

The Person in Charge of Centre for Addiction and Mental Health and The Person in Charge of the Mental Health Centre Penetanguishene (appellants) v. Her Majesty the Queen (respondent) and Brian Conception (respondent)  
(C51956; 2012 ONCA 342)

**Indexed As: R. v. Conception (B.)**

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

**Summary:**

An accused was found unfit to stand trial. The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy. On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." Two mental health treatment facilities appealed, seeking to set aside the order.

The Ontario Court of Appeal allowed the appeal.

**Civil Rights - Topic 659**

Liberty - Limitations on - Committal of or disposition re accused with mental disorder - [See second **Criminal Law - Topic 93.99**].

**Civil Rights - Topic 1210**

Security of the person - General - Denial of security - What constitutes - [See second **Criminal Law - Topic 93.99**].

**Civil Rights - Topic 1392**

Security of the person - Health care (incl. mental health) - Committal or disposition - [See second **Criminal Law - Topic 93.99**].

**Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - General principles and definitions - Void for vagueness doctrine - [See sixth **Criminal Law - Topic 93.99**].

**Civil Rights - Topic 3107.2**

Trials - Due process, fundamental justice and fair hearings - General principles and definitions - Overbreadth principle - [See sixth **Criminal Law - Topic 93.99**].

**Civil Rights - Topic 8344**

Canadian Charter of Rights and Freedoms - Application - Exceptions - Principles of fundamental justice (Charter, s. 7) - [See third and fourth **Criminal Law - Topic 93.99**].

## **Civil Rights - Topic 8626**

Canadian Charter of Rights and Freedoms - Regulation of guaranteed rights - Vagueness rule - [See sixth **Criminal Law - Topic 93.99**].

## **Courts - Topic 2286**

Jurisdiction - Bars - Academic matters or moot issues - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The accused received treatment and the charges against him were ultimately stayed - The Ontario Court of Appeal held that, despite the appeal's mootness, it was appropriate to hear the appeal - The legal issues raised were important and were "capable of repetition, yet evasive of review" - See paragraphs 21 to 23.

## **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Under s. 672.62(1), a treatment order under s. 672.58 could not be made without the consent of "the person in charge of the hospital where the accused is to be treated" - Consent to treat a patient when a bed became available was not a consent to accept a patient for treatment "forthwith" - The hearing judge erred in acting on the basis that the consent requirement had been satisfied - See paragraphs 28 to 30.

## **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - However,

the court did accept that an accused's s. 7 rights might be engaged by the hospitals' refusal to consent to a "forthwith" treatment order under s. 672.62 - When an unfit accused was required to wait and was placed in a jail that was ill-equipped to address his or her mental health concerns, that accused faced a risk of harm - The purpose of a treatment order was to restore an unfit accused to stand trial as expeditiously as possible - There was general agreement that the longer a person's mental illness was left untreated, the more resistant that person's illness became to later treatment - Consequently, any delay in treatment, once an order was made, was a matter of concern - See paragraphs 31 to 42.

### **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - While the court agreed that s. 7 was engaged, any deprivation of the accused's right to liberty or security of the person was in accordance with the principles of fundamental justice - There was no procedural unfairness - A judge made the determination as to whether a treatment order was appropriate - The accused had the right to be heard, to present evidence and to make submissions - The fact that a hospital was temporarily unable to provide operative consent to treatment did not change that, although it might have an impact on the timing of treatment and it might expose the unfit accused to circumstances that impinged on his or her s. 7 rights - See paragraphs 43 to 48.

### **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - While the court agreed that s. 7 was engaged, any deprivation of the accused's right to liberty or security of the person was in accordance with the principles of fundamental justice - Those principles encompassed not only the accused's interests, but also collective, societal interests and that an accused was not entitled to the most favourable procedures

possible - The consent requirement responded to a number of broader societal considerations as well as to the needs of the individual accused - The consent requirement was an important safeguard built into the regime to ensure that the order was made in circumstances where it was capable of being implemented - See paragraphs 49 to 60 and 65.

### **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - While the court agreed that s. 7 was engaged, any deprivation of the accused's right to liberty or security of the person was in accordance with the principles of fundamental justice - The principal function of a s. 672.58 order was legal, not medical - Treatment orders were made for the sole purpose of making an unfit accused fit to stand trial on criminal charges - They were not intended to be therapeutic - The chief function of the hearing judge was to preserve the integrity of the legal process by ensuring that the unfit accused received the medical treatment necessary to render him or her fit to stand trial as soon as practicable - Here, there was no evidence that the predicted six day delay in starting treatment might impair the likelihood of the accused becoming fit to stand trial within the 60 day window provided for in s. 672.59(2) - See paragraphs 61 to 66.

### **Criminal Law - Topic 93.99**

General principles - Mental disorder - Dispositions by court or review board - Where accused found unfit to stand trial - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - The requirement was not "impermissibly vague and open to arbitrary decisions" - The requirement had to be viewed in context as operating within the parameters of a regulatory structure - That framework was 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 - See paragraphs 67 to 76.

## Practice - Topic 8858

Appeals - Bar or loss of right of appeal - Moot issues - [See **Courts - Topic 2286**].

### Cases Noticed:

- R. v. Rosete, 2006 ONCJ 141, refd to. [para. 4, footnote 2].
- R. v. Hneihen (B.), [2010] O.T.C. Uned. 5353; 2010 ONSC 5353, refd to. [para. 4, footnote 2].
- Centre for Addiction and Mental Health v. Al-Sherewadi, 2011 ONSC 2272, refd to. [para. 4, footnote 2].
- Mazzei, Re, [2006] 1 S.C.R. 326; 346 N.R. 1; 222 B.C.A.C. 1; 368 W.A.C. 1; 2006 SCC 7, refd to. [para. 22].
- Bedford et al. v. Canada (Attorney General), [2012] O.A.C. TBEd. AP.002; 109 O.R.(3d) 1; 2012 ONCA 186, refd to. [para. 32].
- PHS Community Services Society et al. v. Canada (Attorney General), [2011] 3 S.C.R. 134; 421 N.R. 1; 310 B.C.A.C. 1; 526 W.A.C. 1; 2011 SCC 44, refd to. [para. 34].
- Cunningham v. Canada, [1993] 2 S.C.R. 143; 151 N.R. 161; 62 O.A.C. 243, refd to. [para. 34].
- Dumas v. National Parole Board, [1986] 2 S.C.R. 459; 72 N.R. 61; 3 Q.A.C. 133, refd to. [para. 34].
- Dumas v. Leclerc Institute - see Dumas v. National Parole Board.
- New Brunswick (Minister of Health and Community Services) v. J.G. and D.V., [1999] 3 S.C.R. 46; 244 N.R. 276; 216 N.B.R.(2d) 25; 552 A.P.R. 25, refd to. [para. 34].
- Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791; 335 N.R. 25; 2005 SCC 35, refd to. [para. 34].
- R. v. Morgentaler, [1988] 1 S.C.R. 30; 82 N.R. 1; 26 O.A.C. 1, refd to. [para. 34].
- R. v. Phaneuf (S.) (2010), 275 O.A.C. 160; 104 O.R.(3d) 392; 2010 ONCA 901, refd to. [para. 36].
- R. v. Malmo-Levine (D.) et al., [2003] 3 S.C.R. 571; 314 N.R. 1; 191 B.C.A.C. 1; 314 W.A.C. 1; 2003 SCC 74, refd to. [para. 46].
- Charkaoui, Re, [2007] 1 S.C.R. 350; 358 N.R. 1; 2007 SCC 9, refd to. [para. 47].
- United States of America et al. v. Ferras, [2006] 2 S.C.R. 77; 351 N.R. 1; 214 O.A.C. 326; 2006 SCC 33, refd to. [para. 47, footnote 4].
- R. v. Mills (B.J.), [1999] 3 S.C.R. 668; 248 N.R. 101; 244 A.R. 201; 209 W.A.C. 201, refd to. [para. 49].
- J., Re (A Minor) (Wardship: Medical Treatment), [1992] 4 All E.R. 614 (C.A.), refd to. [para. 51].
- Rotaru v. Vancouver General Hospital Intensive Care Unit et al., [2008] B.C.T.C. Uned. B11; 2008 BCSC 318, refd to. [para. 51].
- Rasouli v. Sunnybrook Health Sciences Centre et al., [2011] O.T.C. Uned. 1500; 105 O.R.(3d) 761; 2011 ONSC 1500, affd. (2011), 281 O.A.C. 183; 107 O.R.(3d) 9, 2011 ONCA 482, leave to appeal granted, [2011] N.R. TBEd. Motion 504 (S.C.C.), refd to. [para. 51].
- Beauchamp v. Penetanguishene Mental Health Centre et al. (1999), 124 O.A.C. 1; 138 C.C.C.(3d) 172 (C.A.), refd to. [para. 57].
- Winko v. Forensic Psychiatric Institute (B.C.) et al., [1999] 2 S.C.R. 625; 241 N.R. 1; 124

B.C.A.C. 1; 203 W.A.C. 1, refd to. [para. 68].

**Statutes Noticed:**

Criminal Code, R.S.C. 1985, c. C-46, sect. 672.62 [para. 8].

**Counsel:**

James P. Thomson, for the appellants;

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

Paul Burstein, amicus curiae.

This appeal was heard on December 14, 2011, by Simmons, Blair and Hoy, J.J.A., of the Ontario Court of Appeal. On May 24, 2012, Blair, J.A., delivered the following judgment for the court.

Appeal allowed.

Editor: Sharon McCartney

**Civil Rights - Topic 659**

Liberty - Limitations on - Committal of or disposition re accused with mental disorder - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - However, the court did accept that an accused's s. 7 rights might be engaged by the hospitals' refusal to consent to a "forthwith" treatment order under s. 672.62 - When an unfit accused was required to wait and was placed in a jail that was ill-equipped to address his or her mental health concerns, that accused faced a risk of harm - The purpose of a treatment order was to restore an unfit accused to stand trial as expeditiously as possible - There was general agreement that the longer a person's mental illness was left untreated, the more resistant that person's illness became to later treatment - Consequently, any delay in treatment, once an order was made, was a matter of concern - See paragraphs 31 to 42.

**Civil Rights - Topic 1210**

Security of the person - General - Denial of security - What constitutes - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to

the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - However, the court did accept that an accused's s. 7 rights might be engaged by the hospitals' refusal to consent to a "forthwith" treatment order under s. 672.62 - When an unfit accused was required to wait and was placed in a jail that was ill-equipped to address his or her mental health concerns, that accused faced a risk of harm - The purpose of a treatment order was to restore an unfit accused to stand trial as expeditiously as possible - There was general agreement that the longer a person's mental illness was left untreated, the more resistant that person's illness became to later treatment - Consequently, any delay in treatment, once an order was made, was a matter of concern - See paragraphs 31 to 42.

### **Civil Rights - Topic 1392**

Security of the person - Health care (incl. mental health) - Committal or disposition - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - However, the court did accept that an accused's s. 7 rights might be engaged by the hospitals' refusal to consent to a "forthwith" treatment order under s. 672.62 - When an unfit accused was required to wait and was placed in a jail that was ill-equipped to address his or her mental health concerns, that accused faced a risk of harm - The purpose of a treatment order was to restore an unfit accused to stand trial as expeditiously as possible - There was general agreement that the longer a person's mental illness was left untreated, the more resistant that person's illness became to later treatment - Consequently, any delay in treatment, once an order was made, was a matter of concern - See paragraphs 31 to 42.

### **Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - General principles and definitions - Void for vagueness doctrine - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the

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### **Civil Rights - Topic 3107.2**

Trials - Due process, fundamental justice and fair hearings - General principles and definitions - Overbreadth principle - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - The requirement was not "impermissibly vague and open to arbitrary decisions" - The requirement had to be viewed in context as operating within the parameters of a regulatory structure - That framework was 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 - See paragraphs 67 to 76.

### **Civil Rights - Topic 8344**

Canadian Charter of Rights and Freedoms - Application - Exceptions - Principles of fundamental justice (Charter, s. 7) - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - While the court agreed that s. 7 was engaged, any deprivation of the accused's right to liberty or security of the person was in accordance with the principles of fundamental justice - There was no procedural unfairness - A judge made the determination as to whether a treatment order was appropriate - The accused had the right to be heard, to present evidence and to make submissions - The fact that a hospital was temporarily unable to provide operative consent to treatment did not change that, although it might have an impact on the timing of treatment and it might expose the unfit accused to circumstances that impinged on his or her s. 7 rights - See paragraphs 43 to 48.

### **Civil Rights - Topic 8344**

Canadian Charter of Rights and Freedoms - Application - Exceptions - Principles of fundamental justice (Charter, s. 7) - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - While the court agreed that s. 7 was engaged, any deprivation of the accused's right to liberty or security of the person was in accordance with the principles of fundamental justice - Those principles encompassed not only the accused's interests, but also collective, societal interests and that an accused was not entitled to the most favourable procedures possible - The consent requirement responded to a number of broader societal considerations as well as to the needs of the individual accused - The consent requirement was an important safeguard built into the regime to ensure that the order was made in circumstances where it was capable of being implemented - See paragraphs 49 to 60 and 65.

### **Civil Rights - Topic 8626**

Canadian Charter of Rights and Freedoms - Regulation of guaranteed rights - Vagueness rule - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge stipulated in the order that the accused was to "be taken directly from Court to the designated hospital... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The Ontario Court of Appeal allowed the appeal - Having found that the order was made without the consent of the hospital as required under s. 672.62, the court rejected the argument that the consent requirement violated s. 7 of the Charter - The requirement was not "impermissibly vague and open to arbitrary decisions" - The requirement had to be viewed in context as operating within the parameters of a regulatory structure - That framework was 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 - See paragraphs 67 to 76.

### **Practice - Topic 8858**

Appeals - Bar or loss of right of appeal - Moot issues - An accused was found unfit to stand trial - The presiding judge made a treatment order under s. 672.58 of the Criminal Code, requiring the accused to submit to anti-psychotic drug therapy - On being informed that no mental health treatment facility beds were immediately available, the judge

stipulated in the order that the accused was to "be taken directly from Court to the designated hospital.... Accused is not to be taken to a jail or correctional facility under any circumstances pursuant to this order." - Two mental health treatment facilities appealed, seeking to set aside the order - The accused received treatment and the charges against him were ultimately stayed - The Ontario Court of Appeal held that, despite the appeal's mootness, it was appropriate to hear the appeal - The legal issues raised were important and were "capable of repetition, yet evasive of review" - See paragraphs 21 to 23.