

Board Files No. 0T 030109 & OT 030110

**IN THE MATTER OF
The Mental Health Act
R.S.O. 1990, CHAPTER M.7, as amended;**

**AND IN THE MATTER OF
The Health Care Consent Act
R.S.O. 1990, CHAPTER M.7, as amended**

**AND IN THE MATTER OF
P. R.
a patient at the Royal Ottawa Hospital
Ottawa, Ontario**

REASONS FOR DECISION

The Consent and Capacity Board (“the Board”) met on May 9, 2003, to consider an Application made by P. R. under s.39.(1) of the *Mental Health Act* (the *Act*) for a review of her status as an involuntary patient at the Royal Ottawa Hospital (“the Hospital”), and to consider an Application to review a finding of incapacity to consent to treatment of a mental disorder. The Panel of the Board consisted of Albert Hubbard (Presiding Member), Marvin Silverman (Psychiatrist Member), and Bruce Levy (Community Member). The parties to the proceeding were the patient, P. R., who was represented by counsel, Michael Davies, and the attending physician, Dr. Michelle Tremblay. The Applicant’s brother, T. R., was present and was called as a witness by Dr. Tremblay.

The Issues

The documents before the Board in this proceeding (all of which were completed at the Hospital) were: (1) a certificate of involuntary admission under s.20.(5) of the *Act* (the “Form3”) in respect of Ms. Ryley, signed on April 28, 2003, by Dr. Tim Lau; (2) an Application to Review the Patient’s Involuntary Status under s.39.(1) of the *Act* (the “Form16”), signed by her on April 30, 2003; (3) a Notice to the Patient under s.38(4) and s.59(1) of the *Health Care Consent Act* (Form 33) signed by Dr. Lau on April 28, 2003; (4) an Application to Review the finding of incapacity signed by the patient on April 30, 2003 (the Form “A”). Thus, the Board was called upon to determine whether the requirements concerning involuntary admission set out in the *Act* were met at the time of the hearing in order to decide whether to revoke or to confirm the patient’s involuntary status under that certificate, and whether she is capable with respect to treatment of a mental disorder. A preliminary issue regarding the Board’s jurisdiction to proceed with the hearing was also raised by counsel on behalf of the Applicant.

The Board’s Jurisdiction

The Board, differently constituted at the time, met on April 24, 2003, to consider an

earlier application to review the patient's status at the Hospital. Having found that the requirements of the *Act* were not met, by its decision of April 24 (Exhibit 1) the Board revoked the patient's involuntary status. However, Dr. Tremblay examined Ms. P. R. on April 25 and completed a Form 1, purportedly pursuant to s.15.1 of the *Act* (Exhibit 2), subsequent to which the Forms 3 and 33 before the Board at its May 9 hearing were completed by Dr. Lau.

Counsel submitted that the Form 3 certificate was invalid for want of a proper foundation, and that the Board therefore had no jurisdiction to hear the matters before it. In order to be admitted as an involuntary patient s.20.(1)(c) of the *Act* requires a person to be either "the subject of an application for assessment [s.15(1)] or the subject of an order under [the inapplicable] section 32". It was contended that, if the Form 1 is invalid, Ms. P. R. was not "the subject of an application for assessment" when the Form 3 was completed, in which case that certificate is invalid as well. The argument that the Form 1 was invalid is that upon revocation of the previous certificate Ms. P. R. became a voluntary patient, that a Form 1 cannot be used to detain for psychiatric assessment a person who is already a patient in a psychiatric facility, and that the proper form to use to detain such a person is a certificate of involuntary admission, changing the patient's status from voluntary patient to involuntary patient, as provided in s.19 of the *Act*. Although such a certificate was completed on April 28, had she not been detained pursuant to the invalid Form 1 Ms. P. R. might not have been in the Hospital at that time.

In response to the suggestion that, upon revocation of her involuntary status, Ms. P. R. was no longer a patient there and was free to leave the facility, it was submitted that, even if that were so, the use of a Form 1 in order to detain her for "psychiatric assessment" would be an abuse of process. He submitted that the Applicant's psychiatric condition was fully known and that the Form 1 was filled out not for the purpose of an assessment, which was unnecessary in the circumstances, but as an instrument of detention. In any case, it was his contention that a Board's decision revoking a patient's involuntary status merely changes his or her status to that of a voluntary patient, in which regard he cited s.20.(6) of the *Act* which provides that: "An involuntary patient whose authorized period of detention has expired shall be deemed to be an informal or voluntary patient."

Dr. Tremblay maintained that, whereas a Form 1 should not be used simply as a means to detain a person whose involuntary detention has been revoked for reasons with which the attending physician happens to disagree, its use may be warranted where a physician examines such a person and finds a material change (or difference) in the circumstances presented to that Board.

In this case, Dr. Tremblay had occasion to examine Ms. P. R. on April 25. Although, despite the Applicant's persistent belief to the contrary, she had not been her attending physician, Dr. Tremblay was very familiar with her, and with her history, and had some knowledge of what transpired at the April 24 Board hearing. Ms. P. R. informed her that she had not left the hospital following the revocation of the certificate because she was awaiting the arrival of her brother to take her elsewhere. Dr. Tremblay knew that her brother had appeared at the hearing, that he had not been called as a witness, and that he had no intention of escorting his sister from the

Hospital. Thus, there was concern as to where Ms. P. R. would go and how she would get there. In the course of examining her, it became clear to Dr. Tremblay that, notwithstanding assurances to the contrary given to the Board on April 24, Ms. P. R. was adamant in her refusal to go to the Manoir Gallien residence where she had a room. Rather, she demanded to be taken to the Rideau Gardens residence from which she had been expelled (for reasons to be seen). Although in receipt of a notice to terminate her tenancy early for reasons of impaired safety (Exhibit 3), she had insisted on calling that residence in order to prove to Dr. Bahtla (another psychiatrist at the facility) that she had a bed available to her there. She then became embroiled in a heated argument with a member of the residence's staff. She denied having any illness, said that she had "won the Board" and planned to go to Rideau Gardens where she would be welcomed back. She insisted that her brother was coming to pick her up to take her there. When asked by Dr. Tremblay, who knew he had no intention of doing so, what she would do if her brother did not come to get her, she replied that she would remain in the Hospital until he arrived.

The Board is of the view that s.20.(6) of the *Act* is not applicable in the circumstances of this case. In our view, the effect of a Board's decision to revoke a certificate of involuntary admission is not to cause the expiration of "an authorized period of detention". The *Act* specifically "authorizes" the detention of persons for *specified periods* of time, namely: up to 72 hours under a Form 1 (s.15.(5)); up to two weeks under a Form 3 certificate of admission; up to one month under a first certificate of renewal (Form 4); up to two months under a second Form 4; up to three months under a third or subsequent Form (4 s.20.(3)).

In the Board's opinion, the purpose of s.20.(6) is to provide patient-status to a person who remains in a psychiatric facility when such an authorized period of detention expires. Indeed, the criteria required by the *Act* in order to detain that person may still exist and his or her voluntary patient status conferred by s.20.(6) upon the expiration of the authorized period of detention may be changed back to that of an involuntary patient pursuant to s.19 of the *Act*. However, if a decision to release a person *before the expiration of the period authorized by the form used to detain him or her* is made—whether by the attending physician having determined that the required criteria for detention have ceased to exist, or by a Board that has so determined after a hearing—then that person is not someone whose "authorized period of detention" has simply expired, leaving him or her in limbo as to whether the requirements for detention set out in the *Act* have ceased to exist. Quite simply, that person is no longer a patient, voluntary or otherwise, and his or her continued physical presence in the facility while making arrangements to leave does not prolong his or her status as a "patient"—as "a person who is under observation, care and treatment in a psychiatric facility" (s.1.(1) of the *Act*).

Obviously, the revocation of a patient's involuntary status does not confer immunity from future detention pursuant to a Form 1 or Form 3 (as the case may be), nor does the statute prescribe a period of time following a Board's revocation of that status during which no such Forms can be used to detain that person—a sort of "temporary immunity", as it were. The symptoms of mental illness may change dramatically in very short order, and what is relevant is the person's condition at the time the form is completed and not his or her condition as found by a Board at an earlier time, however short the interval—a circumstance to be taken into account

when weighing the evidence.

In our opinion, Ms. P. R. was no longer a patient at the Hospital when the Form 1 (Exhibit 2) was completed by Dr. Tremblay; nor was there in the circumstances attested to by her any abuse of process in having done so. While not privy to the evidence before the Board on April 24, or the reasons for its decision, the evidence before us made it clear that Ms. P. R. had caused that Board to believe that she had an appropriate place to go (namely, Manoir Gallien) and that she intended to go there. In our view, for reasons made apparent herein when dealing with the merits of the applications before us, Dr. Tremblay had reasonable cause to believe the requirements set out in s.15.(1) were met, and the Applicant's refusal to leave the Hospital until her brother should come for her, her inflexible unwillingness to go to Manoir Gallien where she had a room, and her obstinate insistence that she be taken to Rideau Gardens where she was *persona non grata*, is a material change (or difference) in the circumstances sufficient to warrant making that application on April 25, notwithstanding that the previous certificate was revoked only one day earlier.

The Evidence

The patient, a single woman 70 years of age, has a room for which she is paying at the Manoir Gallien residence where she stayed for two weeks prior to her admission to the Hospital. Dr. Tremblay, who became her physician on April 25, 2003, has known Ms. P. R. for years because of her frequent admissions to the Hospital. Dr. Tremblay's review of the history of the patient, who has a university education and was described as "very bright", follows.

The patient's childhood after the age of 12 was referred to as having been "odd" (a point that was not elaborated upon). In 1967 she moved to Prince Edward Island to care for her father. She became ill. Her brother got her admitted to hospital in Kingston, Ontario, where she was diagnosed as suffering from schizophrenia. She was treated successfully with medication. She lived for a time with her brother's family in Montreal and later moved to Toronto where she worked as a legal secretary for 24 or 25 years. In 1984 she suffered breast cancer and underwent a left mastectomy. She receives a disability pension. She started drinking to help her sleep and to cope with retirement. She had some insight into the fact that she was ill and her main problem at that time was alcohol abuse. She began to cause difficulties for others where she lived, one such place being the Elmsmere Retirement Home which has since refused to let her return. She became poorly compliant with her medication and, in June of 2002 there was a marked decline in her psychiatric status. She thought she had AIDS, that her doctor at the residence was hiding in her bed and raped her, and that her co-residents had raped her as well. She became noncompliant with her medication, drank and smoked excessively, was not eating properly and became aggressive with the staff. She was admitted to the Hospital. She said she was 34 years of age, and was being assaulted every night by her doctors and named co-patients. A Review Board found her capable because she had improved. She was discharged against medical advice, and then did not properly attend the day programme set up for her. She went to live at the Rideau Gardens residence. Because she believed men were watching her shower there she took to turning off the light while showering, creating a risk of falling and breaking a hip, or suffering other serious

harm. She also called 911 frequently to complain that she was being raped. She was fearful and believed she was being spied upon. She is alleged to have gone to the rooms of men living in the residence and watched them shower “and pee”. The staff at the residence believed her to be stalking other residents. She reportedly confronted the administrator with a knife in her possession (but Dr. Tremblay had no information as to whether she had wielded it aggressively). The administrator, who did not want her to remain there, called the Hospital where she was re-admitted by Dr. Lau on October 9, 2002, and where she remained until February 3, 2003. During this hospital stay she struck a nurse for having said that her beliefs were not real. She continued to believe in the nightly rapes. She was put on clozaril and, since her condition seemed improved, she was given weekend passes to return to Rideau Gardens. However, her behaviour there led to the issuance on January 28, 2003, of a notice to terminate her tenancy (Exhibit 3), the stated reason being:

Continued harassment of specific other residents by stalking these residents at times and verbal outbursts directed at these residents. Going into other resident’s units without permission. Hiding in inappropriate places because “someone” is threatening you. E.g. Kitchen, other resident’s shower. Verbally aggressive towards other residents in the dining room causing extreme emotional upset of other residents.

Since the Rideau Gardens would not have her back, when discharged Ms. P. R. went to the Manoir Gallien residence, to the costs of which her brother and his family contribute \$900 per month. Although she could obtain a subsidy from the City if she would agree to share a room, Ms. Ryley refuses to do so. She was to be followed in a hospital day programme requiring, *inter alia*, blood work to be done in relation to her medication. However, she was noncompliant and her delusions increased, particularly in relation to being raped. She agreed to return to the Hospital on February 23rd because she was distressed. She recommenced her assertions that she was being sexually assaulted by co-patients whom she identified by name, and by Dr. Lau, her physician. She had the privilege of going out to smoke in the care of an orderly. On one such occasion she seized the opportunity to get into a stranger’s car, and when the orderly tried to remove her from it she burned him with her cigarette lighter. That lighter was then taken from her, but she had another with which she burned him again. Subsequently she was allowed out to smoke only if accompanied by two orderlies. However, because she tried to burn them both she lost that privilege.

Dr. Tremblay, who has seen Ms. P. R. every working day since April 29 when she became her attending physician, said that she has many, and changing, delusions. On one occasion she thought there was an ambulance waiting to take her to the Civic Campus of the Ottawa Hospital for an operation. She alleges that female staff members assault her and want her to be a lesbian. She asserts at times that relatives are in the hospital waiting to take her out. She says she can communicate with her nephew, brother and sister-in-law “through her brain”. While at first she wanted her as her physician, she is now convinced that neither Dr. Tremblay nor Dr. Lau are real doctors. She told Dr. Tremblay that if she “wins the Board” she will go to live with her family or at the Rideau Gardens.

The patient's brother, Tim Ryley, provided the Board with a written statement regarding her "Status at the Royal Ottawa Hospital" (Exhibit 4), the contents of which he summarized. He went on to say that if his sister is released against medical advice she would be "on her own". He and his wife, who live in a small, two-bedroom, townhouse are unwilling to have her live with them in her present condition. She insists on smoking in their home, insults them, raids their liquor cabinet at night to drink herself to sleep, and "presents a significant fire hazard to herself and to my home". Mr. R. said his daughter has indicated that she will not accept the patient, and he believes his recently married son, who lives in Calgary in a one-bedroom apartment, would not take her in either. His written statement lists the following delusions that in his view mark his sister's current mental state:

- a. Her assertion to Dr. Lau, Lisa Hans, the assigned social worker and me, on Wednesday 23 Apr 03 that I was not her brother;
- b. Her belief that a visitor to the hospital has been posing as me and as a consequence, her demand to me of 24 Apr 03 that I show her identification to prove that I am her brother;
- c. Her assertion before the Board on Thursday, 24 Apr 03, that she was being constantly raped by the staff of the Royal Ottawa Hospital, including Dr. Lau, her psychiatrist;
- d. Her assertion that she is being raped every night at the Royal Ottawa when I visited her on Tuesday, 29 Apr 03;
- e. Her assertion to me that Dr. Lau is a "phony, not an MD, not even a psychologist";
- f. Her belief that the staff of Rideau Garden (*sic*) have written a letter inviting her back as a resident in spite of the fact that they evicted her in January, 2003 out of fear for the safety of its other residents and have sent her a letter [dated April 30, 2003] saying that they will not accept her as a resident or as a visitor [Exhibit 5];
- g. Her assertion that I have difficulty contacting her by telephone at Lady Grey 3 because one of the patients answer all phone calls transferred to the patient line and successfully impersonates her on the phone;
- h. Her assertion that she is completely well mentally; and
- i. Her dislike of her current residence, Manoir Gallien, because she believes that persons on Clarence Street, drug users and prostitutes, recognize the value of her coat and are likely to attack her to take it.

Although Ms. P. R. was certainly suffering either from paranoid schizophrenia or from schizo-affective disorder, it was not yet clear which it was. In Dr. Tremblay's opinion, the patient, who insists that she has no psychiatric disorder, is unable to appreciate the consequences of taking or refusing her medication and is not capable of consenting to treatment with respect to either of these conditions. The consent of her substitute decision-maker having been obtained, she is presently taking the medication prescribed for her mental illness; but she is an habitual heavy smoker suffering from chronic obstructive pulmonary disease the medication for which she refuses to take because she believes it contains heroin, whereas she says the cigarettes she

smokes are safe because they are nicotine-free.

Dr. Tremblay said that, if released, Ms. P. R. would continue to believe and act upon her delusions of being raped by both men and women, and would cause problems wherever she goes. She is a danger to others because in any seniors' residence that might accept her she would likely stalk these very vulnerable people, berate them, accuse them of terrible offences, and cause them considerable stress. She has tried to burn people and once carried a knife to a confrontation. She is unable to care for herself and has no realistic plan as to where to go. Despite what she is prepared to tell a Review Board in that regard in order to have her involuntary status revoked, she has repeatedly told Dr. Tremblay that she will not go to the Manoir Gallien residence, and she will not be accepted at the Rideau Gardens residence where she insists on going. There are few residences in the area available to seniors, and she has alienated two of them; moreover, even if she went there in her present state, her conduct would likely result in her permanent expulsion from the Manoir Gallien residence, significantly reducing the pool of possible future residences that might otherwise be available when she is well enough to leave. Dr. Tremblay was of the opinion that the patient, who has limited financial resources, lacks the organizational ability to find another retirement home. In this regard, her brother states (in Exhibit 4) that:

She wants to return to Rideau Gardens. However, they would not accept her as a resident nor allow her to visit. If she arrives asking to be admitted, they would call the police. She would probably tell the police to bring her to my home. I would not accept her as an overnight guest. As a consequence, she might end up at a hostel, rather than returning to Manoir Gallien or spend the night on the street; and she would then, in her disturbed mental state have to find another residence. She has lived in three in Ottawa in the last five years, and they exchange information. It seems unlikely that she could find one to accept her. What does she do then? She is not going to live with us.

Under cross-examination, Dr. Tremblay acknowledged that she had no knowledge that Ms. P. R. had in fact ever fallen. She said that the information that Ms. P. R. had stalked others while residing in the Rideau Gardens, and had approached its administrator while carrying a knife, was provided by one of its employees, Allison Tucker, who told her that the knife incident was not mentioned in the termination notice because of its legal implications for the patient. Dr. Tremblay said that the nurse Ms. P. R. struck had told her she had suffered a minor bruise, and that if an elderly person were similarly struck a more serious injury might be caused. She said that the staff has had to intervene to protect other patient's from the Applicant's aggressive behaviour which, so far, had been only verbal. And while Ms. P. R. has not taken steps to physically harm those she says have raped her, her accusations against cause them distress. Dr. Tremblay said that the patient's condition had worsened since April 25 in that she no longer believed her physician was a real doctor.

As to the issue of incapacity, Counsel asked Dr. Tremblay why Dr. Lau, who had had Ms. P. R. in his care for months, did not declare her incapable until April 28. Dr. Tremblay said she could not answer for him, but assumed that it was because there is a strong presumption of

capacity and the patient was in fact taking her medication while in the hospital. But it was evident by April 28 that she does not think she is ill, has no insight into the fact that her delusions are part of her illness, does not want to take her medication and, while she is capable of understanding the information provided, does not appreciate the consequences of refusing medication.

In her testimony, Ms. P. R. indicated that if her involuntary status were revoked she would take a taxi to a bank to get the money to pay her fare and to recover belongings that had been stolen from her and were being held in a shop from which she could redeem them; she would then take the taxi to Manoir Gallien where she has a room from which she said some of her possessions have been stolen and which her brother entered in order to destroy papers she needs in relation to her income tax for 2003. She said she would stay at the Manoir Gallien until she could contact the Director of the Rideau Gardens to which she would then move. Confronted with the April 30 letter (Exhibit 5) signed by Susan Hallam, the Executive Director of that residence, she insisted that the signature was forged by Ms. Tucker who did not like her, and whom she believes to be schizophrenic. She would be willing to see nurses at Manoir Gallien if arrangements were made. She said that she believes the medication she is getting is for schizophrenia from which Dr Tremblay believes she suffers; but she denies any mental illness, maintaining that she is simply high strung and needs calming medication which she is not receiving. She said that she had, indeed, been raped by Dr. Lau and others, naming a specific co-patient as one of the perpetrators. Under cross-examination she said she was willing to go to Manoir Gallien simply to get out of the Hospital, but that on Monday (the hearing was on Friday) she would contact the director of Rideau Gardens where she was sure she would be admitted. She again denied having any psychiatric illness, accused Allison Tucker of taking her belongings in order to sell them. She said her brother had taken all her money. She said the doctors at the Hospital were delusional and not qualified.

Conclusions

On the basis of the evidence before it, and for the reasons that follow, the Board finds unanimously that the requirements of the *Act* have been met (specifically the criteria in both “Box A” and “Box B” of the certificate of admission as completed), and it is the Board’s decision that the Applicant’s status as an involuntary patient at the Royal Ottawa Hospital is confirmed. The Board finds as well that Ms. P. R. is not capable with respect to the treatment of her mental illness.

In her final submission, Dr. Tremblay said Ms. P. R. has marked false ideations on which she is acting, that she is unlikely to go to Manoir Gallien at all, but that even if she did it is likely that she would not stay, or that she would not be allowed to stay because of her behaviour towards others. While bright and able to understand information, she is not presently capable of appreciating the reasonably foreseeable consequences of her decisions with respect to her illness. Dr Tremblay pointed out that a doctor must be satisfied that a consent to treatment is genuine, and that the fact a patient takes proffered medication is not proof of capacity; where the circumstances cause the doctor to believe that such capacity is missing the doctor cannot act on

that patient's consent and a substitute decision-maker must be found. A final point made by Dr. Tremblay was that Ms. P. R. had shown improvement in some respects while on medication, but that it would "take some time" before she is well enough to leave.

For the reasons seen in connection with the issue as to its jurisdiction, the Board disagrees with Counsel for the patient that nothing has changed since the decision of the Board on April 24, or that the circumstances before that Board were materially the same as those Dr. Tremblay found the next day to provide reasonable cause to make the Form 1 application. While Manoir Gallien may well provide food and shelter in a protective environment, the Board is of the view that, on the evidence before it, the patient's indication that she would go there is chimerical, and even if acted on it is clear that she would persist in unavailing attempts to go to the Rideau Gardens or elsewhere. In any case, it is not simply a question as to whether the patient has some safe place to go. In light of the evidence just reviewed, the Board finds that Ms. P. R. is suffering from a mental disorder which (on the basis of an enhanced balance of probabilities) is likely to result in serious bodily harm to herself and to others, and in her own serious physical impairment unless she remains in the custody of the Hospital.

The Board accepts Dr. Tremblay's evidence that Ms. P. R. suffers either from schizo-affective disorder or paranoid schizophrenia and, in light of her complete denial that she suffers from any mental disorder, and having regard to all of the evidence before it, we find that even though she may comprehend the nature of the condition ascribed to her, she does not appreciate the impact on her of a decision to take or not to take appropriate medication.

We note in passing that, having found that Ms. P. R. is incapable with respect to treatment, and that there has been some improvement while under medication, and in light of our findings regarding the Box A criteria which apply *mutatis mutandis*, we are satisfied that the criteria in Box B of the certificate of involuntary admission that were also relied on are met as well.

Decision

For the above reasons, the certificate of involuntary admission signed by Dr. Lau on April 28, 2003, is hereby confirmed, and the Board is of the opinion that the patient is at present incapable with respect to the treatment proposed, namely, medication for her mental illness.

Dated at Ottawa, Ontario, this 15th day of May, 2003

H. Albert Hubbard, Presiding Member
Consent and Capacity Board