, 2007, once again, the ORB's expectation of a broad and comprehensive review and examination of Mr. Leyshon-Hughes' medical and behavioural history was made evident. In addition, they added another suggestion aimed at testing the diagnosis and treatment of Mr. Leyshon-Hughes' treating psychiatrist, Dr. Bradford, which would necessarily involve in-patient treatment (see second last bullet page 7 of the Reasons for Adjournment, Applicant's Application Record Volume 2 of 2). There is no question that this suggestion would have introduced some disruption to Mr. Leyshon-Hughes' schedule and lifestyle. It is also clear that without Mr. Leyshon-Hughes' consent to participate in this experiment, this suggestion amounted to a suggestion for an assessment which the Board recognized it could not order in the circumstances of the case before it (see page 57 of transcript of December 18, 2006 proceedings at Applicant's Application Record Volume 1 of 2, Tab 3).

¶ 65 It may be mentioned here that Dr. Bradford gave evidence concerning his professional views and as Mr. Leyshon-Hughes' treating psychiatrist on some of the suggestions made by the ORB in its Reasons for Adjournment. He stated that the suggested experiment of taking Mr. Leyshon-Hughes off his recommended medication which, in Dr. Bradford's view had been so significant to the progress made by Mr. Leyshon-Hughes, was unethical and that he would never recommend it to his patient. Dr.

Bradford also questioned whether some of the reconciliations and clarifications sought by the ORB with respect his patient's medical history, background and diagnosis were possible.

THE ORB AND ITS LEGISLATIVE FRAMEWORK

¶ 66 Before embarking on the evaluation of the conduct and decision of the ORB in this matter, it will prove useful to situate the ORB and its jurisdiction in its legislative framework. This issue has been aptly and comprehensively done by all parties in their Facta as well as by the ORB as intervener. With respect to the question of the ORB jurisdiction, the scope of its inquisitorial powers and the procedures adopted by it, the ORB has filed as exhibit #3 the Affidavit of Jim Curran, registrar of the ORB, sworn April 3, 2007. Much of the information included in the Affidavit of Mr. Curran was not contested by any of the parties and, in fact, was confirmed by their own material which they filed with this Court. Dr. Bradford, in his oral evidence, also confirmed much of the same information.

¶ 67 It is not necessary to repeat the details of this evidence here. It suffices simply to refer to the following as providing the legislative and contextual framework for the ORB mandate and work,

* the establishment and purpose of the ORB (paras. 6 and 8 of exhibit #3);
* the composition and medical specialization of the makeup of the ORB, its practice concerning its quorum (paras. 7, 9, 11 and 22 of exhibit #3);
* the location and nature of the ORB proceedings, its Rules of Procedure filed as exhibit #1, the power of the Chairperson to determine the procedure when not provided for in the Rules, the power of the ORB to call witnesses and evidence and the concurrent right of the parties to do the same and to be represented by counsel, the fact that the ORB is not a court of law (paras. 12, 13 and 14 of exhibit #3);
* the nature of the ORB decisions or "dispositions" (paras. 17, 18 and 19 of exhibit #3); and
* the mandatory nature of the annual review hearings and a party's right to appeal a disposition of the ORB to the Court of Appeal on a question of law or fact or a question of mixed law and fact (paras. 20 and 21).

THE SCOPE OF THE ORB'S INQUISITORIAL POWERS

¶ 68 As the Applicant points out in paragraph 46 of his Factum, Part XX.1 of the *Criminal Code of Canada*, which governs the ORB, was enacted as a response to the Supreme Court of Canada's decision in *R. v. Swain*, [1991] 1 S.C.R. 933. In brief, it replaced the old model of conviction-acquittal in dealing with mentally ill offenders with an assessment-treatment model which was declared to be more in keeping with the right to procedural fairness under section 7 of the *Charter*. There is no question that the ORB is creature of statue and has no inherent common-law power. There is also no question that in any of its dealing with mentally ill offenders it is required to provide procedural fairness to the mentally ill offender.

¶ 69 Consequently, the proceedings of the ORB have a dual purpose as follows:

(a) protecting the safety of the public; and
(b) treating the offender fairly (see para. 47 of the Applicant's Factum, para. 22 of the Crown's Factum and para. 28 of the Intervener's Factum).

Tasked with this dual purpose, the ORB also bears the burden of making a disposition which is "the least onerous and least restrictive to the accused" taking into consideration the following four factors, namely, "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" (section 672.54 of the *Criminal Code of Canada*).

¶ 70 In the decision of *Winko v. British Columbia (Forensic Psychiatric Institute), supra*, the Supreme Court of Canada was asked to examine the constitutionality of Part XX.1 of the *Criminal Code of Canada*. It ultimately found it to be constitutional. Among other things, the Supreme Court of Canada discussed the practical implications of the dual statutory purpose of the ORB to protect the public and to treat the mentally ill accused fairly.

¶ 71 The ORB proceedings are not and could not be adversarial in nature. Parties may disagree as to the appropriate disposition which should be made. In this case, Mr. Leyshon-Hughes and counsel for the Crown do disagree. Nonetheless, no one party bears the burden of "proving" or establishing risk to the public in any given case. As the Supreme Court of Canada pointed out at paragraph 54 of its decision:

> The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain, Part XX.1 provides for the resolution by way of default in favour of the liberty of the individual.

¶ 72 Consequently, I agree with the statement made by the Applicant in paragraph 47 of his Factum that before a Review Board has jurisdiction to do anything other than order an absolute discharge, they must make a positive finding that the offender "poses a significant threat to the safety of the public."

¶ 73 *Winko v. British Columbia (Forensic Psychiatric Institute), supra*, went on to state that because of this legal and evidentiary burden, the ORB must be able to exercise broad inquisitorial powers which it has been accorded by statute under the *Criminal Code of Canada*. All parties agreed that the ORB is given broad inquisitorial powers. The issues between them are what are the limits of those powers and were they exercised legally on the facts of this case.

¶ 74 Concerning the ORB's inquisitorial powers the Supreme Court of Canada had the following to say:

[54] The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of Part XX.1 play within the criminal justice system. The Crown may often not be present at the hearing. The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present.
[...]
[55] As a practical matter, it is up to the court or Review Board to gather and review all available evidence pertaining to the four factors set out in s. 672.54: public protection; the mental condition of the accused; the reintegration of the accused into society; and the other needs of the accused. The court and the Review Board have the ability to do this. They can cause records and witnesses to be subpoenaed, including experts to study the case and provide the information they require. Moreover, with particular reference to the Review Board that may assume ongoing supervision of the NCR accused, Parliament has ensured that its members have special expertise in evaluating fully the relevant medical, legal and social factors which may be present in a case: s. 672.39. [...]
[...]
[61] It follows that the inquiries conducted by the court or Review Board are necessarily broad. They will closely examine a range of evidence, including but not limited to the circumstances of the original offence, the past and expected course of the NCR accused's treatment if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community and, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. The broad range of evidence that the court or the Review Board may properly consider is aimed at ensuring that they are able to make the difficult yet critically important assessment of whether the NCR accused poses a significant threat to public safety.
[...]
[62] On this interpretation of Part XX.1 of the Code, the duties of a court or Review Board that is charged with interpreting s. 672.54 may, for practical purposes, be summarized as follows:
[...]

4. The proceeding before the court or Review Board is not adversarial. If the parties do not present sufficient information, it is up to the court or Review Board to seek out the evidence it requires to make its decision. Where the court is considering the matter, it may find in such circumstances that it cannot readily make a disposition without delay and that it should be considered by the Review Board. Regardless of which body considers the issue, there is never any legal burden on the NCR accused to show that he or she does not pose a significant threat to the safety of the public.
5. The court or Review Board may have recourse to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive.

[...]

¶ 75 Based on the above quotation and after examining the legislative framework of the ORB's jurisdiction, I am persuaded that the ORB committed a jurisdictional error in conducting the hearing of December 18, 2006 in the way that it did and in coming to the decision which it did to adjourn the matter for a six month period.

¶ 76 As indicated above the Supreme Court of Canada summarized the duty of the ORB at paragraph 62 of its decision in *Winko v. British Columbia (Forensic Psychiatric Institution), supra*. Point 4. of that paragraph clearly implies that the ORB has a duty to hear the information presented by the parties before it embarks on its own inquiry to seek out other evidence. Furthermore, it has a duty to seek out evidence it requires to make its decision only "if the parties do not present sufficient information." In other words, it exercises its right to seek out other evidence in the context of a hearing that is procedurally fair to the mentally ill accused. This is a hearing that in the first instance respects all of the mentally ill accused's rights under section 672.5 of the *Criminal Code of Canada* including, among a number of rights, but perhaps most importantly, the right found under section 672.5(11) which reads:

> Any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application cross-examine any person who made an assessment report that was submitted to the court or Review Board in writing.

¶ 77 At paragraphs 66 to 70 of its decision in *Winko v. British Columbia (Forensic Psychiatric Institute), supra*, the Supreme Court of Canada rejected the proposition that Part XX.1 breached a NCR's

constitutional right by improperly shifting the burden to the NCR to prove that he or she will not pose a significant threat to public safety. In the eyes of the Court what safeguarded the section from constitutional attack was the fact that the ORB "must have a hearing" upon making its determination of whether the NCR accused poses a risk to public safety." It is during this hearing that the ORB acts "in an inquisitorial capacity, to investigate the situation prevailing at the time of the hearing and determine whether the accused poses a significant threat to the safety of the public." In this way the Supreme Court of Canada concluded that "this process does not violate the principles of fundamental justice."

¶ 78 In light of the above, I am persuaded by the submissions of the Applicant and the Respondent, The Royal Ottawa Hospital that the ORB must consider all of the evidence available and which is being advanced by all of the parties before making a determination as to whether there is sufficient information. Only upon concluding at the hearing on the basis of all of the evidence presented can it then make the determination that it has insufficient information to make the determination required of it.

¶ 79 On the facts of this case, December 18, 2006 was the date set for Mr. Leyshon-Hughes' mandatory annual review hearing. It was not a pre-hearing meeting or a preliminary proceeding. On the ORB's recommendation Mr. Leyshon-Hughes had retained counsel to represent him at the hearing. Two pre-hearing conferences had already taken place. The issues between the parties were made clear to everyone. All parties were ready to proceed. Mr. Leyshon-Hughes had his witnesses present and available for examination in support of his position. Counsel for the Crown was prepared to advance his position by way of an intended vigorous cross-examination of Dr. Bradford. On behalf of the party, the Royal Ottawa Hospital, Dr. Bradford had specifically expanded his annual report to include historical medical information in order to address Crown counsel's concerns expressed during the two pre-hearing teleconferences.

¶ 80 In adjourning Mr. Leyshon-Hughes' hearing on their own motion without the consent of Mr. Leyshon-Hughes, the ORB denied Mr. Leyshon-Hughes his right to his hearing, more specifically, his right to make oral or written submissions on all of the evidence and to call witnesses to be examined and cross-examined prior to their decision concerning the sufficiency of the information before them. The evidence indicated that, as was the usual practice at these hearings, the ORB panel had the benefit of receiving Dr. Bradford's final hospital report in advance. However, by making its decision concerning the sufficiency of the evidence on the basis of that written report alone without the benefit of the examination and cross-examination of its author, as well as the benefit of hearing the other witnesses which were to be called during the hearing, the ORB made its decision concerning the sufficiency of the information before it on the basis of only a portion of the evidence available to it. In my view, it prematurely closed down the hearing and in that way breached the fundamental principles of natural justice by its conduct.

¶ 81 In summary, I find that the ORB committed a reversible error in a number of ways. Firstly, it adjourned the matter without statutory jurisdiction. As part of its inquisitorial powers under section 672.5 (13.1), the ORB may adjourn a hearing "for a period not exceeding thirty days if necessary for the purpose of ensuring that the relevant information is available to permit it to make or review a disposition or for any other sufficient reason." There is no question that the reason for the adjournment in this case

was to ensure, in the ORB's opinion, that relevant information be available before it made its decision. However, it did not have the jurisdiction to adjourn the matter for six months without the consent of all of the parties. On the evidence I have found that the parties did not consent to the adjournment. The absence of that consent is, in my view, fatal to the ORB's decision to adjourn the matter for six months. In so doing it did so without statutory jurisdiction.

¶ 82 Secondly, for the reasons discussed earlier I have found that the ORB came to a premature decision concerning the sufficiency of evidence. It made its decision about the sufficiency of the evidence before according to Mr. Leyshon-Hughes the right to exercise all of his procedural rights at the hearing relating to the presentation and testing of all of the evidence. In doing this the ORB exceeded the permissible scope of its inquisitorial jurisdiction.

¶ 83 On this point, I can take no issue with many of the oral and written submissions of counsel for the Intervener, the ORB. Many of these submissions were reiterated by the counsel for the Crown. In particular, I refer to paragraphs 29 to 33 of the Intervener's Factum which mentions such things as the Board having recourse to a broad range of evidence, the Board being granted a wide latitude to determine what additional evidence is required, the Board not only having the jurisdiction to seek out new evidence, but also the duty to do so when the evidence tendered is insufficient, and the Board being entitled to disagree with the expert evidence presented. All of these inquisitorial powers are recognized by the Supreme Court of Canada in its decision, *Winko v. British Columbia (Forensic Psychiatric Institute), supra*.

¶ 84 I also accept the submissions of both counsel for the Crown and counsel for the Intervener that in seeking out additional evidence in the exercise of its inquisitorial powers, it may examine or cause to examine not only current diagnosis and treatment plans, but also past ones. While the Applicant is correct in stating that ultimately the ORB is "obligated to assess the NCR accused person's current mental condition and risk to the public" (see paragraph 76 of the Applicant's Factum), considering past diagnosis and treatment plans may be relevant to that ultimate assessment depending on the facts of the case.

¶ 85 This broad temporal scope of inquiry was recognized in the decision of *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, (S.C.C.). On the facts of that case the NCR accused had been subject to annual review by the ORB for a number of years. He was considered to continue to be a significant risk to the safety of the public. The Review Board also found that Mr. Mazzei's medical treatment, clinical progress and reintegration prospects were at an "impasse." The Board ordered that Mr. Mazzei continue to be detained in the Forensic Psychiatric Hospital and imposed conditions on the Hospital requesting them, among other things, to "undertake a comprehensive global review of Mr. Mazzei's diagnostic formulations, medications and programs with a view to developing an integrated treatment approach which considers the current treatment impasse and the accused's reluctance to become an active participant in his rehabilitation" and to provide "an independent assessment of the accused's risk to the public in consideration of the above refocused treatment plan."

¶ 86 In considering the question of whether the Review Board exceeded its jurisdiction in making such binding orders and imposing conditions "regarding treatment" on the Psychiatric Hospital, the Supreme Court found that it had not. At paragraphs 39 and 58 of its decision it explains that in the course of rendering its dispositions,

> [39] Although Review Boards may not actually prescribe or impose a particular course of medical treatment for an NCR accused, they still possess the authority to make orders and conditions in a "supervisory" role or capacity with respect to the NCR accused's medical treatment and clinical progress. Review Boards are in effect empowered to make orders and conditions "related to" or "regarding" an NCR accused's medical treatment (or the supervision of such treatment) while in the custody of a provincial hospital; Review Boards also have the power, as discussed above, to make such orders and conditions binding on all parties involved, including 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. The authority for this power is derived from the purpose of the legislative scheme, the mandate and expertise of Review Boards, and the wording of various sections of Part XX.1; it is also echoed in the jurisprudence.
> [...]
> [58] This condition is also consistent with the Board's statutory mandate to make an appropriate disposition order which achieves the twin goals of Part XX.1: protection of the public and safeguarding Mazzei's liberty interests. In fulfilling this mandate, the Board is required to gather accurate information in order to assess Mazzei's risk to public safety. This is reflected in the factors enumerated in s. 672.54, such as the need to consider "the mental condition of the accused". Requiring the Director to undertake a review of past and current treatment approaches, and the reasons for the apparent "impasse", is consistent with this scheme. It is a supervisory power which is incidental and necessary to the Board's mandate to obtain all necessary information it requires in order to arrive at an accurate assessment of an accused's risk to public safety and prospects for community reintegration. Forming its own opinion on the appropriateness or efficacy of a particular treatment plan is a necessary component of this power.
> [...]

¶ 87 In its written Reasons for Adjournment the ORB relied on this decision in justifying its suggested areas of review to be undertaken by the expert chosen during the adjournment of the hearing. One obvious significant point of distinction between the facts found in *Mazzei v. (Director of Adult Forensic Psychiatric Services), supra,* and the facts found in the case at bar is that in *Mazzei v. (Director of Adult Forensic Psychiatric Services), supra,* the ORB formulated its disposition after the annual review hearing and all of the evidence had been presented (as incomplete as it was found to be) (see paragraph 3 of the decision). On the facts of this case the ORB made its suggestions for the comprehensive review of Mr. Leyshon-Hughes' diagnosis, history of treatment, as well as experimental

treatment to test current diagnosis in the absence of a hearing and on the basis of only part of the evidence that it would have heard had the hearing gone ahead. One might also ask if such an approach is justified in the face of an obviously successful diagnosis and treatment in the case of Mr. Leyshon-Hughes which was not the case with Mr. Mazzei whose treatment "impasse" clearly justified a totally fresh approach. However, I accept that this may be a decision dictated by the medical expertise of the ORB.

¶ 88 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.

¶ 89 The Alternate Chairperson provides an explanation of the ORB's decision and its timing, found at page 51 of the transcript of the proceedings (see Applicant's Application Record Volume 1 of 2, Tab 3). It was as he indicates to avoid "an entire day or more of evidence and submissions that might be repeated later on." It was also to give Dr. Bradford an opportunity to deal with another opinion relating to his diagnosis and treatment of Mr. Leyshon-Hughes. While this explanation is well-intentioned the underlying concern and preoccupation of such an explanation is misplaced when it sacrifices procedural fairness in the interests of efficiency. I cannot agree with the submissions of the Intervener that the ORB met its statutory duty here to hold an annual review by convening the hearing in the Applicant's case and then adjourning it without the consent of the parties.

¶ 90 Thirdly, the ORB's suggestion in their written Reasons for Adjournment released on January 23, 2007 that Mr. Leyshon-Hughes submit to a trial withdrawal from his medication in a an in-patient setting is clearly a suggestion for an assessment. Ms. Edwardh in her oral submissions to the ORB dealing with the Board's power to order an assessment under section 672.12(1) correctly pointed out that the ORB, on the facts of the case before it, could not order such an assessment. The ORB recognized this statutory limitation to its jurisdiction to order an independent assessment of Mr. Leyshon-Hughes.

¶ 91 Counsel for the Intervener submitted that it was only a suggestion and not an order. Furthermore, he submitted that since the suggestion was outside the jurisdiction of the Board to order it should simply be ignored. I agree with counsel for the Intervener to a point. Such a suggestion, particularly in the face of Dr. Bradford's evidence concerning that suggestion, should be ignored. However, when the Board strongly implies in both its oral reasons and written reasons that without that information to "assist in the review process" the panel "could not come to an informed decision", a NCR accused, such as Mr. Leyshon-Hughes, who continues to be subject to the management of the ORB and whose personal liberty is dependent on the ORB review process, may find it difficult to ignore such a suggestion without fear of some impending consequence. In the context of all of the circumstances of this case, there is a basis for concluding that the ORB was attempting to do indirectly what it knew it could not do directly. It was consistent with the ORB's expressed disappointment that counsel for the

Crown did not pursue the option of seeking an assessment (see page 2 of the Transcript of the Proceedings, Volume 1 of 2, Tab 3).

¶ 92 The suggestion that there be some experimental withdrawal of Mr. Leyshon-Hughes' medication to test Dr. Bradford's organic diagnosis concretely demonstrates the kind of mischief created by the Board when it made a decision precipitously in the absence of all of Mr. Leyshon-Hughes' procedural rights being exercised. Had the Board taken not only the preferred route, but the correct route of hearing and considering all of the evidence, including the oral evidence of Dr. Bradford, his cross-examination and questions by the Board, it would have had the benefit of Dr. Bradford's views on their suggested experiment and may not have made such a suggestion which in Dr. Bradford's view was unethical and jeopardized his patient's progress, and which we all have to ignore.

OTHER PRACTICES ADOPTED BY THE ORB

¶ 93 In view of the implications for other Board hearings which this decision might have counsel have asked for directions from this Court concerning certain practices adopted by the ORB. Briefly, much has been made of the in-camera pre-hearing conference conducted by the panel members before opening the hearing and requesting the submissions of counsel on its concern. Dr. Bradford testified to his experience of this practice. His evidence was that he participates on such panels. The pre-hearing in-camera meetings of the panel members are a frequent enough occurrence in the ORB's practice. According to Dr. Bradford it allows the Board to identify the main issues in the hearing and to assist the panel members to formulate their questions concerning the anticipated evidence in the context of the issues. According to Dr. Bradford, this meeting is always followed by the presentation of evidence by the parties, usually starting with the attending physician's hospital report which the Board would have received weeks before the hearing.

¶ 94 I can take no issue with such a pre-hearing in-camera meeting of the ORB panel if it is for the purpose described by Dr. Bradford and followed by the hearing during which all of the parties have the opportunity to present their evidence and test the evidence of the other parties. I cannot see how such a pre-hearing in-camera meeting would compromise a NCR accused's procedural rights.

¶ 95 On the other hand, the holding of such a pre-hearing in-camera meeting of the panel becomes problematic and improper if during that meeting decisions are made in the absence of the NCR accused which may touch on his procedural and substantive rights, such as whether the hearing should be adjourned for whatever reason. I have found that the ORB did not make its final decision to adjourn Mr. Leyshon-Hughes' hearing until it had given all of the parties an opportunity to make submissions on the Board's proposal for the adjournment. I am, therefore, unable to find that the pre-hearing in-camera meeting which took place in this case was one during which the final decision to adjourn was made.

¶ 96 The Rules of Procedure of the ORB, a copy of which were filed as exhibit #1 provide for substantial advance notice to the Review Board and all of the parties of any expert evidence, documents and authorities to be relied upon at the hearing (see Rule 16 to 20). The Rules also provide for pre-

hearing conferences "where the Review Board receives notice that a hearing is expected to take longer than two hours or that the hearing may be unusually complex" ... "in order to determine the issues and the appropriate amount of time required for the hearing" (see Rule 29). Mr. Leyshon-Hughes' case was such a case. The matter was scheduled for two days because of Crown counsel's original wish for another assessment, which he subsequently abandoned. There were in fact two pre-hearing teleconferences in this matter during which issues and the evidence relating to those issues were discussed between the parties under the direction of an ORB member, grant it not one that sat on this panel.

¶ 97 By the end of the second and last pre-hearing teleconference, it is fair to say that the ORB was aware that counsel for the Crown would not be pursuing its request for an independent assessment. The ORB member conducting the pre-hearing teleconference did not inform any of the parties that from the ORB's point of view this would be problematic to the Board and its mandate. Furthermore, upon questioning from Ms. Edwardh during this teleconference, counsel for the Crown indicated that he would not be revisiting at the 2006 hearing issues of Mr. Leyshon-Hughes' historical testing discrepancies and the issues raised in the 1999 annual review hearing about actuarial risk assessment tools. Once again, with respect to this discussion between the parties the ORB member conducting the pre-hearing teleconference did not inform any of the parties that from the ORB's point of view this would be problematic to the Board and its mandate.

¶ 98 As stated earlier the ORB has an overriding power of inquiry to seek out other evidence to complete the information before it in order to determine whether the NCR accused poses a substantial risk to public safety. Consequently, the ORB is not bound by any discussions or resolutions reached by the parties in pre-hearing conferences pursuant to the Rules of the Review Board or otherwise regarding the issues and evidence to be relied upon at the annual review hearings. Such discussions between the parties cannot interfere with the ORB's right and duty to raise issues and question regarding evidence during the annual review hearing after it has heard all of the evidence, if it considers it relevant to completing the information before it and to fulfilling its mandate.

¶ 99 If, however, the ORB intends to do this or anticipates doing it there must be some mechanism established to provide all of the parties, and the NCR accused in particular, with reasonable notice of such intention. The kind of review envisaged by the ORB in its final Reasons for Adjournment was a comprehensive one, involving some expense and dating back, in the case of Mr. Leyshon-Hughes some 20 years or more. Procedural fairness to Mr. Leyshon-Hughes dictated that he be given reasonable notice in advance of the hearing of the ORB's intention. For obvious reasons, notice on the day of the commencement of the hearing is not reasonable.

¶ 100 There was some evidence that after Mr. Leyshon-Hughes' 2005 annual review hearing, the Alternate Chairperson, who was the same Alternate Chairperson for the annual review hearing in question, contacted by telephone Dr. Bradford, who had given evidence at Mr. Leyshon-Hughes' annual review hearing, requesting him to inform Mr. Leyshon-Hughes (who did not have counsel at his 2005 hearing) that the ORB intended to review some matters raised at Mr. Leyshon-Hughes' 1999 annual Review Board hearing which it clearly did as can be seen from its 2005 Reasons for Disposition. This

message was passed on to Mr. Leyshon-Hughes by Dr. Bradford. The ORB in its Reasons for Disposition also suggested that Mr. Leyshon-Hughes retain counsel for his 2006 annual hearing. While all of this was giving Mr. Leyshon-Hughes, in a rather indirect way, some indication that past issues were still a concern of the ORB, it can hardly be considered reasonable notice which would permit Mr. Leyshon-Hughes and his counsel to prepare for what occurred on December 18, 2006.

¶ 101 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 on issues 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.

REASONABLE APPREHENSION OF BIAS

¶ 102 After examining all of the evidence, I come to the conclusion that the Applicant must succeed on this ground of his Application. In my view, the ORB lost jurisdiction over this matter because the decision of the panel, as stated by the Alternate Chairperson, created a reasonable apprehension of bias that the panel had pre-judged both the evidence and the conclusions to be drawn from evidence prior to hearing all of the evidence and prior to giving the parties the opportunity of testing the evidence.

¶ 103 It is well accepted that Courts of law in the adversarial systems are *tabula rasa* for both the issues and the evidence advanced by the parties to a litigation, with some small exceptions such as when the *parens patriae* jurisdiction of a Court may be engaged. The inquisitorial powers of the ORB and the expert composition of the Board makes it anything but a *tabula rasa* with respect to firstly, the issues and secondly, the kind of evidence which should be advanced to address the issues. Nonetheless, identifying issues and naming the kind of evidence which may address the issues is not to necessarily pre-judge the evidence to be advanced.

¶ 104 There is substantial jurisprudence on the question of apprehension of bias. The test for reasonable apprehension of bias was described by the Supreme Court of Canada in the decision of *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 in the following way:

> [...] the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a informed person, viewing the matter realistically and practically-and having thought the matter through-conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. (See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at p. 289).

¶ 105 As counsel for the Crown points out at paragraph 35 of his Factum, the Supreme Court suggested that the test for reasonable apprehension of bias needs to be applied in the particular

circumstances of each case and that a high threshold should be applied in determining the question.

¶ 106 Clearly, the circumstances of this case are that the tribunal under investigation is not a court of law. Rather it is a Board that is expected and mandated to use its experience and specialized knowledge relating to mental illness with respect to the issues before it and the evidence which it examines. Consequently, the application of the test for reasonable apprehension of bias must be different, more "elastic", if one can use that expression, to this kind of a tribunal than might otherwise be the case.

¶ 107 The nature of this elasticity was described by Mr. Justice de Grandpré, when he cited with approval *Tomko v. N.S. Labour Relations Board et al.*, (1974), 9 N.S.R. (2d) 277 aff'd [1977] 1 S.C.R. 112 in his dissenting decision in *Committee for Justice and Liberty v. Canada (National Energy Board), supra*, in the following way:

> [...]
> This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the courts. The nature and purpose of the Trade Union Act dictate that members 'bring an experience and knowledge acquired extra-judicially to the solution of their problems' (Lord Simonds in John East, supra, A.C. at p. 151, D.L.R. at p. 682).
> The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held per se to disqualify a Panel member.
> [...]
> That good faith is not shaken by the fact a member of the Board may have held tentative views. Not only is this the situation in Canada as it appears from the judgment in Tomko, above but it is the situation in England -- 1 Halsbury (4th edition) at pp. 83-84:
>
> > In a wide range of other situations the impression may be received that an adjudicator is likely to be biased. A person ought not to participate or appear to participate in an appeal against his own decision, or act or appear to act as both prosecutor and judge; the general rule is that in such circumstances the decision will be set aside. Normally it will also be inappropriate for a member of tribunal to act as witness. Likelihood of bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both

> judge and party, or because of his personal relationship with a party or for other reasons. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating, or that he is a member of a trade union to which one of the parties belongs where the matter is not one in which a trade dispute is involved.
> The fact that an administrator may incline towards deciding an issue before him one way rather than another, in the light of implementing a policy for which he is responsible, will not affect the validity of his decision, provided that he acts fairly and with a mind not closed to argument; and similar standards may be applied to other persons whose prior connection with the parties or the issues are liable to preclude them from acting with total detachment. (Underlining mine)

¶ 108 On the facts of this case, I agree with the submissions for counsel for the Crown that the ORB clearly held a tentative view that Mr. Leyshon-Hughes' current diagnosis was an issue to be pursued by the ORB. I also agree that given the Review Board's mandate and the concern it must have for public safety that tentative view alone does not necessarily lead to a conclusion of a reasonable apprehension of bias on the part of the Review Board. It would be merely raising a live issue on the information before it based on its expertise and experience as well as its knowledge of Mr. Leyshon-Hughes' historical medical history.

¶ 109 Having said that, the Board did more than merely raise an issue. It clearly reached conclusions about the contribution Dr. Bradford's evidence would make to the issue raised. It did this on the basis of only part of Dr. Bradford's evidence, namely his written hospital report. They came to their conclusions prior to Dr. Bradford completing his evidence by way of his testimony and prior to having that testimony tested by the examination and cross-examination by the parties as well as the questions by the Board which the principles of natural justice would have demanded.

¶ 110 In explaining its Reasons for Adjournment, both orally and in written form, the ORB expressed "concern or discomfort" about the lack of completeness of the evidence it would likely hear. This was said without allowing the evidence of the parties to be completed. The Board, itself, would clearly have had questions about Dr. Bradford's hospital report. One example was what the Board referred to as Dr. Bradford's "dismissive" attitudes towards other experts' conclusions and test results. Yet they adjourned the hearing without allowing Dr. Bradford to testify so that they could put those questions to him.

¶ 111 With the following words stated at page 58 of the transcript of proceedings (see Applicant's Application Record Volume 1 of 2, Tab. 3),

> 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.

¶ 112 The Board pre-judged the contribution which Dr. Bradford's oral evidence and the parties' questioning of that oral evidence might have made to the task at hand.

¶ 113 In the face of the above, I agree with the submissions of the Applicant and the Respondent, The Royal Ottawa Health Care Group that the only reasonable conclusion possible is the ORB had come to a conclusion that any evidence provided by Dr. Bradford would be of limited value. In deciding to adjourn Mr. Leyshon-Hughes' hearing in the way that it did and for the reasons stated, the ORB panel did not "act fairly." Furthermore, it demonstrated "a mind closed to argument" contrary to the test established by the Supreme Court of Canada. In so doing the ORB created a reasonable apprehension of bias in this matter to the prejudice of Mr. Leyshon-Hughes.

CONCLUSION

¶ 114 For the reasons stated above, this Court finds that the ORB in its decision and conduct of Mr. Leyshon-Hughes' annual Review hearing on December 18, 2006 committed numerous reversible jurisdictional errors. It violated Mr. Leyshon-Hughes' rights to natural justice and procedural fairness. The Review Board operated with a reasonable apprehension of bias.

¶ 115 Consequently, the Application of Mr. Leyshon-Hughes is granted on all the two grounds advanced by him.

¶ 116 The following orders are to issue:

(1) An Order in the nature of *Certiorari*, quashing the December 18, 2006 decision of the Ontario Review Board by which it adjourned Mr. Leyshon-Hughes' annual Review Board hearing.
(2) An Order in the nature of Prohibition, prohibiting the Alternate Chairperson and the members of the panel of the Ontario Review Board as constituted on December 18, 2006 from re-convening to conduct Mr. Leyshon-Hughes' Review Board hearing.
(3) An Order of *Mandamus* directed to the Ontario Review Board, requiring it to establish a new panel of the Review Board to proceed forthwith with Mr. Leyshon-Hughes' annual Review Board hearing.

COSTS

¶ 117 The last issue to be dealt with by this Court is the question of costs. In accordance with my ruling which was consented to by the parties at the end of this hearing, the parties are permitted to make written submissions on costs. In order to assist in this process, the Applicant shall have two weeks from the date of the release of this decision to serve the other parties and Intervener and file with the Court his written submissions on costs. All of the other parties, and the Intervener, shall then have one week from that date to serve on the other parties and to file with the Court their response submissions on costs. The

Applicant shall then have one week from that date to provide any reply submissions on costs, if he so wishes.

M.T. LINHARES de SOUSA J.

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