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Community access granted for NCR man who killed cop

CHRISTOPHER GULY

The Court of Appeal for Ontario has issued a unanimous ruling that aligns with Supreme Court of Canada jurisprudence concerning the NCR regime, in a rare if not unprecedented case.

In *Kachkar (Re)* [2014] O.J. No. 1500, the province's high court upheld an Ontario Review Board decision to grant community access privileges to a man found not criminally responsible (NCR) for killing a Toronto police officer. The court dismissed an appeal by the Crown which argued that giving Richard Kachkar privileges to leave the psychiatric facility where he is detained, either escorted or accompanied by staff, without supporting evidence was unreasonable, and that granting this privilege without giving the Crown an opportunity to make submissions about it denied the prosecution the common law duty of procedural fairness.

In January 2011, Kachkar was charged with first-degree murder after a stolen snowplow he was driving struck and killed Sergeant Ryan Russell. However, a jury last year found Kachkar not criminally responsible on account of mental disorder.

In its April 1 decision, the appeal court said that two psychiatrists who assessed Kachkar provided "strong evidentiary support for the community access condition" and it was therefore not unreasonable. Furthermore, the duty of procedural fairness applies to a public authority, such as the ORB, making an administrative decision that affects the rights, privileges or interests of an individual that does not include the Crown, said the court.

Under *Criminal Code* section 672.54, the board must ensure its disposition is "least onerous and



“The board has an independent obligation to sift through evidence and decide on what is the least onerous and least restrictive disposition for an accused, but that is also consistent with public safety.”

Barbara Walker-Renshaw
Mental health lawyer

least restrictive to the respondent while protecting public safety," wrote Justice Stephen Goudge on behalf of the three-judge panel that included Justices Katherine van Rensburg and Gladys Pardu.

"The Crown can hardly claim that a disposition that does so adversely affects the interest the Crown advances so as to trigger an entitlement to procedural fairness. If the Crown considers that a disposition does not do so, its right is to appeal on the grounds of unreasonableness rather than assert a breach of procedural fairness."

At the commencement of Kachkar's ORB hearing, Crown and defence counsel made a joint submission that he be detained in a medium-security unit at the Ontario Shores Centre for Mental Health Sciences in Whitby, and be afforded privileges to access the hospital grounds escorted by hospital staff at the hospital's discretion. However, the appeal court held there was no requirement that the Attorney General have the right to make submissions about the community access condition before the ORB attached it to the disposition, since there was evidence to show that the condition was consistent with the Crown's interest in public safety.

Mental health lawyer Barbara Walker-Renshaw, who represented Ontario Shores in the appeal, said that Justice Goudge noted that the ORB process is "inquisitorial, not adversarial," and that the board, as she explained, is not bound by the recommendations of the parties in reaching its own decision.

"The board has an independent obligation to sift through evidence and decide on what is the least onerous and least restrictive disposition for an accused, but that is also consistent with public safety," said Walker-Renshaw, a partner in the health law group at Borden Ladner Gervais in Toronto.

She said the ORB decision and the appellate court ruling are consistent with the leading case in this area of law, *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] S.C.J. No. 31, in which the Supreme Court of Canada held that an offender suffering from a mental disorder should be "treated with dignity and accorded the maximum liberty compatible with [Criminal Code] Part XX.1's goals of public protection and fairness to the accused."

Edward Prutschi, a partner with Toronto boutique criminal litigation firm Adler Bytensky Prutschi Shikhman, said the "very humanizing" decision in *Winko* emphasized that the unintended consequences of a mentally ill offender's actions bear no moral culpability—a point echoed in the Court of Appeal for Ontario's *Kachkar* ruling.

NCR status "reflects the moral conviction that those suffering from mental disorders that render them incapable either of appreciating the nature and quality of their criminal act or of knowing that these acts were wrong are exempted from criminal responsibility," Justice Goudge wrote.

"It's appropriate for courts to defer to the expertise of a review board, unless there are clear factual or legal errors that would require intervention," said Prutschi.

Toronto criminal defence lawyer Steve Skurka said the "overarching lesson" in *Kachkar* is that it demonstrates that a Canadian jury, the ORB and the Ontario Court of Appeal "have not been swayed by the tragic details of the case, but have been guided by the rule of law."

He believes the Kachkar case could also be the first one in Canadian history involving the successful defence of an NCR offender charged with murdering a police officer.

"That's an enormous challenge for defence counsel to get a jury to understand the law in that we don't hold people criminally responsible for acts they didn't know were wrong and apply that to a heart-rending case like *Kachkar*," said Skurka, a frequent media commentator on the law.

Eric Siebenmorgen, who represented the Crown, and Kachkar's defence counsel, Peter Copeland, declined to comment on the appeal.

Letter to the editor

Real problem with access to justice

Dear editor:

Lawyers are seen as the single largest barrier to justice. Simply put, lawyers and legal fees are blamed for being obstacles

to justice.

This is what is fueling conversations about self-represented litigants, the expansion of paralegal practices, the end of articling, mandatory mediation, pro bono and alternative business structures.

The Law Society of Upper Canada needs to look deeper into the issue of access to justice and not arrive at quick fixes to this problem by inviting paralegals into

the work of lawyers, and making the field of law another commercial activity that can be bought and sold to non-lawyers.

The legal profession requires careful, reasoned, systemic and lasting change. The problem is not lawyers and legal fees.

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