The Consent and Capacity Board's Jurisdiction to Make Section 41.1 Orders

July 10, 2019

Background

Prior to December 2015, pursuant to the *Mental Health Act* (MHA), an involuntary patient could be detained indefinitely by renewing the Certificate of Renewal (Form 4) and the Consent and Capacity Board (CCB or the Board) had only the power to confirm or rescind this form. This was dependent on whether the specific criteria for the involuntary admission were met at the time of the hearing to review the involuntary admission. The Board also had a limited power to transfer an involuntary patient to another psychiatric facility in certain circumstances.

Following the Ontario Court of Appeal's decision in *P.S. v. Ontario*, 2014 ONCA 900, the MHA was amended to replace the fourth and subsequent Certificate of Renewal with a Certificate of Continuation (Form 4A), to provide mandatory reviews by the Board and to expand the Board's jurisdiction to make a variety of orders for long term involuntary detainees. By the time patients are subject to a Form 4A Certificate of Continuation, they have been detained involuntarily for more than six months.

Now, pursuant to section 41.1 of the MHA, when the Board makes an order confirming a patient's Certificate of Continuation, the Board can make any of the following orders on its own motion or in response to an application (Form 51) from the patient or a person on the patient's behalf:

1. Transfer the patient to another psychiatric facility, subject to subsections 41.1(10), (11) and (12), but only if the patient does not object.
2. Place the patient on a leave of absence for a designated period on the advice of a physician, subject to subsection 41.1(13).
3. Direct the officer in charge of the psychiatric facility to provide the patient with a different security level or different privileges within or outside the psychiatric facility.
4. Direct the officer in charge of the psychiatric facility to allow the patient to be provided with supervised or unsupervised access to the community.
5. Direct the officer in charge of the psychiatric facility to provide the patient with vocational, interpretation or rehabilitative services.

Can section 41.1 orders be sought without a Certificate of Continuation?

Recently, a motion was brought by a patient (SR) seeking, *inter alia*, that the Board make orders with respect to his "conditions of detention" when considering his Application to Review his involuntary status. The Notice of Motion specifically requested the Board to order, pursuant to sections 41.1(1) and (2): one-on-one supports to access off unit and hospital grounds and rehabilitation, socialisation, recreation and vocational training; and religiously appropriate therapeutic intervention and community visits. The patient submitted that the Board had the authority to order this relief pursuant to section 39 of the MHA, by requesting the Board to read in the jurisdiction to consider and grant the requested Orders. At this time, the patient was detained at a psychiatric facility pursuant to a Form 4 Certificate of Involuntary Detention, not a Form 4A Certificate of Continuation.

On behalf of the physician, it was successfully argued that the Board did not have the jurisdiction to make these orders as its jurisdiction to grant such an order is limited under section 41.1 to when the Board has confirmed a Certficate of Continuation. At the time of the hearing, the patient had not been admitted to the hospital for a long enough period of time for a Certificate of Continuation (Form 4A) to have been completed.

The Board was asked to conclude that the ordinary and plain meaning of words, in the context of the statute as a whole, should play a dominant role when interpreting legislation, based on fundamental principles of statutory interpretation, as confirmed by the Supreme Court of Canada.1

The CCB is an administrative tribunal created by statute — the MHA. It is well-established that statutory bodies, like the CCB, "may perform only those tasks assigned to them by Parliament or one of the provincial legislatures, and in performing those tasks they have at their disposal only those powers given to them expressly or implied".2 It is the provisions of the MHA that establish the Board's authority to make decisions with respect to a patient's involuntary status and to issue orders governing the conditions of a patient's involuntary admission, once the patient is detained, subject to a Certificate of Continuation (Form 4A).

Similar requests previously considered by the Board

The Board has previously considered requests to make orders in circumstances that were not strictly consistent with the legislated provisions of the MHA in force at the time.

In *MM (Re)*, 2015 CanLII 98324 (ON CCB), the patient (MM) had been involuntarily admitted continuously for over a year, when the patient applied for transfer to another psychiatric facility under s. 39.2 of the MHA. At the time of the hearing, a fourth Form 4 Certificate of Renewal had not been completed, which was a prerequisite under the legislation for an application for transfer. In this case, the only reason why a fourth Form 4 had not been issued was because the patient had exercised her right to have her involuntary status reviewed by the Board on several occasions during her admission. There had been hearings following which her certificate of involuntary admission had been rescinded on procedural grounds, following which a Form 3 had been issued, which "restarted" the process. The total time of continuous involuntary admission exceeded the time before a patient would be entitled to an application for transfer as

contemplated in the legislation. Accordingly, the Board determined it had jurisdiction to consider the patient's request for transfer.

In *PL (Re)*, 2016 CanLII 98378 (ON CCB), the patient (PL) had been an involuntary patient continuously for over two years and had been hospitalized continuously for over 5 years. The Board determined that "through no fault of his own", the patient had not been made subject to a Form 4A Certificate of Continuation and therefore was not able to bring an application for transfer and other orders under s. 41.1. Given the length of his involuntary admission, the Board read s. 41.1(1) in a purposive manner that reflected the length of time of PL's continuous detention and found that the Board had jurisdiction to consider PL's application. In the result, although the Board confirmed PL's involuntary status, it declined to make any of the orders requested by PL.

In *C.O. (Re)*, 2017 CanLII 49280 (ON CCB), the patient (CO) requested that the Board make an order pursuant to subsection 41.1 despite the certificate in place at the time being a Form 4 (Certificate of Renewal) and not a Form 4A (Certificate of Continuation). The Board declined to make the order and confirmed that:

The panel was unable to make such an order since section 41.1 only provides authority for an order 'When the Board makes an order confirming a patient's certificate of continuation' which was not the situation in this case.

In *T.P. (Re)*, 2018 CanLII 100365 (ON CCB), the Board acknowledged that the patient (TP) was frustrated by his inability to go into the community without supervision, even for short periods. The panel stated that:

[It] had no jurisdiction to address that issue in this hearing, given TP was not subject to a Certificate of Continuation and there was no ability for TP to bring an application for section 41.1 orders at this time.

It is clear that the MHA does not confer jurisdiction on the Board to grant the type of order provided for in s. 41.1 to patients who are not subject to a Form 4A. The Board has decided in one case that it had jurisdiction to consider a section 41.1 or Form 51 application, where the patient had been detained for a length of time that, but for administrative or procedural irregularities unrelated to the patient, would otherwise have resulted in a Form 4A Certificate of Continuation having been completed.

The Board's disposition of SR's request

In dismissing SR's application, the Board relied on the wording of the sections 39.6 and 41.1 of the MHA, finding that the legislation requires that a person be subject to a Certificate of Continuation to request relief under s. 41.1 and the Board must confirm the Certificate to grant the relief. Additionally, the Board found that the two previous cases that considered requests for Orders absent a Certificate of Renewal or Continuation, (Re MM and Re PL respectively [above]), were distinguishable from SR's request, as those patients had been detained for much longer than six months and were thus substantively eligible to bring an application, using a purposive interpretation of the statute. The Board found that these cases interpreted the legislation broadly to give life to the intent of the law and the direction from the Court in *PS v. Ontario*, whereas SR was asking the Board to create new powers which, as a statutory tribunal, it does not have the authority to do.

1 *Rizzo & Rizzo Shoes Ltd. (Re),*[1998] 1 SCR 27, at paragraph 21.

2 *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, at paragraph 26.

By

Barbara Walker-Renshaw, Jessica R. Szabo

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.