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COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY and O'CONNOR JJ.A.

B E T W E E N:	)	
	)	
ONTARIO CRIMINAL CODE REVIEW BOARD	)	
Applicant/ Respondent	)	Peter J. Harte for the appellant
- and -	)	
	)	Robert Ratcliffe for the respondent
DONALD HALE, Inquiry Officer; JOHN DOE I; JOHN DOE II; JOHN III	)	Ontario Criminal Code Review Board
Respondents	)	William S. Challis and
- and -	)	John Higgins for the respondent, Hale
SIMCOE COURT REPORTING (BARRIE) INC.	)	Marshall A. Swadron for the respondents, Doe
Respondent/ Appellant	)	
	)	**Heard: September 28, 1999**

On appeal from the order of the Divisional Court (Dandie, Sharpe and Greer JJ.) dated March 7, 1997

O'CONNOR J.A.:

[1] This appeal raises the issue whether a record is "under the control" of a provincial government institution giving rise to a right of access under s. 10 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("the *Act*"). Each of the respondents, John Doe I, II and III, sought access to backup audio tapes prepared by the court reporter at their disposition hearings before the Ontario Criminal Code Review Board. The Board refused these requests. It took the position that the backup tapes were not under its control but rather were under the control of the court reporter who was an independent contractor hired by the Board. The John Does appealed to

an Inquiry Officer. The Inquiry Officer held that the backup tapes were under the control of the Board and ordered that the Board obtain copies of them from the court reporter.

[2] The Board applied for judicial review. The Divisional Court dismissed the application. This appeal, brought by the court reporter, supported by the Board, is from that decision. For the reasons below, I would dismiss the appeal.

Facts

[3] The Board is an administrative tribunal which was established in 1992. It was created and receives its authority from s. 672.38 of the *Criminal Code*, R.S.C. 1985, c. C-46.[1] The Board's mandate is to review dispositions of persons who have been found unfit to stand trial or not criminally responsible by reason of mental disorder. The proceedings of the Board are called "disposition hearings".

[4] Section 672.52(1) requires the Board to keep a record of its proceedings. It reads as follows:

> 672.52(1) The court or Review Board shall cause a record of the proceedings of its disposition hearings to be kept, and include in the record any assessment report submitted.

[5] The record of the Board's disposition hearings includes the verbatim record of the oral evidence given at a hearing. This record may take different forms depending on the method of recording used by the court reporter responsible for a particular hearing. Some court reporters take shorthand notes, others make stenographic notes using a stenographic machine, and others employ a tape recorder using steno mask technology. Some use a backup system, others do not.

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[1] s. 672.38(1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.
(2) A Review Board shall be treated as having been established under the laws of the province.
(3) No member of a Review Board is personally liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions.

[6] Appeals from disposition hearings of the Board lie to the Court of Appeal and are based on transcripts of the proceedings. An appellant is usually required to provide the Court of Appeal and the respondent with a transcript of the evidence taken before the Board certified to be accurate by the stenographer (court reporter).[2]

[7] The Board employs independent fee-for-service court reporters to create records of its proceedings and to prepare transcripts of those proceedings when required. These reporters are paid a *per diem* fee for attending at a hearing and creating the record that the Board is required to keep under s. 672.52(1). The practice is that the court reporter maintains the physical custody of the record on behalf of the Board. In addition, the court reporters are entitled to charge a per page fee for preparing transcripts.

[8] In July 1994, the Board held separate disposition hearings for each of the three respondent John Does. The Board hired the appellant, Simcoe Court Reporting (Barrie) Inc., to provide court reporting services for each of these hearings. The individual court reporter employed by the appellant was Carol Forde, a Chartered Shorthand Reporter. Ms. Forde used a stenographic machine to make stenographic notes of each hearing. In addition, she also used a single track tape recorder and an open microphone to create tape recordings of all or portions of the proceedings. Ms. Forde described these tapes as "backup audio tapes" which were created as aids to assist her in preparing an accurate record. It is these backup tapes that are in issue in this appeal. The appellant is Ms. Forde's personal corporation. Nothing turns on this and for simplicity, I will refer to Ms. Forde as the court reporter.

[9] The three John Does each made a request under s. 10(1) of the *Act* for access to the backup tapes of their respective hearings. Section 10(1) provides as follows:

> 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or

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[2] Sections 672.73(1) and 672.74(4) of the Criminal Code.

> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[10] The Board refused these requests, taking the position that the backup tapes were in the custody of the court reporter and not the Board. The Board indicated that the requesters could contact the court reporter directly and obtain a copy of the record (a transcript) at a cost determined by the court reporter.

[11] The John Does appealed under s. 50 of the *Act*. Pursuant to s. 56(1), an appeal under this section is determined by the Commissioner of Information and Privacy or by a person designated by him.

[12] A notice of inquiry was provided to the John Does and to the Board. In addition, the court reporter and the Chartered Shorthand Reporters Association of Ontario (CCSRAO) were asked to make representations. The Board, the court reporter, the CCSRAO and also the Society of Ontario Adjudicators and Regulators made representations opposing the request for access to the backup tapes.

[13] In its written submission to the Inquiry Officer, the Board took the position that the stenographic notes constituted the official record of the Board's proceedings. The Board accepted that the stenographic notes were under its control within the meaning of s. 10(1) of the *Act* even though they were kept by the court reporter for safekeeping.[3] The Board argued, however, that the backup tapes belonged to the court reporter and were not in the custody or under the control of the Board. The backup tapes were simply an *aide memoire* for the reporter. She could listen to them to clarify a word or phrase that might be unclear in the stenographic notes. Except for the requests by the John Does that the backup tapes be produced, the Board would not have inquired about their existence nor the circumstances under which they were created. The use the court reporter may make

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[3] In its submission, the Board justified this position in part by referring to its policy that court reporters do not prepare transcripts of the proceedings for anyone requesting a transcript unless the Board first gives its written consent. There is some doubt about whether this is still the policy of the Board. For the reasons that I set below, I do not think that it matters to the result of this appeal whether or not there is such a policy.

of the backup tapes was of no concern to the Board. Unlike the stenographic notes, the Board did not request that they be made, was not concerned about their existence, and was not concerned about whether they continued to exist or were destroyed.

[14] The Board also submitted that it did not have a right to possession of the backup tapes, nor did it exercise control over their use by the court reporter. The Board said that it was impossible for it to compel the court reporter to surrender the backup tapes. The tapes were created by the court reporter solely for her own benefit.

[15] The court reporter took essentially the same position. She said that the backup tapes were aids to her and that they may or may not be complete as she turned the tape machine on and off at various times during the proceedings. The tapes were for her own personal use. In close to 20 years' experience as a court reporter, she had never released backup tape recordings. She said the Board did not have possession of them, that they had not been voluntarily produced by her, nor had they been provided pursuant to any mandatory statutory or employment requirement. She also said "the record [the backup tapes] is being held by me for the purpose of my duties as a maker of the official record." She drew the same distinction as the Board between the stenographic notes and the backup tapes. She accepted that the Board has " . . . authority to the use of my stenographic notes." She concluded that she was at liberty to dispose of the backup tapes at any time.

[16] The precise contractual terms between the Board and the court reporter are not in the record. There is no indication of an agreement setting out their respective rights of property, custody or control over the stenographic notes or the backup tapes nor specifying what records the reporter must keep.

[17] The appeal was decided by an Inquiry Officer designated by the Commissioner. The Inquiry Officer allowed the John Does' appeals. He found that the backup tapes, like the stenographic notes, were created by the court reporter as a result of an engagement by the Board and he considered that both of these records, taken together, constituted the Board's record of proceedings. He rejected the argument that the backup tapes were created for the court reporter's personal purposes. He found that

the court reporter was the trustee or repository of the backup tapes and that the right of control remained with the Board. The Inquiry Officer directed the Board to obtain copies of the backup tapes from the court reporter. It is important to note that this order does not necessarily mean that the John Does will be provided access to the backup tapes. The Board has not yet determined whether it will rely upon any of the exemptions set out in the *Act* and, on that basis, refuse access.

[18] The Board brought an application for judicial review. The Divisional Court dismissed the Board's application. The court reporter, with the support of the Board, appeals that decision.

Analysis

[19] The single issue before the Inquiry Officer was whether the backup tapes were records to which there was a right of access within the meaning of s. 10(1) of the *Act*. That section limits the jurisdiction of the Board. Records in the custody or under the control of an institution are subject to the access provisions in the *Act*. Records that are not fall outside the scope of the *Act*. This court has held that a decision by the Commissioner or his designate under s. 10(1) of the *Act* is to be reviewed on a standard of correctness, not reasonableness: *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.). The reasoning behind this decision was threefold: s. 10(1) is jurisdiction limiting; the interpretation of the "custody or control" test does not require specialized expertise; and there is no privative clause.

[20] With this standard in mind, I turn to the question of the application of s. 10(1) to the backup tapes. For convenience, I repeat s. 10(1):

> 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[21] It is accepted that the backup tapes are records within the meaning of the *Act* (s. 2). It is also accepted that the Board has been designated as an institution in the regulations made under the *Act*.[4]

[22] The only issue is whether the backup tapes are under the control of the Board. I start with the proposition that the records of the Board's disposition hearings are under its control. Under s. 672.52(1) of the *Criminal Code*, the Board is required to keep a record of its proceedings. It seems obvious that whatever constitutes that record must be under the control of the Board. If the record is not physically in the Board's custody, then it must be kept under an arrangement by which the Board has access to it. Were it otherwise, the Board would be in breach of its statutory mandate "to keep a record of its proceedings."

[23] The question then is -- what constitutes the Board's record of proceedings? The court reporter now argues that even the stenographic tapes do not constitute the record. It contends that only a transcript, if prepared, is the record of proceedings referred to in s. 672.52(1). I disagree. In many cases, there will be no transcript prepared; the Board nevertheless has a duty to keep a record. That record must include the non-transcribed record prepared by the court reporter responsible for making a record of the proceedings.

[24] Unlike the court reporter, the Board accepts that it has control over the stenographic notes because those notes constitute the record of its proceedings. The Board, however, argues that the stenographic notes constitute the entirety of that record. As set out above, it takes the position that the backup tapes are prepared by the court reporter for her own purposes and are, therefore, not part of the record. That argument, it seems to me, takes an unduly narrow view of the reason that the backup tapes were created.

[25] Accepting that s. 672.52(1) requires that the record of proceedings that must be kept is an accurate record, and it is inconceivable that it could be otherwise, it makes sense that there should be included in that record those documents or materials that, when taken together, provide the accurate record. The court reporter was hired for the purpose of making an accurate record. She

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[4] R.R.O. 1990, Reg. 460, s. 1(1).

chose to use a backup audiotape process to assist her in doing so. It may be that the backup tape in some instances will add nothing to the accuracy of her stenographic notes. However, it seems reasonable to conclude that in some cases the backup tape must be of assistance, otherwise there would be no purpose in making one.

[26] I am of the view that the record of the Board includes all of those documents or materials that were created for the purpose of making an accurate record. As Sharpe J. said in the reasons of the Divisional Court:

> I fail to see how when two methods are used to record proceedings, one being the primary method and the other being a backup or check, one constitutes the "record" while the other does not. Both are created for the same purpose . . . .

[27] It is not an answer to say that some court reporters do not employ a backup system to assist with the accuracy of a record. The record includes whatever documents are created by the court reporter in carrying out the mandate to prepare an accurate record for the Board.

[28] I am also of the view that even if the backup tapes do not constitute part of the Board's record, the Board nonetheless has control over them within the meaning of s. 10(1) of the *Act*. There are three aspects to the relationship between the Board and the court reporter that are important to this conclusion.

[29] First, the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate to keep an accurate record.

[30] Next, it is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them,[5] and to limit the disclosure of disposition information to the public or to an accused.[6] It follows that orders

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[5] Section 672.5(6).

[6] Section 672.51(5) and (3).

of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. That level of control is implicit in the powers conferred upon the Board by the *Criminal Code*.

[31] It is reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board. The Board can and should exercise control over the use of all records made by court reporters of its proceedings.

[32] Third, the Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

[33] The Federal Court of Appeal has decided that, in the context of the federal legislation, a broad, liberal and purposive approach should be given to the interpretation of access to information legislation: *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242, [1995] 2 F.C. 110. Letourneau J.A., writing for the court, held as follows, at p. 245:

> The notion of control referred to in [the Act] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government.

[34] This reasoning applies equally well to the Ontario legislation and supports the conclusion that the Board should be found to have control over the backup tapes. The Federal Court's decision was cited with approval by Dorgan J. in *Neilson v. British Columbia (Information and Privacy*

Commissioner), [1998] B.C.J. No. 1640, a case involving an application under the B.C. Act for the production of notes made by a school counselor during counseling sessions with the children of the applicant parent. Dorgan J. held that the statute, which also provides for access to "any record in the custody or under the control" of a public body, was broad enough to encompass these documents. The counselor in that case argued, as did the stenographer in this case, that the notes were simply an aide memoire which she was not required to make, over which she had custody and control, and which she stored at her home. The court, however, found that the notes were under the control of the School Board because the counselor, as an employee, was required to write reports on the children she counseled and that requirement implicitly involves the keeping of notes. Although the facts of the instant case are not identical, similar reasoning applies.

[35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put an other way, the Board cannot avoid the access provisions of the *Act* by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the *Act*.

[36] In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable. In that case, the request was made to the Ministry of the Attorney General to provide documents in the personal possession of individual members of the Judicial Appointments Committee. In holding that the documents were not under the control of the Ministry, this court pointed out that the Advisory Committee was set up to provide recommendations

for judicial appointments that were to be arrived at independently and at arms length from the Ministry. Further, in *Walmsley*, there was no statutory or contractual basis upon which the Ministry could assert the right to possess or dispose of the documents. The situation in this appeal is very different. The court reporter is specifically hired to fulfil the statutory duty of the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the *Criminal Code*. Unlike the situation in *Walmsley*, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arms length" from the Board.

[37] I am satisfied that regardless of whether the backup tapes are part of the Board's "record of proceeding", the Board has control over them within the meaning of s. 10(1) of the *Act*.

[38] As an alternative argument, the court reporter submitted that if s. 10(1) of the *Act* is interpreted to provide access to records of proceedings of disposition hearings there could be a conflict between an order made under the *Act* and those provisions of the *Criminal Code* that permit the Board to restrict access to its proceedings. It is argued that the doctrine of paramountcy would result in the provisions of the *Criminal Code* taking precedence. That issue does not arise on the facts of this case. There were no orders restricting access to the disposition hearings involved in this appeal. If access is permitted to the backup tapes, there would be no conflict with any order of the Board.

[39] We were not told, in argument, why the respondents insisted on access to the backup tapes rather than the production of a transcript. There appeared to be an understandable concern on the part of the court reporter, and probably the Board, that if access is permitted to the backup tapes someone may be able to prepare a transcript of a disposition hearing without paying for it, i.e., that it will not be difficult to have a typed version of a backup tape prepared. Leaving aside the fact that a backup tape may not cover an entire hearing, a typed version will be of limited use. It could not be used for purposes of an appeal from a decision of the Board nor for any other legal proceedings in which a

transcript must be filed. It would not be a certified transcript. Only a transcript certified by the court reporter who was present at a hearing is sufficient for an appeal or other legal proceedings.

[40] For the above reasons, I would dismiss the appeal. The order of the inquiry officer requires the Board to obtain copies of the backup tapes from the court reporter. The next step is for the Board to determine if it takes the position that any of the exemptions set out in the *Act* apply to the backup tapes and to advise the parties accordingly.

[41] The inquiry officer, who appeared as a respondent on this appeal, does not request an order for costs. John Doe III filed a factum and appeared by counsel on the argument of this appeal. John Doe I and II did not. I would direct that the appellant and the Board are liable for John Doe III's costs of the appeal forthwith after assessment.

O'CONNOR J.A.
I agree: CATZMAN J.A.
I agree: DOHERTY J.A.

Released: November 1, 1999