The Person in Charge of the Centre for Addiction and Mental Health et al. v. Her Majesty the Queen et al.

[Indexed as: Centre for Addiction and Mental Health v. Ontario]

111 O.R. (3d) 19

2012 ONCA 342

Court of Appeal for Ontario,
Simmons, Blair and Hoy JJ.A.
May 24, 2012

Charter of Rights and Freedoms -- Fundamental justice -- Treatment order made under s. 672.58 made without consent of person in charge of hospital as required by s. 672.62 of Code -- Judge in mental health court making order directing that accused be transferred "directly" to named hospital and not be transferred to correctional facility during period of order -- Improper to order that accused be transferred to hospital "forthwith" or "directly" -- No evidence that accused's ability to become fit within 60 days would be jeopardized by few days' delay in receiving treatment -- Appellate court rejecting argument that accused's s. 7 rights under the Charter violated by requiring consent of person in charge of hospital as precondition to s. 672.58 order -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.58, 672.62.

Criminal law -- Mental disorder -- Unfit accused -- Treatment order -- Unfit accused subject of treatment order under s. 672.58 -- No bed immediately available for accused -- Hearing judge erring in ordering that accused be taken "forthwith" to

designated hospital and that he not be taken to jail or correctional facility prior to admission to hospital -- Order made without consent of person in charge of hospital as required by s. 672.62 of Code -- Requirement in s. 672.62 of Code not violating s. 7 of Charter -- "Consent" in s. 672.62 not restricted to consent to treatment order in general and extending to right to decline accused as patient because of bed shortage -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.58, 672.62.

The accused was charged with sexual assault. He was found to be unfit to stand trial, and a treatment order was made under s. 672.58 of the Criminal Code [page20]requiring him to submit involuntarily to anti-psychotic drug therapy. Upon being informed that a bed would not be available for the accused for six days, the hearing judge ordered that he was to be taken directly to the designated hospital and brought directly back to court, and that he was not to be taken to a jail or correctional facility under any circumstances. The hospital authorities appealed.

Held, the appeal should be allowed.

There is a specialist mental health court in downtown Toronto that is staffed by judges with expertise in dealing with mental health issues and is supported by medical experts and staff with similar expertise. Judges in this court have expressed understandable impatience with the time it sometimes takes for the accused to be transferred to mental health facilities, and because many accused have been sent to correctional facilities while awaiting beds at a hospital. As a result, some orders were written in a number of contexts, including in relation to treatment orders made under s. 672.58, that the accused be sent to a named mental health centre "forthwith", "directly" or "with no stopover in jail". This appeal concerns orders written in the context of treatment orders.

Under s. 672.62 of the Code, no disposition shall be made under s. 672.58 without the consent of the person in charge of the hospital where the accused is to be treated or the person to whom responsibility for the treatment is assigned by the

court. "Consent" in s. 672.62 is not restricted to consent to provide treatment in a broad sense. It carries with it the right to decline an accused as a patient because of a bed shortage. Consent to treat an accused when a bed becomes available in six days' time is not consent to accept the accused for treatment forthwith. The hearing judge erred in acting on the basis that the consent requirement had been satisfied.

The consent requirement in s. 672.62 does not violate an accused's s. 7 right as guaranteed by the Charter. When an unfit accused is required to wait for a bed and is placed in a jail that is ill-equipped to address his or her mental health concerns, that individual faces a risk of harm to his or her mental and physical health, triggering both liberty and security of the person concerns. However, the consent requirement accords with the principles of fundamental justice. It does not remove the s. 672.58 decision-making power from the judge or bestow it upon hospital administrators. It provides an important procedural safeguard for the unfit accused and must be considered in that light. Moreover, there are significant risks to patients themselves and to medical personnel, hospital staff and others when potentially violent psychotic patients are detained in settings where proper facilities are not available. The consent requirement permits Ontario's forensic psychiatric facilities to co-operate in order to triage the demands and needs of both unfit accused and NCR accused. Finally, it is not unreasonable that an unfit accused may have to wait on some occasions for a short period of time while a bed becomes available in a designated psychiatric facility. The funding of mental hospitals takes place in an overall policy context that is not the purview of the courts. The consent requirement complies with society's notions of procedural fairness. It is not unconstitutionally vague or arbitrary.

Cases referred to

Centre for Addiction and Mental Health v. Al Sherewadi, [2011] O.J. No. 1755, 2011 ONSC 2272 (S.C.J.); The Person in Charge of Mental Health Centre Penetanguishene v. HMQ, Thomas Rea, The Person in Charge of Centre for Addiction and Mental Health, unreported, November 13, 1999, Toronto, Court File No. C50716 (C.A.), consd [page21]

Other cases referred to

Beauchamp v. Penetanguishene Mental Health Centre (Administrator), [1999] O.J. No. 3156, 124 O.A.C. 1, 138 C.C.C. (3d) 172, 43 W.C.B. (2d) 283 (C.A.); Canada (Attorney General) v. Bedford (2012), 109 O.R. (3d) 1, [2012] O.J. No. 1296, 2012 ONCA 186, 91 C.R. (6th) 257, 290 O.A.C. 236; Canada (Attorney General) v. PHS Community Services Society, [2011] 3 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44, 244 C.R.R. (2d) 209, 310 B.C.A.C. 1, 421 N.R. 1, 2011EXP-2938, J.E. 2011-1649, EYB 2011-196343, 336 D.L.R. (4th) 385, 272 C.C.C. (3d) 428, 205 A.C.W.S. (3d) 673, 96 W.C.B. (2d) 322, 86 C.R. (6th) 223, 22 B.C.L.R. (5th) 213, [2011] 12 W.W.R. 43; Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35, 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 139 A.C.W.S. (3d) 1080; Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, [2007] S.C.J. No. 9, 2007 SCC 9, 276 D.L.R. (4th) 594, 358 N.R. 1, J.E. 2007-455, 54 Admin. L.R. (4th) 1, 44 C.R. (6th) 1, 152 C.R.R. (2d) 17, 59 Imm. L.R. (3d) 1, 154 A.C.W.S. (3d) 363, EYB 2007-114995; Cunningham v. Canada, [1993] 2 S.C.R. 143, [1993] S.C.J. No. 47, 151 N.R. 161, J.E. 93-847, 62 O.A.C. 243, 11 Admin. L.R. (2d) 1, 80 C.C.C. (3d) 492, 20 C.R. (4th) 57, 14 C.R.R. (2d) 234, 19 W.C.B. (2d) 276; Dumas v. Leclerc Institute, [1986] 2 S.C.R. 459, [1986] S.C.J. No. 61, 34 D.L.R. (4th) 427, 72 N.R. 61, J.E. 86-1135, 3 Q.A.C. 133, 22 Admin. L.R. 205, 30 C.C.C. (3d) 129, 55 C.R. (3d) 83, 25 C.R.R. 307; J (a minor) (wardship: medical treatment) (Re), [1992] 4 All E.R. 614 (C.A.); Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services), [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, 2006 SCC 7, 264 D.L.R. (4th) 10, 346 N.R. 1, J.E. 2006-620, 222 B.C.A.C. 1, 46 Admin. L.R. (4th) 1, 206 C.C.C. (3d) 161, 36 C.R. (6th) 1, 68 W.C.B. (2d) 722, EYB 2006-102437; New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 244 N.R. 276, J.E. 99-1756, 216 N.B.R. (2d) 25, 26 C.R. (5th) 203, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 552 A.P.R. 25, 90 A.C.W.S. (3d) 698; R. v. Consuelo, unreported, September 14, 2010, Toronto, Court File Nos. 10-10001715, 10-10004017, 10-70009469 (Ont. C.J.); R. v. Hneihen, [2010] O.J. No. 4115, 2010 ONSC 5353, 219 C.R.R.

(2d) 151, 261 C.C.C. (3d) 375, 90 W.C.B. (2d) 640 (S.C.J.); R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, 2003 SCC 74, 233 D.L.R. (4th) 415, 314 N.R. 1, [2004] 4 W.W.R. 407, J.E. 2004-131, 191 B.C.A.C. 1, 23 B.C.L.R. (4th) 1, 179 C.C.C. (3d) 417, 16 C.R. (6th) 1, 114 C.R.R. (2d) 189, 59 W.C.B. (2d) 116; R. v. Mills, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, 180 D.L.R. (4th) 1, 248 N.R. 101, [2000] 2 W.W.R. 180, J.E. 99-2312, 75 Alta. L.R. (3d) 1, 244 A.R. 201, 139 C.C.C. (3d) 321, 28 C.R. (5th) 207, 69 C.R.R. (2d) 1, 44 W.C.B. (2d) 124; R. v. Morgentaler, [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1, 44 D.L.R. (4th) 385, 82 N.R. 1, J.E. 88-220, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 3 W.C.B. (2d) 332; R. v. Phaneuf (2010), 104 O.R. (3d) 392, [2010] O.J. No. 5631, 2010 ONCA 901, 222 C.R.R. (2d) 50, 275 O.A.C. 160, 97 C.P.C. (6th) 281; R. v. Procope, unreported, October 6, 2010, Toronto, Court File Nos. 10009107, 1200160 (Ont. C.J.); R. v. Rosete, [2006] O.J. No. 1608, 2006 ONCJ 141, 69 W.C.B. (2d) 383 (C.J.); R. v. Seaboyer, [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62, 83 D.L.R. (4th) 193, 128 N.R. 81, J.E. 91-1312, 48 O.A.C. 81, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117, 6 C.R.R. (2d) 35, 13 W.C.B. (2d) 624; Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre (2011), 107 O.R. (3d) 9, [2011] O.J. No. 2984, 2011 ONCA 482, 281 O.A.C. 183, 89 C.C.L.T. (3d) 175, affg (2011), 105 O.R. (3d) 761, [2011] O.J. No. 1100, 2011 ONSC 1500, 231 C.R.R. (2d) 26 (S.C.J.) [Leave to appeal to S.C.C. granted Cuthbertson v. Rasouli (Litigation Guardian), [2011] S.C.C.A. No. 329]; Rotaru v. Vancouver General Hospital Intensive Care Unit, [2008] B.C.J. No. 456, 2008 BCSC 318, 165 A.C.W.S. (3d) 746; United States of America v. Ferras; United States of America v. Latty, [2006] 2 S.C.R. 77, [2006] S.C.J. No. 33, 2006 SCC 33, 268 D.L.R. (4th) 1, 351 N.R. 1, J.E. 2006-1461, 209 C.C.C. (3d) 353, 39 C.R. (6th) 207, 143 C.R.R. (2d) 140, 69 W.C.B. (2d) 711, EYB 2006-107828; [page22]Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, 175 D.L.R. (4th) 193, 241 N.R. 1, J.E. 99-1277, 124 B.C.A.C. 1, 135 C.C.C. (3d) 129, 25 C.R. (5th) 1, 63 C.R.R. (2d) 189, 42 W.C.B. (2d) 381

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 11(b)

Criminal Code, R.S.C. 1985, c. C-46, Part XX.1 [as am.], ss. 672.58-672.62 [as am.], 672.59, (1), (2), 672.6(1) [as am.], (2), 672.61, 672.62, (1)(a), (b), (2)
Mental Health Act, R.S.O. 1990, c. M.7 [as am.]
Public Hospitals Act, R.S.O. 1990, c. P.40 [as am.]

APPEAL from the order of Hogan J. of the Ontaio Court of Justice dated April 13, 2010 requiring the accused to be taken to the designated hospital forthwith.

James P. Thomson, for appellants.

Grace Choi and Dena Bonnet, for respondent Attorney General of Ontario.

Paul Burstein, amicus curiae.

The judgment of the court was delivered by

BLAIR J.A.: --

Overview

[1] The issues in this appeal expose the tension that exists where scarce public resources do not meet the needs of mentally ill persons coming into contact with the justice and health care systems.

[2] Mr. Conception was charged with sexual assault and, because of his apparent mental health difficulties, found himself in "102 Court" at Old City Hall in Toronto. 102 Court -- the Mental Disorder Court -- is a specialized court dealing with people with mental health concerns who have been accused of criminal offences. The judges who preside there, and the staff and medical experts who assist them, are knowledgeable, proficient and compassionate in administering to the complexities that arise when the law comes face-to-face with mental health realities. They are to be applauded for their dedication and the important work that they do.

[3] Justice Mary Hogan, who made the order under appeal, is one of those judges. But she and her colleagues are also understandably frustrated when the mental health care system is unable to provide the facilities -- in particular, the beds -- that are needed to accommodate orders made where an accused [page23]person requires timely treatment in a mental health facility. In this case, the tension arose when Mr. Conception was made the subject of a treatment order under s. 672.58 of the Criminal Code, R.S.C. 1985, c. C-46 requiring him to submit involuntarily to anti-psychotic drug therapy following a finding that he was unfit to stand trial. The hospital authorities to whom the order was directed could not accommodate him immediately because no bed was available for at least six days.

[4] The incident arose during a period when a number of 102 Court judges were expressing their frustration by issuing a series of "forthwith" and "no stopover in jail" orders, either by way of s. 672.58 treatment orders or warrants of committal, in a number of different matters. [See Note 1 below] Those orders required mental health hospitals to accept as patients accused persons who were made the subject of treatment orders "forthwith", without delay and without regard to whether the hospitals had the beds and facilities available to treat the patient. Some of the orders also stipulated that the accused were not to be sent to a correctional facility prior to being sent to the mental health facility.

[5] The order under appeal is one of those orders. The appellants -- the person in charge of Centre for Addiction and Mental Health ("CAMH") and the person in charge of Mental Health Centre Penetanguishene ("MHCP") -- seek to set it aside on the basis that the order requiring treatment to be conducted at "CAMH or designate (preferably Oak Ridge)" [See Note 2 below] was made without the necessary consent of CAMH as required by s. 672.62 of the Criminal Code and in circumstances where the hearing judge knew there were no beds available.

[6] Respectfully, while I understand the concerns and the rationale underlying the order, I conclude that it was not a

proper one in the circumstances. For the reasons that follow, I would allow the appeal.

The "Treatment Order Regime"

[7] What I shall refer to as the "treatment order regime" is a component of Part XX.1 of the Criminal Code that deals generally [page24]with persons in the criminal law system who suffer from mental disorders. Amongst other things, Part XX.1 provides the court with the authority to make orders for the assessment of mentally ill accused who may be unfit to stand trial (unfit accused) or not criminally responsible for an offence as a result of a mental disorder (NCR accused), and to make the appropriate order or enter the appropriate verdict in the event of such an assessment. Persons who are found unfit for trial or not criminally responsible for an offence fall under the purview of the various federal review boards set up in each province. Part XX.1 outlines the dispositions that may be made by courts and review boards, and the parameters within which those dispositions are to be made.

[8] Sections 672.58 through 672.62 set out a statutory framework within which the court may compel an unfit accused to submit to involuntary treatment for a period of up to 60 days. The relevant portions of that framework are the following:

> 672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified.
>
> 672.59(1) No disposition may be made under section 672.58 unless the court is satisfied, on the basis of the testimony of a medical practitioner, that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.

(2) The testimony required by the court for the purposes of subsection (1) shall include a statement that the medical practitioner has made an assessment of the accused and is of the opinion, based on the grounds specified, that

(a) the accused, at the time of the assessment, was unfit to stand trial;

(b) the psychiatric treatment and any other related medical treatment specified by the medical practitioner will likely make the accused fit to stand trial within a period not exceeding sixty days and that without that treatment the accused is likely to remain unfit to stand trial;

(c) the risk of harm to the accused from the psychiatric and other related medical treatment specified is not disproportionate to the benefit anticipated to be derived from it; and

(d) the psychiatric and other related medical treatment specified is the least restrictive and least intrusive treatment that could, in the circumstances, be specified for the purpose referred to in subsection (1), considering the opinions referred to in paragraphs (b) and (c). [page25]

. . . . .

672.62(1) No court shall make a disposition under section 672.58 without the consent of

(a) the person in charge of the hospital where the accused is to be treated; or

(b) the person to whom responsibility for the treatment of the accused is assigned by the court.

(2) The court may direct that treatment of an accused be carried out pursuant to a disposition made under section 672.58 without the consent of the accused or a person who, according to the laws of the province where the disposition is made, is authorized to consent for the accused.

Background and Facts

[9] On April 13, 2010, Mr. Conception appeared in 102 Court for a hearing to determine whether he was fit to stand trial.

After considering the expert medical evidence and the submissions of counsel, the hearing judge found him unfit. The Crown then sought a treatment order under s. 672.58.

[10] Dr. Waisman, the forensic psychiatrist on call at 102 Court that day, was recalled and questioned on the treatment order issue. He testified that the criteria for such an order were met: Mr. Conception was likely to remain unfit without treatment; treatment was likely to make him fit for trial within 60 days; the anti-psychotic treatment proposed was the least intrusive that could be given in the circumstances and was not disproportionate to the expected benefits; the side effects were manageable; and Mr. Conception had responded well to treatment in the past. As the charge against him concerned a sexually-related assault of a CAMH staff member, Dr. Waisman felt that Mr. Conception's treatment could be carried out more appropriately at Oak Ridge.

[11] Given the evidence and an existing arrangement that CAMH and the hospitals would generally accept persons who were made the subject of treatment orders, subject to bed availability, the hearing judge indicated that she would make such an order in Mr. Conception's case. What followed provides an illuminating window through which the tension between the court and the government and hospitals surrounding forensic psychiatric resources may be understood.

[12] Based on information obtained from a representative of CAMH who was in court, the Crown advised the hearing judge that there would not be a bed available for Mr. Conception in a designated psychiatric facility until April 19, six days later. MHCP, of which Oak Ridge is a part -- the preferred "designate" [page26]in this case, given Dr. Waisman's opinion -- would have a bed available on the 19th.

[13] The hearing judge's response to this news was succinct: "Oh, that is great."

[14] Perhaps detecting a note of exasperation in the judge's voice, and no doubt having in mind the context of other "forthwith" treatment orders made in the 102 Court, Crown

counsel made submissions designed to explain the delay. She acknowledged that the situation was not ideal, but stressed that hospital administrators needed to be able to determine who requires priority of treatment.

[15] The hearing judge was not persuaded. She asked why she should leave it up to hospital administrators to determine priority, observing that she did not make treatment orders lightly, but "if someone is in such a condition that they have to be the subject of a treatment order, where they are being forced to take medication . . . and I have made that determination, based on the expert evidence I have heard, then that means now, it does not mean that a treatment order is necessary next Monday or that, you know the correctional facilities will try to do whatever they can try to do in the interim" (emphasis added).

[16] In the course of a further dialogue, Crown counsel pointed out that because there was a shortage of beds, the problem with giving Mr. Conception priority would be that someone else who needed that bed would be displaced. In these circumstances, she submitted again, it should be hospital administrators who make those kinds of treatment choices. The hearing judge remained firm:

> Then why don't we leave making treatment orders to hospital administrators, we do not; we do not. You know, it is a very serious order that is made and it has to come to a court where expert evidence is heard, where a judge has to be satisfied that the statutory criteria has been satisfied and that it is required now, and if that is the situation then -- and we do not take that seriously then leave everything to hospital administrators, but we do not.
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> As I say, I make orders that people against . . . their will have drugs administered to them. That is extraordinarily serious and we do that because we feel it is absolutely necessary and that means now, not a week from now and I understand that, as I have said, and I do not do it lightly when I do things like this, but I understand it does create disruption. But, you know, it would probably be better if he

is in a bed in the hall of a psychiatric hospital than if he is in the medical unit not getting what I have been told is absolutely necessary treatment for, you know, a week.

So if you look at the priorities and what is better, not ideal, but you know at least he is in a hospital and not a jail and I do not understand -- if you are saying to me, it's okay, and you are saying it is not ideal but you are saying it is okay to have him wait a week. Well, if it is okay to have him wait a [page27]week then we should not be asking for treatment orders today and I should not be making them; it is not okay.

[17] The debate ended with the following exchange:

The Crown:

But what I'm saying though Your Honour is that the practical reality is that someone who would have gotten their bed today for a treatment order made by another judge is now not going to get their bed.

The Court:

Well, I feel badly about that, but I am not in a position to, quite frankly -- well for one thing, firstly with that argument I do not know that in fact that is reality, that there is someone else that a judge has ordered to have a treatment order today. I do not know . . . where they would sit in terms of Mr. Conception; in terms of priority, if one had to do that, I have none of that information, but regardless it is about time the Province provided sufficient beds to deal with our mental health needs and it is not going to happen if I -- you know, if we are prepared to do something as serious as make treatment orders and then say, but it is okay they can sit in a jail bed. That is not appropriate. We have a mental health system here that is supposed to treat people and you know ordering treatment orders is one of the most serious things we can do in terms of the mental health system and yet we cannot seem to provide a bed for them to get treated in and that is totally

unacceptable. And I understand the argument but it is not an argument that carries any weight with me when it comes to treatment orders.
(Emphasis added)

[18] In the result, the hearing judge issued a treatment order requiring that Mr. Conception be conveyed to "CAMH or designate (preferably Oak Ridge)" to receive treatment for the purpose of making him fit to stand trial, for a period of up to 60 days. The order also directed that he remain in custody at CAMH or designate and that he "be taken directly from Court to the designated hospital and from [the] hospital directly back to Court. Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order."

[19] Correctional authorities complied. CAMH could not accommodate Mr. Conception's needs because it did not have an available bed and it was too dangerous to try to squeeze him in when no bed was available. MHCP did not have a bed available for another six days. Nonetheless, in view of the order, Court Services delivered Mr. Conception to MHCP at about 10:00 p.m. on the day the order was made, and left him in a hallway.

[20] In the end, Mr. Conception received treatment at MHCP. The hearing judge's order was stayed under the Criminal Code when the hospitals' appeal was launched and Lang J.A. made an order, with everyone's agreement, that he be treated at MHCP where he had been taken, notwithstanding the effect of the appeal had been to stay the order. Mr. Conception was treated. [page28]He returned to court. The charges against him were ultimately stayed in June 2011.
Mootness

[21] Because the charges against Mr. Conception have been dealt with, there is a question whether the court should refuse to hear the appeal on the basis that it is moot. All counsel urge us to decide the appeal, and I am persuaded that we should do so.

[22] Although the issues raised are factually moot, the legal issues raised are important. Moreover, they are "'capable of

repetition, yet evasive of review'": Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services), [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, 2006 SCC 7, at para. 15. A court may deal with a moot issue in such circumstances.

[23] Here, the clash between the hearing judge's desire to be able to make treatment orders on a "forthwith/no stopover in jail" basis and the hospitals' need to refuse consent when they are unable to accept an immediate referral has been a recurring theme in the Ontario Court of Justice. Some clarification of these issues may be of assistance.

Fresh Evidence

[24] The parties have co-operated in filing a comprehensive brief of fresh evidence to provide a record for the constitutional argument raised for the first time on the appeal. The fresh evidence consists of

(a) testimony from two experienced forensic psychiatrists concerning the implications of wait times for the treatment of unfit accused people who are to receive involuntary treatment and whether waiting for a hospital bed would have a serious deleterious effect on them, and outlining as well the medical services available in correctional facilities and the efforts made by hospitals to prioritize such people needing hospital admission;

(b) testimony from the person in charge of CAMH, describing and outlining

(i) its funding;

(ii) its provision of an on-site psychiatrist on a daily basis to perform assessments;

(iii) its provision of an administrator to coordinate and advise on bed availability across the province; [page29]

(iv) its facilities for treating such patients;

(v) the manner in which that treatment is prioritized, and why;

(c) testimony from officials in the Ministry of Health and Long-Term Care and the Ministry of Community Safety and Correctional Services, and a correctional officer, providing further details about hospital administration and funding and the medical treatment available, or not

available, in corrections settings.

[25] Counsel agree that we should consider the fresh evidence and I accept that position. The fresh evidence creates a record for assessing the constitutional challenge that, as noted above, is raised for the first time by amicus curiae on appeal. The fresh evidence also provides helpful background about the mental health facilities available in the province to respond to the needs of accused persons who find themselves under the umbrella of Part XX.1 of the Criminal Code.

Analysis

[26] The appellant hospitals submit that the hearing judge erred in granting the treatment order because they had not provided the requisite consent to such an order under s. 672.62. They further contend that she erred in issuing a "forthwith" order when she knew that the hospitals would not have the capacity to treat Mr. Conception for up to six days. In response, amicus argues that the appellants had indeed provided the necessary consent to treatment -- the timing of when that treatment was to commence being simply a detail -- but, in any event, that the consent requirement in s. 672.62 is unconstitutional because it violates Mr. Conception's s. 7 rights under the Canadian Charter of Rights and Freedoms. The respondent Attorney General and the appellants support the constitutionality of the consent requirement. The respondent Attorney General also supports the appellants' position that the hospitals had not provided an operative consent.

[27] As helpful as Mr. Burstein's submissions as amicus have been, I take a different view. In my opinion, the hospitals had not provided their consent to a treatment order disposition, and the Criminal Code requirement that they do so is not unconstitutional. I arrive at these conclusions for the following reasons. [page30]

The consent requirement under s. 672.62 was not met

[28] As amicus contends, there was never any doubt, at one level, that CAMH or its designate, MHCP, would accept Mr. Conception as a patient pursuant to a treatment order. A

memorandum of understanding was in place between CAMH and the 102 Court, and by its terms CAMH provided a form of general consent to the placement and treatment of accused persons subject to s. 672.58 treatment orders (and other dispositions provided for under Part XX.1 of the Criminal Code). Mr. Burstein argues that "consent" as contemplated by s. 672.62 means only that the hospital agrees to provide treatment in a broad sense, that is, that it acknowledges it has the skill and ability to administer the treatment called for in the order and agrees that the treatment is appropriate. He submits that the need for "consent" in this context does not carry with it the right to decline on the basis of a bed shortage.

[29] I disagree. In my opinion, it is implicit in the umbrella consent provided that the hospitals will have the necessary facilities, personnel and in-patient beds available at the time the order becomes operative, to enable them to provide the treatment required in a manner that is effective and ensures the safety of the patient, the medical and hospital staff, and the other patients at the hospital. As Dr. Simpson, the person in charge of CAMH, said, when CAMH withholds its consent because of the unavailability of a bed, it does so for reasons of safety.

[30] Consent to treat a patient when a bed becomes available in six days' time is not a consent to accept the patient for treatment forthwith. The hearing judge erred in acting on the basis that the consent requirement had been satisfied in these circumstances.

The consent requirement in s. 672.62 does not violate s. 7 of the Charter

[31] In addition, I am satisfied that the "consent" requirement in s. 672.62 of the Criminal Code does not violate s. 7 of the Canadian Charter of Rights and Freedoms. I say this because even if a hospital's refusal to admit an unfit accused for a s. 672.58 treatment order immediately engages the accused person's right to liberty and security of the person as contemplated by s. 7, the unfit accused is deprived of those rights in a manner that accords with the principles of

fundamental justice.

[32] In Canada (Attorney General) v. Bedford (2012), 109 O.R. (3d) 1, [2012] O.J. No. 1296, 2012 ONCA 186, this court summarized the proper approach to a s. 7 claim, at paras. 88-89: [page31]

> Although the language of the English version of s. 7 might suggest otherwise, the case law has established that s. 7 creates a single constitutional right: the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. There is no freestanding right to life, liberty and security of the person. Legislation that limits the right to life, liberty and security of the person will attract s. 7 scrutiny. It will, however, survive that scrutiny and avoid judicial nullification unless it is shown to be contrary to the principles of fundamental justice.
>
> An applicant alleging a breach of s. 7 must demonstrate on the balance of probabilities that: (1) the challenged legislation interferes with or limits the applicant's right to life, or the right to liberty, or the right to security of the person; and (2) that the interference or limitation is not in accordance with the principles of fundamental justice. (Citations omitted; emphasis in original)

The right to liberty and the security of person

[33] Section 7 of the Charter ensures that:

> 7. Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[34] I accept that Mr. Conception's s. 7 rights may be engaged by the hospitals' refusal to consent to a "forthwith" treatment order under s. 672.62. It is well-established that detention and a threat of imprisonment can engage a person's liberty interest, as can a continuation of the deprivation of liberty: see Canada (Attorney General) v. PHS Community

Services Society, [2011] 3 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44, at para. 90; Cunningham v. Canada, [1993] 2 S.C.R. 143, [1993] S.C.J. No. 47, at para. 10; Dumas v. Leclerc Institute, [1986] 2 S.C.R. 459, [1986] S.C.J. No. 61, at p. 464 S.C.R. For mentally ill accused, the threat of imprisonment may also trigger particular security of person concerns. It is generally accepted that "the right to security of the person protects 'both the physical and psychological integrity of the individual'": New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, at para. 58. Further, the Supreme Court of Canada has held that laws impeding access to medical care can engage security of the person concerns: see Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35; R. v. Morgentaler, [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1; PHS Community Services Society.

[35] Unfit accused in need of treatment who cannot be placed in a forensic mental health facility are typically remanded to wait in jail and, as amicus points out and the fresh evidence reveals, Ontario jails are not ideally equipped to deal with the [page32]special needs of mentally ill inmates. While some Ontario detention centres do have basic facilities available to assist inmates with mental health concerns, jails are simply not designed to respond effectively to such special needs. Jails provide fewer opportunities for the mentally ill to obtain sometimes-urgently needed psychiatric help, and incarceration generally poses an enhanced risk to the mental health of mentally ill inmates, in comparison to housing in a psychiatric facility suited to meeting those needs.

[36] No one quarrels with the observation that severely mentally ill accused should not be housed in jail facilities. In R. v. Phaneuf (2010), 104 O.R. (3d) 392, [2010] O.J. No. 5631, 2010 ONCA 901, at para. 28, this court recognized the risks involved:

> There can be no doubt that the incarceration of mentally ill persons in a jail setting risks further deterioration of their mental state and potentially places them at real risk of physical harm.

[37] As outlined in the fresh evidence, there are significant differences between the type of treatment available to an unfit accused who is temporarily detained in a jail facility pending the availability of a bed in a psychiatric facility and the treatment that is afforded to an unfit accused in CAMH or MHCP or another such facility. There is universal acceptance that the latter is the preferred route. When a facility with a Special Needs Unit [See Note 3 below] does not have space in the unit, and in other jails that do not have such units, the mentally ill person is commonly (although not always) held in segregation. The evidence indicates this experience can exacerbate their symptoms, lacking as it does the "therapeutic quiet" offered to agitated psychotic patients in a psychiatric facility.

[38] Accordingly, when an unfit accused is required to wait, and is placed in a jail that is ill-equipped to address his or her mental health concerns, that individual faces a risk of harm to his or her mental and physical health, triggering both liberty and security of the person concerns.

[39] The purpose of the treatment order regime in the Criminal Code is to restore an unfit accused's fitness to stand trial as expeditiously as possible, thus enabling the trial process to proceed in a timely fashion and, in turn, enhancing both the accused's fair trial and other Charter rights and society's interest is seeing that criminal matters are disposed of on their merits. [page33]Experience shows that the majority of accused who are the subject of treatment orders suffer from a serious psychotic illness, such as schizophrenia, schizo-affective disorder or bipolar disorder. Experience also shows they can often achieve a return to fitness for trial through the administration of anti-psychotic drug treatment for a period of 30-60 days: hence, the 60-day limit on a s. 672.58 order.

[40] Except for individuals experiencing their first psychotic episode (who make up a very small proportion of those accused who are found to be unfit for trial), there was no consensus between the psychiatrists who gave fresh evidence

that a delay in treatment of even a matter of days would have an adverse effect on treatment outcome. At the same time, there is general agreement that individuals who are psychotic should be treated as soon as possible because it may be that the longer a person is left untreated, the more resistant that person's illness can become to later treatment. Consequently, any delay in treatment, once an order is made, is a matter of concern.

[41] While what happens in practice may often be something else, in theory the delay resulting from an absence of consent leads to a similar delay in commencing and completing successful treatment, which may result in a postponed declaration of fitness, and therefore, a delay in the renewal of the trial process and the ultimate trial determination. This extended delay and its accompanying forced "stopover" in a detention centre not fully equipped to meet the needs of mentally ill inmates prolongs the unfit accused's deprivation of liberty, and does so in an environment that may well be characterized by significant infringements on the individual's security of person interests, as the fresh evidence indicates.

[42] That is sufficient to engage s. 7 of the Charter, and I turn now to the question that has consumed most of the debate. Is the unfit accused deprived of his or her s. 7 rights in these circumstances in a manner that does not accord with principles of fundamental justice?

The principles of fundamental justice

[43] Amicus argues that the consent requirement in s. 672.62 violates the principles of fundamental justice because it is procedurally unfair and because it is constitutionally vague and arbitrary.

Procedural fairness

[44] Amicus argues that the consent requirement unconstitutionally delegates the power to decide whether to make a [page34]treatment order under s. 672.58 to hospital administrators, in effect giving hospital authorities a "veto"

over the judge's decision and thereby permitting an unfit accused's s. 7 interests to be determined by someone other than the presiding judge and without affording an opportunity for the accused to be heard. I disagree.

[45] The consent requirement does not remove the s. 672.58 decision-making power from the judge or bestow such authority upon hospital administrators. The decision whether to make such an order remains that of the hearing judge, based upon the evidence before him or her. The requirement for hospital consent is one of the parameters within which that decision must be made, in order to accommodate considerations on the medical side of the treatment order equation. These considerations are of considerable importance in ensuring that the court strikes the right balance between an individual's right to refuse medical treatment and the state's power to impose such treatment. In my opinion, when the treatment order regime is viewed as a whole, there is no violation of the principles of fundamental justice.

[46] For a rule or principle to constitute a "principle of fundamental justice" within the meaning of s. 7 [R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, 2003 SCC 74, at para. 113],

> . . . it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[47] There can be no dispute that some of the principles relied upon by amicus in this debate are principles of fundamental justice. Decisions that risk depriving an individual of his or her rights to liberty and security of the person under s. 7 ought to be made by a competent tribunal applying the law to the evidence presented before it, and the individual has the right to be heard and to present his or her case in such circumstances. As the Supreme Court reminds us in Charkaoui v. Canada (Citizenship and Immigration), [2007] 1

S.C.R. 350, [2007] S.C.J. No. 9, 2007 SCC 9, at para. 48: [See Note 4 below] [page35]

> Since Bonham's Case [(1610), 8 Co. Rep. 113b, 77 E.R. 646], the essence of a judicial hearing has been the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law[.] [Citation omitted]

[48] However, these principles are not violated by the consent requirement in s. 672.62. The hearing judge makes the determination whether an unfit accused should be subjected to a treatment order, applying the law to the evidence led. The unfit accused has the right to be heard, to present evidence and to make submissions. The fact that a hospital is temporarily unable to provide operative consent to treatment because of a shortage of beds does not change this, although it may have an impact on the timing of the treatment and it may expose the unfit accused to circumstances that impinge upon his or her s. 7 rights, as outlined above.

[49] The jurisprudence is clear, moreover, that principles of fundamental justice encompass not only the accused's interests but also collective, societal interests, and that an accused person is not entitled to the most favourable procedures possible. In R. v. Mills, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, the Supreme Court of Canada summarized the body of law reflected in that statement in the following passage, at para. 72:

> [T]he principles of fundamental justice do not entitle the accused to "the most favourable procedures that could possibly be imagined": R. v. Lyons, [1987] 2 S.C.R. 309, per La Forest J., at p. 362. This is because fundamental justice embraces more than the rights of the accused. For example, this Court has held that an assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant" and not just the accused: R. v. E. (A.W.), [1993] 3 S.C.R. 155, per Cory J., at p. 198. In a similar vein, McLachlin J., in Seaboyer, [R. v. Seaboyer, [1991] 2 S.C.R. 577], at p.

603, stated:

> The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field" (Beare, [1988] 2 S.C.R. 387], at pp. 402-3 per La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.

(Emphasis added)

[50] Subject to the vagueness argument to which I will return, the consent requirement in s. 672.62 responds to a number of broader societal considerations as well as to the needs of the individual unfit accused, and in that way does not run afoul of the principles of fundamental justice.

[51] First, there is a general reluctance in law to compel a medical practitioner or hospital authorities to administer [page36]treatment. This approach is evident in such decisions as J (a minor) (wardship: medical treatment) (Re), [1992] 4 All E.R. 614 (C.A.); Rotaru v. Vancouver General Hospital Intensive Care Unit, [2008] B.C.J. No. 456, 2008 BCSC 318; Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre (2011), 105 O.R. (3d) 761, [2011] O.J. No. 1100, 2011 ONSC 1500 (S.C.J.), affd (2011), 107 O.R. (3d) 9, [2011] O.J. No. 2984, 2011 ONCA 482, leave to appeal to S.C.C. granted Cuthbertson v. Rasouli (Litigation Guardian), [2011] S.C.C.A. No. 329. The consent requirement of s. 672.62 respects that important societal notion.

[52] Secondly, although the effect of s. 672.58 is to overcome the common law's unwillingness to compel someone to submit involuntarily to medical treatment, the consent requirement in s. 672.62 provides an important safeguard for the unfit accused. A treatment order is, in itself, a profound interference with the unfit accused's security of the person. The consent requirement ensures that the designated psychiatric

facility has the necessary bed and staff ready to execute the treatment order safely. Rather than stripping the hearing judge of authority, this requirement provides the hearing judge with some assurance that the treatment order process is initiated and more likely to produce positive results.

[53] In this context, the consent requirement is but one of several preconditions incorporated by Parliament into the treatment order regime in order to safeguard the accused's interests. These protections include that a medical practitioner must first assess the accused and then testify before the court. Further, the accused has the opportunity to challenge the application and bring evidence to challenge it: see Criminal Code, ss. 672.59(1) and (2), 672.6(1) and (2), 672.61, and 672.62(1)(a) and (b).

[54] Thus, the consent requirement in s. 672.62 is one of a number of components -- albeit a crucial one -- within a broad legislative package designed to provide safeguards for the accused and to preserve procedural and substantive fairness to the accused in relation to s. 672.58 treatment orders. It must be considered in that light.

[55] Thirdly, as the fresh evidence demonstrates, there are significant risks to patients themselves and to medical personnel, hospital staff and others when potentially violent psychotic patients are detained in settings where proper facilities are not available. In the words of Dr. Simpson, "if CAMH is full to capacity, we cannot safely accept any more patients until a bed is vacated. Consequently, a 'forthwith' order cannot be safely [page37]accommodated, if 'forthwith' is interpreted to mean 'immediately'" (emphasis added).

[56] Fourthly, the consent requirement permits Ontario's forensic psychiatric facilities to co-operate in order to "triage" the demands and needs of both unfit accused and NCR accused. On the evidence, CAMH is central to this initiative. Dr. Simpson explained that CAMH participates in a multi-party subcommittee regarding warrants of committal; provides psychiatrists to go to 102 Court to conduct fitness assessments and assist in diverting mentally ill patients out of the

forensic system; participates in the provincial bed registry for forensic assessments beds; and sends an administrator to 102 Court virtually every day to assist in finding forensic placements for accused persons.

[57] This court has previously recognized that the competing demands within the psychiatric hospital environment -- generally involving matters not within the knowledge of the courts -- are factors to be taken into account when making an order transferring an NCR patient from one institution to another: see Beauchamp v. Penetanguishene Mental Health Centre (Administrator), [1999] O.J. No. 3156, 138 C.C.C. (3d) 172 (C.A.), at para. 38; The Person in Charge of Mental Health Centre Penetanguishene v. HMQ, Thomas Rea, The Person in Charge of Centre for Addiction and Mental Health, unreported, November 13, 1999, Toronto, C50716 (Ont. C.A.). I see no reason why the same considerations should not apply in the context of treatment orders. The consent requirement of s. 672.62 merely incorporates them into the statutory framework governing such orders.

[58] Finally, it is not unreasonable that an unfit accused may have to wait on some occasions for a short period of time while a bed becomes available in a designated psychiatric facility. As Robin Nicholas, the manager, forensic outpatient service and the court liaison for CAMH at 102 Court, deposed, the effect of "forthwith" orders such as the one made here

> is to compel designated facilities to provide immediate service to a specific accused and may jeopardize and disadvantage other individuals who are also the subjects of judicial orders and who are awaiting admission to designated psychiatric beds. Accommodation of orders such as this invariably results in displacement of other accused.

[59] Undesirable as this may be at one level, unfit accused and NCR accused do not have a monopoly on scarce public resources to the exclusion of all others -- including other similarly situated accused, other mentally ill patients and all other services governments are called upon to provide. The funding of mental [page38]hospitals takes place in an overall

policy context that is not the purview of the courts, frustrating as that may be at times for those working in the system and as compelling as the policy arguments may be for more funding in this area.

[60] Justice Nordheimer expressed similar sentiments while dealing with another skirmish between the judges of 102 Court and the hospitals: see Centre for Addiction and Mental Health v. Al-Sherewadi, supra. In that case, the court's immediate concern was that Mr. Al-Sherewadi was going to be housed in a police division holding cell which had no medical treatment of any kind available. However, Nordheimer J.'s observations also touched on broader issues, including the difficulties faced by personnel involved on both the justice and medical sides of these issues and the need to adopt a reasonable approach that recognizes the conflicting policy demands in dealing with them. I fully subscribe to his observations, at paras. 12, 14 and 15 of his reasons:

> I understand that the issuance of warrants of committal may reflect a level of frustration by judges, who regularly deal with persons who have mental health issues, with the fact that the Province does not provide an adequate number of hospital spaces for the treatment of persons who are involved in the criminal justice system but who have mental health issues. That situation is troubling. Having to deal with it on a regular basis, even the human impact, is understandably trying. It does not, however, seem to me that the current situation is the appropriate way of addressing that frustration. It may be apparent to any reasonable and sensible person that, once a finding of a mental health issue is made, the appropriate place for the person to be housed is in a hospital setting where appropriate steps can be taken to assist the person. It should be self-evident that detention facilities are not well equipped to handle these persons[.]
>
> . . . . .
>
> It seems to me that the solution to at least part of this problem is to recognize that there must be some allowance of time for the implementation of treatment for these individuals. Neither an accused person nor a court can

reasonably expect that treatment facilities will be available immediately upon a determination that the accused person suffers from a serious mental illness. Some reasonable period of time must be allowed for the system to accommodate the needs of these individuals. Just as a person who is arrested cannot expect an immediate bail hearing, or a person who is charged with a criminal offence cannot expect an immediate trial, similarly, a person who is found to have a mental illness cannot expect immediate treatment. To hold otherwise is to insist on a system of perfection that is unrealistic in any normal society. It fails to take into account that there are competing demands for the expenditure of public funds and that the Government is required to make fair and reasonable allocations of those funds among these competing demands -- decisions that are not susceptible to being overridden by the courts.

Recognizing those realities is not to be equated with any suggestion that the needs of such people can be ignored or pushed to the side for lengthy [page39]periods of time, however. It remains the duty of the court to monitor compliance with any order that the court makes. But it requires that an allowance of a reasonable period of time for compliance with the order be permitted. It is only after that reasonable period of time has expired, and compliance has not been made, that a court is justified in taking more direct and vigorous action.

[61] It is worth mentioning at this point that the principal function of a s. 672.58 order is not medical but legal. Treatment orders are made for the sole legal purpose of making an accused fit to stand trial on criminal charges. They are not intended to be therapeutic or for the medical benefit of the unfit accused in the broad sense.

[62] From the comments made by the hearing judge, and cited earlier in these reasons, it is clear that she was justifiably concerned that Mr. Conception's treatment was medically necessary and, therefore, could not be delayed for even a few days. This is understandable and commendable, even without demanding perfection, as no one here does. Nobody wants to see

a vulnerable, mentally ill person sent to jail when they should be in a hospital.

[63] However, it is not the function of the hearing judge to ensure that the unfit accused obtains the medical treatment he or she may so badly need in general. It is the chief function of the hearing judge to preserve the integrity of the legal process by ensuring -- on proper medical evidence concerning the unfit accused's mental state, as called for in s. 672.59(1) -- that the unfit accused receives the medical treatment necessary to render him or her fit to stand trial as soon as practicable.

[64] Here, there was no evidence that a six-day delay in starting treatment might impair the likelihood of Mr. Conception's becoming fit to stand trial within the 60-day statutory window provided in s. 672.59(2). Were there such evidence and a consent to a forthwith order still not forthcoming, or were there a legitimate concern that a delay would infringe the unfit accused's right to be tried within a reasonable time under s. 11(b) of the Charter, different considerations might apply and there might be a basis for a one-off exemption permitting a "forthwith" order dispensing with hospital consent on constitutional grounds. But that is not the case here, and we need not deal with such an eventuality in disposing of this appeal.

[65] In the end, I am satisfied that the consent requirement in s. 672.62 does not violate Mr. Conception's s. 7 rights in a fashion that fails to respect the principles of fundamental justice. It complies with society's notions of procedural fairness. Indeed, the consent requirement is an important safeguard built into the [page40]regime to ensure that the order is made in circumstances where it is capable of being implemented.

[66] To adopt the language of R. v. Seaboyer, [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62, at p. 603 S.C.R., the consent requirement in the treatment order regime "viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice". It does not violate s. 7 on

that basis.

Is the consent requirement vague and arbitrary?

[67] Amicus' final argument is that s. 672.62 provides no criteria governing when a hospital may justifiably withhold its consent to accept an unfit accused who is the subject of a treatment order. It therefore infringes the unfit accused's s. 7 rights because it is impermissibly vague and open to arbitrary decisions. I would not give effect to this argument.

[68] As the Supreme Court of Canada noted in Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, at para. 68:

> A law will only be found to be unconstitutionally vague if it so lacks precision that it does not give sufficient guidance for legal debate: R v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at pp. 638-40 . . . Laws must of necessity cover a variety of situations. Given the infinite variability of conduct, it is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges, aided by precedent and considerations like the text and purpose of a statute, to interpret laws of general application and decide whether they apply to the facts before the court in a particular case. This process is not in breach of the principles of fundamental justice; rather, it is in the best tradition of our system of justice.
> (Emphasis added)

[69] The consent requirement under s. 672.62 does not "so [lack] in precision as not to give sufficient guidance for legal debate". The legal notion of "consent", and the myriad of questions that can surround it, are well-known in many areas of both the criminal and civil law. Judges have been dealing with them for generations. Consent and the issues surrounding it are concepts perfectly capable of being interpreted in their specific context.

[70] In addition, while it is true that a proposed treating hospital is left with some flexibility when granting or

withholding consent, that flexibility is not absolute, nor is the s. 672.62 consent requirement completely open-ended. The consent requirement must be viewed in context. Ontario has a broad legislative and regulatory framework that governs the conduct of hospital authorities and medical practitioners in relation to the acceptance and treatment of patients. Examples include the [page41]Mental Health Act, R.S.O. 1990, c. M.7, the Public Hospitals Act, R.S.O. 1990, c. P.40, the various health professions acts and the regulations under all of these statutes. Parliament was entitled to decide to leave the medical component of the treatment order regime to these authorities and medical practitioners, and crafted the relevant provisions of the Criminal Code accordingly. The consent requirement therefore operates within the parameters set by this regulatory structure.

[71] It follows that hospital authorities and their professional clinical staff working under Part XX.1 of the Criminal Code do not have an unfettered, standardless freedom to withhold consent arbitrarily, unreasonably or subject to whims of inconvenience. For example, the forensic psychiatric hospitals to which treatment orders are directed are all "designated" psychiatric facilities under the Mental Health Act, and as such are bound by patient admission criteria found outside of s. 672.62 of the Criminal Code. While these criteria may not speak directly to the specific circumstances of consent required under s. 672.58, they do reflect the imperative that patients receive treatment where required.

[72] In Mazzei, at para. 24, the Supreme Court of Canada recognized the role filled by provincial regulatory schemes in the context of Part XX.1 of the Criminal Code and underscored the expectation that medical authorities would comply with those requirements:

> . . . other parties involved (hospital authorities, for example) are already bound by provincial statutes to assume custody of the accused and provide treatment in accordance with the duties set out in those statutes . . . The legislative scheme in Part XX.1 assumes that hospital authorities . . . are expected to comply, and will comply,

with Board orders and conditions as a result of these specific statutory obligations.
(Emphasis added)

[73] In my opinion, the foregoing framework is sufficient to guard against the risk of hospital authorities arbitrarily withholding consent when asked to accept an unfit accused for treatment under a s. 672.58 order.

[74] Although constitutional challenges are concerned with the risk of, rather than the reality of, arbitrarily withheld consent, it is significant nonetheless that amicus does not seek to put forward any examples of such a practice. Indeed, the evidence is to the contrary. For example, in CAMH's Statement of Principles and Practices for Admission Prioritization, the first principle stated is that "No one waits who cannot." The statement sets out the following admission principle: [page42]

If the accused is acutely mentally unwell and requires immediate hospitalization, or if the accused is subject to Court orders or Dispositions of the ORB which do not permit other placements, admission is arranged expeditiously.
(Emphasis added)

[75] This policy is the antithesis of arbitrariness.

[76] The consent requirement in s. 672.62 of the Criminal Code is not unconstitutionally vague or arbitrary, in my view.
Disposition

[77] For the foregoing reasons, I would allow the appeal and set aside the order of the hearing judge directing that Mr. Conception be remitted "forthwith" to CAMH (or its designate).

Appeal allowed.

Notes

Note 1: See, for example, R. v. Rosete, [2006] O.J. No. 1608, 2006 ONCJ 141 (C.J.); R. v. Hneihen, [2010] O.J. No. 4115, 2010 ONSC 5353 (S.C.J.); R. v. Consuelo, unreported, September 14, 2010, Toronto, 10-10001715, 10-10004017, 10-70009469 (Ont. C.J.); R. v. Procope, unreported, October 6, 2010, Toronto, 10009107, 1200160 (Ont. C.J.); Centre for Addiction and Mental Health v. Al-Sherewadi, [2011] O.J. No. 1755, 2011 ONSC 2272 (S.C.J.).

Note 2: Oak Ridge is a wing at Mental Health Centre Penetanguishene.

Note 3: In the Toronto area, there are Special Needs Units at the Toronto Jail, the Toronto West Detention Centre, the Vanier Centre for Women and the Ontario Correctional Institute.

Note 4: Relying upon United States of America v. Ferras; United States of America v. Latty, [2006] 2 S.C.R. 77, [2006] S.C.J. No. 33, 2006 SCC 33, at para. 25.
