CITATION: R. v. Hneihen, 2010 ONSC 5353
COURT FILE NO.: CR-10-00000143-00-MO
DATE: 20100928

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	**Mr. C. A. F. Hynes and Mr. E. del Junco**,
Respondent	)	for the Applicant
	)	
- and -	)	
	)	**Mr. M. Feindel**, for the Crown
BAHAEDDINE HNEIHEN	)	
Applicant	)	
	)	**Mr. M. Davies**, for the Centre for
-and-	)	Addiction and Mental Health
	)	
CENTRE FOR ADDICTION AND MENTAL HEALTH (QUEEN STREET DIVISION)	)	**Ms. D. S. Schell**, for the Ministry of Health and Long-Term Care
Respondents	)	
	)	
	)	**Mr. B. G. Whitehead**, for the Ministry of Community Safety and Correctional Services
	)	
	)	
	)	**HEARD:** July 30, 2010

Forestell J.

REASONS FOR ORDER GRANTING THE APPLICATION FOR WRITS OF *HABEAS CORPUS* AND *MANDAMUS*

Background and Nature of the Application

[1] On June 10, 2010, in the Ontario Court of Justice at Old City Hall in Toronto, Mr. Hneihen was found not criminally responsible ("NCR") on account of mental disorder under s. 16(1) of the *Criminal Code*, R.S., 1985, c. C-46 with respect to charges of forcible confinement, sexual assault, fail to comply with recognizance, theft under $5,000 and two

counts of mischief under $5,000. Upon finding Mr. Hneihen not criminally responsible, the trial judge, Schneider J., made an order under s. 672.46(2) of the *Criminal Code* that Mr. Hneihen be detained at the Centre for Addiction and Mental Health ("CAMH") or its designate pending a disposition of the Ontario Review Board ("ORB"). The applicant was not sent to CAMH or any other hospital, but remained in custody in the Toronto (Don) Jail. His ORB hearing was held on July 15, 2010. The ORB issued a disposition on July 20, 2010 ordering that the applicant be detained at CAMH. The applicant remained at the Don Jail up until the date of the hearing of this application for *habeas corpus*.

[2] The evidence before me is that there is a waiting list for beds at CAMH as there are for other designated hospitals in Ontario. There are a limited number of forensic beds funded by the government. Accused persons ordered to be detained at a hospital or ordered to be assessed at a hospital are placed on waiting lists and accepted as space becomes available. While at the jail, accused persons on the waiting list for CAMH are seen by psychiatrists from CAMH and the urgency of their need for admission is assessed. If the need for transfer to the hospital is determined to be medically acute, the accused person can be admitted before others on the waiting list.

[3] At the time of the hearing of this matter and the issuance of my endorsement of July 30, 2010, the Applicant remained detained at the Toronto (Don) Jail. He was on the waiting list for a transfer to CAMH. There was no determinate date for his transfer from the jail to CAMH. On July 30, 2010, I issued a brief endorsement and ordered that the applicant be moved immediately from the jail to the Centre for Addiction and Mental Health (CAMH). I indicated at the time of the order that I reserved the right to issue further more detailed reasons. These are those reasons.

Issue

[4] Section 10(c) of the *Canadian Charter of Rights and Freedoms* guarantees the right, on arrest or detention, to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[5] The Court, in *May v. Ferndale Institution*[1], acknowledged *habeas corpus* as, "a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*)."

[6] The Supreme Court of Canada, in *May*, set out the two elements required for a successful application for *habeas corpus*: that there be a deprivation of liberty and that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the Applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.[2]

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[1] *May v. Ferndale Institution*, [2005] S.C.J. No. 84
[2] *May v. Ferndale Institution*, *supra*, at para. 74

[7] There is no issue that the applicant has been deprived of his liberty. The issue is whether the deprivation is lawful. In most cases it is relatively straightforward for the government to show the *prima facie* legality of a detention. A facially valid warrant of committal will constitute such proof. There is, in this case, no warrant of committal authorizing the detention of the applicant in a jail. The only valid warrant requires the detention of the applicant at CAMH. The respondents argue that there is an implicit and inevitable delay when a person is ordered transferred from a jail to a hospital. Therefore, they argue that the court should imply that it is lawful for an NCR accused who has been ordered detained in a hospital to be imprisoned in a jail for a reasonable time before being transferred to a hospital. They further argue that the period of time, in this case, of 60 days, is reasonable.

[8] In my endorsement of July 30, 2010 I rejected the submission of the respondents that the delay of 60 days in moving the applicant from the jail to the hospital was reasonable and lawful. I therefore granted the writ of *habeas corpus*.

[9] The conclusion that the detention was unlawful follows from the determination of the following question: Is it lawful to detain an NCR accused in a jail pending his/her transfer to a hospital following a verdict of NCR and if so, for what period of time?

Analysis

[10] The place of detention of an NCR accused following the verdict and prior to the initial disposition hearing is governed by section 672.46 of the *Criminal Code* which provides as follows:

> (1) Where the court does not make a disposition in respect of the accused at a disposition hearing, any order for the interim release or detention of the accused or any appearance notice, promise to appear, summons, undertaking or recognizance in respect of the accused that is in force at the time the verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered continues in force, subject to its terms, until the Review Board makes a disposition.
>
> (2) Notwithstanding subsection (1), a court may, on cause being shown, vacate any order, appearance notice, promise to appear, summons, undertaking or recognizance referred to in that subsection and make any other order for the interim release or detention of the accused that the court considers to be appropriate in the circumstances, including an order directing that the accused be detained in custody in a hospital pending a disposition by the Review Board in respect of the accused.

[11] Where the court does not make a disposition, section 672.47 requires that the ORB hold a hearing and make a disposition not later than 45 days after the verdict. The time for

the hearing can be extended to 90 days after the verdict if there is a determination by the court that there are exceptional circumstances justifying the extension.

[12] Sections 672.46 and 672.47 are contained in Part XX.1 of the *Criminal Code.* This legislation governing mentally ill offenders was introduced in response to the decision of the Supreme Court of Canada in *R. v. Swain*[3] which held that the predecessor sections were unconstitutional. The previous provisions required the automatic detention of the accused found not guilty by reason of insanity (the "NGRI accused").

[13] In *Swain*, Lamer C.J., in considering the automatic detention of an NGRI accused in a hospital following the verdict, stated: "The delay in making the dangerousness determination is inevitable because evidence adduced at trial with respect to the s. 16 defence only relates to mental condition at the time of the offence. Automatic detention following an acquittal by reason of insanity is to some extent, then, a codification of practical reality."[4] The Chief Justice went on to hold that the minimal impairment component of the *Oakes* test requires that NGRI accused be detained no longer than necessary to determine whether they are dangerous. Lamer C.J. was willing to accept that a detention of fixed and limited duration, while still arbitrary if imposed without a hearing and without criteria, would nevertheless be constitutional.[5] It was the indeterminate nature of the automatic detention in the previous *Criminal Code* sections that infringed section 7 of the *Canadian Charter of Rights and Freedoms*.

[14] In response to *Swain*, Parliament created a comprehensive legislative scheme in Part XX.1 of the *Criminal Code*. The dispositions available to a court or to the ORB, are set out in s. 672.54 and include **only** absolute discharge, conditional discharge or detention in a designated hospital. Detention in a jail is not an available disposition to a court or to the ORB. The provisions provide procedural safeguards that limit the time that an NCR accused can spend in a jail after an NCR verdict. They also provide the court with the power to place an NCR accused immediately into a hospital where the court considers it appropriate in the circumstances, as the trial judge did in this case.

[15] Under Part XX.1 the only time that an NCR accused can be detained in a jail after the NCR verdict is when the NCR accused has been detained in jail pending trial and the court does not make an initial disposition nor does it vary the detention order. In those circumstances the legislation permits detention in a jail for up to 45 days, or in exceptional circumstances, 90 days.

[16] The provisions are consistent with the objectives of the legislation to treat rather punish the NCR accused and to detain the NCR accused in a hospital rather than a prison. The constitutionality of Part XX.1 was challenged in *R. v. Winko*[6]. In upholding the constitutionality of the legislation, McLachlin J., as she then was, writing for the majority observed that the new statutory scheme created an "assessment-treatment alternative for the

[3] *R. v. Swain*, [1991] S.C.J. No. 32
[4] *Swain, supra*, at para 144.
[5] The 'detention' under consideration in *Swain* was 'strict custody' in a hospital
[6] *R. v. Winko*, [1999] 2 S.C.R. 625 at para 42

mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy." McLachlin J. quotes with approval a passage from *Re Rebic and The Queen*[7] which was also quoted by Lamer C.J. in *Swain*: "The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. The objective is to be achieved by treatment of the patient in a hospital, rather than in a prison environment." She observes at paragraph 41 that the "need for treatment rather than punishment is rendered even more acute by the fact that the mentally ill are often vulnerable and victimized in the prison setting".

[17] The provisions with respect to detention after verdict, while not specifically addressed in *R. v. Winko*, are part of the comprehensive scheme that has been held to be constitutional. In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, Binnie J. states "*Winko* makes it clear that Part XX.1 of the *Criminal Code* survived the s. 7 *Charter* challenge in that case only because at every step of the process consideration of the liberty interest of the NCR accused was built into the statutory framework."[8]

[18] In the case before me, the procedure set out in Part XX.1 was followed by the court and subsequently by the ORB. The liberty interest of the accused was considered and valid orders were made. As of the date of the hearing of this application however, the valid orders were not followed.

[19] It is meaningless to have a process which carefully considers and safeguards the liberty interest of the NCR accused if the resulting orders of the court and the ORB need not be implemented by the state. The order of the court requiring the accused to be detained at CAMH and the disposition of the ORB ordering the accused to be detained at CAMH cannot be overridden by a bureaucratic determination of bed availability.

[20] The respondents in this case point to two recent cases for support for their contention that the legislative scheme must be interpreted to provide for a reasonable period of time for transfer of an NCR accused from jail to the hospital.

[21] In *Ontario v. Phaneuf*[9] the Divisional Court considered the lawfulness of the detention of a person who had been ordered assessed under section 672.11. The issue arose in the context of a civil suit for false imprisonment and an application for certification of the action as a class proceeding. Section 672.16 contains specific provisions that address whether the accused will be held in custody pending the assessment and imports the same considerations as sections 515 and 516 of the *Criminal Code* which govern judicial interim release.

[22] The court held that the incarceration of the plaintiff in jail while awaiting her court ordered assessment was lawful. Ms. Phaneuf, who was charged with criminal offences, had been ordered by the judge to be 'remanded into custody' for assessment under s. 672.11. The assessment provisions allow for detention either in a hospital or in a jail. The judge in

[7] *Re Rebic and The Queen* (1986), 28 C.C.C. (3d) 154 (B.C.C.A.)
[8] *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* [2004] 1 S.C.R. 498 at para. 53.
[9] *Ontario v. Phaneuf*, [2009] O.J. No. 5618 (S.C.J.)

the *Phaneuf* case did not specify that Ms. Phaneuf should be held in a hospital while awaiting her assessment. On this basis the court held that the detention in the jail was lawful because there was a "valid court order that indicates that the accused be held 'in custody'."

[23] *Phaneuf* is clearly distinguishable from the case before me. The applicant, Mr. Hneihen, was clearly ordered by Schneider J. to be detained at CAMH and not in jail. Schneider J. made a judicial determination of the appropriate place of detention and made a valid order. There was no ambiguity. Moreover, the ORB made a disposition requiring detention at CAMH. In *Phaneuf*, the court held that the legislation governing assessment "provides for the accused to be 'in custody' without specifying that it be in a designated hospital or a jail." The legislation governing dispositions does **not** provide for the accused to be in custody in a jail. Subject to limited exceptions that have no application here, the accused, if detained pursuant to a disposition, must be detained in a hospital.

[24] The other case relied upon by the respondents is the decision of our Court of Appeal in *Mental Health Centre Penetanguishene v. Ontario (Rea)*[10]. In that case, an NCR accused was detained at the Mental Health Centre Penetanguishene following a finding of NCR and pending his initial disposition by the ORB. At his initial hearing the parties agreed that Mr. Rea should be detained at a minimum security hospital and should have privileges, including hospital and grounds privileges and supervised community access. Mr. Rea sought to be transferred from the minimum security hospital at Penetanguishene to CAMH. It was agreed by the parties that, if transferred to CAMH, he should have the same privileges as were being recommended for Penetanguishene. During the hearing, there was evidence that a transfer was unlikely to occur immediately. The Board ordered the detention of Mr. Rea at CAMH with the recommended privileges. The disposition made no order for the accused to have any privileges at Penetanguishene while awaiting transfer. It was in this context that Watt J.A. wrote: "…the failure of the Board to obtain concrete information about the delay in transfer and include express terms relating to interim custody and discretionary privileges was unreasonable. The disposition made was not the least onerous and least restrictive to the detainee and was thus legally wrong, because it meant that during an inevitable detention at MHCP of uncertain duration while awaiting transfer, the detainee would be disentitled to apply for privileges for which the Board itself determined he should be eligible. An interim order of this kind would have the added, and not insignificant, advantage of providing express lawful authority for the host hospital to hold the detainee pending transfer**".**

[25] The respondents point to this paragraph as constituting recognition of the lawfulness of a 'status quo detention' for a reasonable time before an order of the court or Review Board can be implemented. It is, like the statement of Lamer C.J. above, a judicial acknowledgement of the 'practical reality' of transfer within our health system or between corrections and the health system. There are, however, critical distinctions between the circumstances of Mr. Rea and those of Mr. Hneihein. Mr. Rea was already detained at a hospital. The order was for a move to a hospital at the same level of security. If given the same privileges at Penetanguishene as were ordered for CAMH, the quality of the detention would have been equivalent at either hospital. Mr. Hneihein was detained at a jail. The restrictive quality of his detention was significantly different from that which had been

[10] *Mental Health Centre Penetanguishene v. Ontario (Rea)*, [2010] O.J.No. 1044

ordered. Further, in *Rea*, the power to order detention at either hospital was within the jurisdiction of the ORB and authorized by the statute. In the case at bar, detention in a jail is not within the jurisdiction of the ORB nor is it authorized by the governing statute.

[26] The comments of Watt J.A. in *Rea* may be read as recognizing the inevitability of delay in implementing dispositions of the ORB that order transfers between equivalent hospitals but cannot be interpreted as condoning the lawfulness of detention of an NCR accused in a jail in the face of a valid court order or ORB disposition mandating detention in a hospital.

[27] I am of the view that neither *Phaneuf* nor *Rea* is authority for the detention of a mentally ill offender in a jail without a valid court order. Part XX.1 is clear and only permits the detention of an NCR accused in a jail after verdict if the accused was detained in a jail prior to verdict and the court does not order a change in the detention order. In these circumstances the accused will remain detained until the initial disposition by the court or Review Board. Absent a court finding exceptional circumstances and extending the time, the disposition must be made within 45 days of the verdict.[11] The applicant in this case was detained in jail prior to verdict but the court ordered that he be detained in a hospital pending his disposition hearing.

Conclusions

[28] The detention of the applicant at the Don Jail was unlawful. There was a lawful order of the court and, subsequently, a lawful disposition of the ORB that required Mr. Hneihein to be detained at CAMH and not at the jail. There was, after the order of Schneider J., no lawful authority for Mr. Hneihein to be detained for any period of time in jail. To do so was in direct contravention of the valid court order. There exists a valid, constitutional scheme to determine the nature and quality of the detention of an NCR accused following the verdict of NCR. It cannot be overridden by an opaque and bureaucratic process with no discernible criteria, no temporal limitations and no appeal.

[29] The prerogative writs of *habeas corpus* and *mandamus* were issued on July 30, 2010 requiring the applicant's immediate transfer to CAMH in accordance with the disposition of the Ontario Review Board.

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Forestell J.

[11] There are also specific provisions governing 'dual status offenders' or accused who are subject to terms of imprisonment and to dispositions. These provisions permit detention in a prison following a hearing to determine the appropriate place of detention.

Released: September 28, 2010

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RULING ON AN APPLICATION FOR WRITS OF *HABEAS CORPUS* AND *MANDAMUS*

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