Penetanguishene Mental Health Centre *v.* Ontario (Attorney General), [2004] 1 S.C.R. 498, 2004 SCC 20

Pertti Tulikorpi *Appellant*

v.

Attorney General of Ontario, Administrator of the Penetanguishene Mental Health Centre and Administrator of the Whitby Mental Health Centre *Respondents*

and

Attorney General of Canada, Ontario Review Board and Nunavut Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition *Interveners*

Indexed as: Penetanguishene Mental Health Centre *v.* Ontario (Attorney General)

Neutral citation: 2004 SCC 20.

File No.: 29095.

2003: November 5; 2003: November 7.

Reasons delivered: March 26, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Criminal law — Mental disorder — Dispositions by review board — Terms of dispositions — Criminal Code providing that disposition made by review board must be "the least onerous and least restrictive to the accused" — Whether "least onerous and least restrictive" requirement applies to particular conditions forming part of disposition — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

The appellant was found not criminally responsible ("NCR") for an assault with a weapon in 1991 by reason of mental disorder. He was committed to a medium security facility, but in 1993 the Ontario Review Board ordered his transfer to a maximum security facility. Under s. 672.54 of the *Criminal Code*, the disposition made by the Review Board must be "the least onerous and least restrictive to the accused". In July 2000 the Review Board found that the least restrictive, least onerous disposition consistent with managing the appellant to protect the public, taking into account the relevant factors, was his transfer to a medium secure hospital, allowing him hospital and grounds privileges while accompanied by staff. The Court of Appeal held that the requirement of "the least onerous and least restrictive" disposition applied only to choosing among the three potential outcomes, namely an absolute discharge, discharge subject to conditions, or detention in a hospital subject to conditions. It referred the matter back to the Review Board for a rehearing.

Held: The appeal should be allowed.

This appeal and its companion, *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21, released concurrently, represent the latest round in

the attempt to reconcile the twin goals of public safety and the fair treatment of individuals who commit offences while suffering from a mental disorder.

The *Criminal Code* entitles an NCR accused to conditions that, viewed in their entirety, are the least onerous and least restrictive of his liberty consistent with public safety, his mental condition and "other needs" and his eventual reintegration into society. It is not enough to apply the "least onerous and least restrictive" requirement only to the bare choice among the three potential dispositions — absolute discharge, conditional discharge or continued detention. This requirement applies also to the particular conditions forming part of that disposition. This interpretation is dictated by a reading of s. 672.54 in the context of Part XX.1 of the *Criminal Code* as a whole, and by this Court's earlier decisions in *Winko* and *Owen*.

In terms of the liberty interest, the "disposition" and its "conditions" cannot, as a practical matter, be isolated from one another. The type of hospital in which the NCR accused is to be detained is an integral part of the disposition under s. 672.54(*c*). Parliament intended the Review Board to consider at every step of s. 672.54 "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused", and there is no textual or contextual reason to isolate the governing requirement of s. 672.54 ("the least onerous and least restrictive") from the other factors mentioned in the list and hold that it alone does not apply to the formulation of conditions that constitute part of the disposition order.

The word "appropriate" in s. 672.54(*b*) and (*c*) cannot be read as conferring a discretion unfettered except by the management expertise and medical judgment of the

Review Board to impose such conditions as it thinks fit. Parliament intended "appropriate" to be understood and applied in the framework of making the "least onerous and least restrictive" order consistent with public safety, the mental condition and other needs of the NCR accused, and the objective of his or her eventual reintegration into society.

The Crown's fears about "hamstringing" Review Boards by the application of a "least onerous and least restrictive" requirement to the conditions of a disposition order are not endorsed by the experts in the field. The overall requirement of "least onerous and least restrictive" is applied in practice by Review Boards to the whole "package" of conditions rather than each individual item. It is hard to see how micromanagement of the conditions attached to a disposition will result from this interpretation, given that the Review Board's exercise of its mandate is protected by a "reasonableness" standard of review.

In light of the resolution of the issue of statutory interpretation, the basis of the appellant's constitutional challenge disappears. For the reasons given in *Winko*, s. 672.54 does not infringe s. 7 of the *Canadian Charter of Rights and Freedoms*.

On the facts of this case, applying the "reasonableness" standard of review, the Review Board decision should stand. On the evidence, it was reasonable for the Review Board, applying as it did the correct legal test, to order the appellant transferred to the medium security hospital with hospital and grounds privileges, staff accompanied. This disposition not only offered him the potential of substantially greater liberty, but represented an essential step in the appellant's treatment and his potential eventual reintegration into the community.

Cases Cited

Applied: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33; **not followed:** *R. v. Pinet* (1995), 23 O.R. (3d) 97; **referred to:** *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (1999), 131 C.C.C. (3d) 473, leave to appeal denied, [1999] 1 S.C.R. vi (*sub nom. Clement v. Attorney General for Ontario*); *R. v. Brunczlik* (2002), 61 O.R. (3d) 321; *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269; *Lajoie v. Québec (Commission québécoise d'examen)*, [1994] R.J.Q. 607; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 672.1 [ad. 1991, c. 43, s. 4], 672.54 [*idem*], 672.56 [*idem*], 672.78(1)(*a*) [*idem*].

Authors Cited

Ontario. Ministry of Health. *Manual of Operating Guidelines for Provincial Psychiatric Hospitals*, No. 10a-35-01, s. 4, June 16, 1995.

Ontario. Ministry of Health and Long-Term Care. *Assessment, Treatment and Community Reintegration of the Mentally Disordered Offender*. Final Report of the Forensic Mental Health Services Expert Advisory Panel. Toronto: Ministry of Health and Long-Term Care, December 2002.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 146 O.A.C. 321, 158 C.C.C. (3d) 325, 43 C.R. (5th) 189, [2001] O.J. No. 2016 (QL), allowing an appeal from a decision of the Ontario Review Board and ordering a new hearing. Appeal allowed.

Marlys A. Edwardh, *Delmar Doucette* and *Jill Copeland*, for the appellant.

Alexander V. Hrybinsky and *Christine Bartlett-Hughes*, for the respondent the Attorney General of Ontario.

Leslie McIntosh, *Sonal Gandhi* and *Diana Schell*, for the respondents the Administrator of the Penetanguishene Mental Health Centre and the Administrator of the Whitby Mental Health Centre.

James W. Leising and *Michael H. Morris*, for the intervener the Attorney General of Canada.

Maureen D. Forestell and *Sharan K. Basran*, for the interveners the Ontario Review Board and the Nunavut Review Board.

Daniel J. Brodsky, *Anita Szigeti* and *Michael Davies*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

The judgment of the Court was delivered by

1 BINNIE J. — The appellant, a person found not criminally responsible for an assault with a weapon by reason of mental disorder in 1991, appeals to this Court the conditions of his continued detention in a mental hospital.

2 The legal question for the Court is whether the "least onerous and least restrictive" requirement of s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46, applies only to the bare choice among the three potential dispositions of his case — absolute discharge, conditional discharge or continued detention — as held by the Ontario Court of Appeal, or whether this requirement applies also to the particular conditions forming part of that disposition, as the appellant contends. In fact, the appellant argues that unless the "least onerous and least restrictive" requirement applies to the conditions themselves, then s. 672.54 violates his right to liberty under s. 7 of the *Canadian Charter of Rights and Freedoms* and the statutory scheme, to that extent, is null and void.

3 Following the hearing of this appeal, the Court concluded that the *Criminal Code* entitles the appellant to conditions that, viewed in their entirety, are the least onerous and least restrictive of his liberty consistent with public safety, his mental condition and "other needs" and his eventual reintegration into society. This interpretation is dictated by a reading of s. 672.54 in the context of Part XX.1 of the *Criminal Code* as a whole, and by this Court's earlier decisions in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, and *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33. The appeal was therefore allowed with reasons to follow. These are the reasons for that decision.

I. Facts

4 The appellant has displayed symptoms of chronic schizophrenia since at least 1986 and has been hospitalized on numerous occasions as a result of his illness. His mental disorder has been linked to a lengthy criminal record which includes convictions for theft, mischief, failing to appear and breach of probation. In 1987, he was convicted of sexual assault.

5 On March 11, 1991, at a rooming house for persons with mental disorders, he stabbed a male staff-worker under the delusional belief that this worker had both beaten and raped him and was about to strangle his mother. He feared he was about to be strangled. The appellant was charged with assault with a weapon. He was found not criminally responsible ("NCR") on account of mental disorder.

6 On August 13, 1991, he was committed to the Kingston Psychiatric Hospital, a *medium* security facility. On January 19, 1993, the Ontario Review Board ordered his transfer to a *maximum* security facility (the Oak Ridge Division of the Penetanguishene Mental Health Centre). The appellant submits that his earlier transfer occurred so that he could take part in recreational activities at Oak Ridge and improve the quality of his life. The Crown submits he was transferred because he posed "a serious management problem" at the medium security hospital where he refused treatment and behaved inappropriately. For the purpose of this appeal, we need not decide why he was transferred in 1993.

7 At Oak Ridge, the appellant was diagnosed as suffering from substance abuse and chronic paranoid schizophrenia, a personality disorder with anti-social traits. He was last "physically assaultive" in 1996. In January 1998, he experienced a

"significant episode of behavioural dysfunction". The appellant also engaged in "sexually inappropriate behaviour". The most recent such episode was in 1998.

8 According to nursing notes dated May 24, 2000, the appellant said that voices from a television set had told him to stop taking his medication, and that his brother had been calling and wanted him out of Oak Ridge. The appellant requires drugs to control his mental disorder. He objects to taking the medication, however, and it is administered by substitute consent provided by his father. In the 12 months prior to the most recent Board Disposition, the appellant had developed a problem with "water intoxication". The hospital Administrator recommended his continued detention at Oak Ridge maximum security institution.

II. History of the Proceedings

A. *Ontario Review Board*

9 Annual review hearings resulted in orders for the appellant's continued hospitalization at Oak Ridge from 1993 until July 24, 2000, when the Review Board ordered his transfer to a *medium* security unit, stating:

> The Board is unanimously of the view that Mr. Tulikorpi continues to represent a significant threat to the safety of the public by reason of his poor insight into his mental illness and as to the need for medication as well as the probability that he would immediately become non-compliant in terms of medication and would decompensate such that his behaviour would become dangerous if left to his own devices. He clearly requires monitoring and supervision.

10 The Board interpreted s. 672.54 of the *Criminal Code* to require the "least onerous and least restrictive" test to be applied to the conditions of the appellant's continued detention, and not just to the type of detention itself.

11 The Board then found that the least onerous, least restrictive disposition consistent with managing the appellant and protecting the public, taking into account the relevant factors, was his transfer to the medium secure Whitby Mental Health Centre ("Whitby Hospital"), allowing him hospital and grounds privileges while accompanied by staff. The disposition order read in part as follows:

> 5. IT IS FURTHER ORDERED that the person in charge of the Whitby Mental Health Centre create a program for the detention in custody and rehabilitation of the accused within the medium secure unit of the Whitby Mental Health Centre, in which the person in charge, in his or her discretion, subject to the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused, may permit the accused:
>
> (a) to attend within or outside of the hospital for necessary medical, dental or compassionate purposes; and
>
> (b) hospital and grounds privileges for socialization, recreation and vocation, accompanied by staff.
>
> 6. AND IT IS FURTHER ORDERED that the person in charge of the Whitby Mental Health Centre notify the local police at such times as he or she exercises his or her discretion to permit the accused to enter the community and to advise the local police of the terms and conditions under which he or she permitted the accused to do so pursuant to term 5 of this Disposition.

The Administrators of both Oak Ridge and the Whitby Hospital appealed.

B. *Court of Appeal* (2001), 158 C.C.C. (3d) 325

12 The Court of Appeal, following its previous jurisprudence, held that the requirement of "the least onerous and least restrictive" disposition applied only to choosing among the three potential outcomes, namely an absolute discharge, discharge subject to conditions, or detention in a hospital subject to conditions. That choice having been made, in its view it was not necessary that the Review Board also consider whether the type of hospital (e.g., transfer from Oak Ridge to Whitby) or the conditions attached to the order (e.g., hospital and grounds privileges) would themselves be the least onerous and least restrictive.

13 In that court's view, applying the "least onerous and least restrictive" test to every condition that could be said to impact on the liberty of an NCR accused would hamstring the Review Board in the exercise of its discretion and place the Court of Appeal in the untenable position of having to micromanage the Review Board's every decision.

14 As it was not certain that the Review Board would necessarily have come to the same conclusion had it applied the correct legal test, the court referred the matter back to the Board for a rehearing after it obtains additional information concerning the reasons for the earlier 1993 transfer and the suitability of the Whitby Hospital to monitor and treat the appellant.

15 The appellant continued to be detained at Oak Ridge pending his appeal to this Court.

III. Relevant Constitutional and Statutory Provisions

16 *Canadian Charter of Rights and Freedoms*

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

Criminal Code, R.S.C. 1985, c. C-46

> **672.1** In this Part,
>
> "disposition" means an order made by a court or Review Board under section 672.54 or an order made by a court under section 672.58;
>
> **672.54** [Dispositions that may be made] Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

IV. Constitutional Questions

17 By order dated March 18, 2003, the Chief Justice stated the following constitutional questions:

1. Does s. 672.54(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

18 The Court granted the parties leave to file supplementary evidence on the legislative facts related to the constitutional questions.

V. Analysis

19 This appeal and its companion, *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528, 2004 SCC 21, released concurrently, represent the latest round in the attempt to reconcile the twin goals of public safety and the fair treatment of individuals who commit offences while suffering from a mental disorder.

20 In *R. v. Swain*, [1991] 1 S.C.R. 933, the Court struck down the former s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provided that, where an accused was found to be "insane" at the time of the offence, he was to "be kept in strict custody in the place and in the manner" directed "until the pleasure of the lieutenant governor of the province is known". Because there was no provision for periodic reviews or hearings or "other procedural safeguards", the then s. 542(2) of the *Criminal Code* was held to infringe s. 7 of the *Charter* on the basis that an accused, who was "insane", was deprived of his or her right to liberty in a manner that was not in accordance with the principles of fundamental justice. The infringement could not be justified under s. 1.

21 In response to *Swain*, Parliament, in 1991, enacted Part XX.1 of the *Criminal Code*, which described such accused persons as "not criminally responsible" ("NCR") and placed them in a special stream that emphasized treatment and stabilization over incarceration and punishment. The continued detention of such persons was made conditional on a showing that they posed "a significant threat to the safety of the public" (s. 672.54).

22 Part XX.1 was itself attacked as a violation of s. 7 of the *Charter* in *Winko*, *supra*. The Court concluded that the constitutionality of the scheme was saved by the requirement, *per* McLachlin J. (as she then was), that "an absolute discharge be granted unless the court or Review Board is able to conclude that [the NCR accused persons] pose a significant risk to the safety of the public" (para. 3). In that context (at para. 42),

> Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation.

The appellant argues that, if the NCR detainee is not protected by the "least onerous and least restrictive" requirement, the *Charter* challenge dismissed in *Winko* is brought back to life.

23 More recently, in *Owen*, *supra*, where an NCR accused challenged as unreasonable an order for his continued detention in a mental hospital, a majority of this Court upheld the detention order but acknowledged that (at para. 52):

> The appeal of an NCR disposition order under Part XX.1 of the *Criminal Code* is not an appeal in an adversarial criminal prosecution . . . but an inquisitional administrative procedure designed to arrive at the least

> restrictive regime for an NCR detainee consistent with public safety. [Emphasis added.]

24 The "least restrictive regime", in ordinary language, would include not only the place or mode of detention but the conditions governing it. On the face of it, therefore, *Winko* and *Owen* would appear to have decided the point of statutory interpretation in the appellant's favour. The liberty interest of the NCR accused is not exhausted by the simple choice among absolute discharge, conditional discharge, or hospital detention on conditions. A variation in the conditions of a conditional discharge, or the conditions under which an NCR accused is detained in a mental hospital, can also have serious ramifications for his or her liberty interest, as will be seen.

A. *The Arguments Put Against the Appellant*

25 The Crown and the supporting interveners seek to uphold the decision of the Ontario Court of Appeal on three principal grounds:

> 1. As a matter of statutory interpretation, the "least onerous, least restrictive" test does not apply to conditions that form part of a disposition.
>
> 2. The statutory test applicable to the setting of conditions is "appropriateness". In fashioning conditions, "[t]he Review Board [may have] to consider many factors which are health care related and are not readily measurable against a 'least onerous, least restrictive' standard". Such factors include location of specific treatment programs, patients' past experience in a particular facility, effects of a transfer on a patient, access

to family, potential risk to other patients, patient wishes, and the availability of space/supervision. It is logical, the Crown argues, that dispositions and conditions of dispositions are governed by different standards.

3. As a policy matter, it is desirable that the discretion of the Board be unfettered regarding the conditions it considers appropriate, and the specifics delegated to professional caregivers without "micro-management" by the court.

26 In support of its position, the Crown relies upon a line of authority in the Ontario Court of Appeal, including *R. v. Pinet* (1995), 23 O.R. (3d) 97 ("*Pinet No. 1*"), at p. 102; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (1999), 131 C.C.C. (3d) 473, at p. 478, leave to appeal denied, [1999] 1 S.C.R. vi (*sub nom. Clement v. Attorney General for Ontario*); and *R. v. Brunczlik* (2002), 61 O.R. (3d) 321.

27 The Ontario Review Board and the Nunavut Review Board in response, rely upon what they say is a conflicting line of authority in other provinces in decisions that pre-date *Winko*, *supra*, including *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269 (B.C.C.A.), at pp. 277-78; *Lajoie v. Québec (Commission québécoise d'examen)*, [1994] R.J.Q. 607 (C.A.), at p. 610.

B. *The Factual Context*

28 The legal issues thus raised need to be put in their factual context. The Review Board order continued the appellant's detention "in custody in a hospital" under para. (*c*) of s. 672.54, even though he was transferred from a maximum security hospital

to a medium security hospital. There was therefore, in the parlance of *Pinet No. 1*, no change of "disposition". Yet the evidence shows that the restrictions on liberty in various mental institutions and at various levels of security vary enormously.

29 There are 10 hospitals in Ontario designated by the provincial Minister of Health for the custodial treatment of NCR accused. These hospitals operate out of 12 locations around the province. Oak Ridge is the only facility designated "maximum" security. The rooms are cell-like, with barred or solid steel doors, barred windows and attached steel fixtures (sink, toilet, bed). The use of privacy curtains is limited. Access to privileges and facilities is strictly controlled. In some ward areas of Oak Ridge, detainees are not allowed to keep soap, a toothbrush or a comb in their rooms, or in some cases to use a pen. Visits to the canteen may be escorted.

30 The Ontario hospital system provides three levels of security below the Oak Ridge "maximum", namely, double-lock medium (high medium), single-lock medium (regular medium) and minimum. These levels permit detainees what is called "a cascade" of increasingly greater levels of liberty. At the Royal Ottawa Health Care Group at Brockville, for example, the doors are unlocked during the day. Most patients, though formally "detained" in the hospital, have unsupervised grounds or unsupervised community privileges. The importance of these lower level security hospitals is that they can facilitate the gradual reintegration of detainees into the community as the twin goals of public safety and treatment permit, with progressively greater access to family, community facilities and outward-looking programming, and their attendant therapeutic effect.

31 It is obvious that once the Review Board has made the disposition to "a hospital" under s. 672.54(*c*), choice of the type of hospital and level of security and conditions of detention will have a vital impact on the liberty interest of the detainee. Confinement to a cell-like room at Oak Ridge is a long way from a life of liberal access to the community at the Royal Ottawa Health Care Group facility at Brockville.

32 Apart from hospital selection, there are other conditions routinely considered by Review Boards that also affect the liberty interest having regard to "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused". The disposition order may specify that the detainee is (or is not) to have access to the grounds of the hospital, or to the community within a defined radius (including a weekend or overnight pass), and, if so, the level of accompanying supervision, if any. The Review Board may specify the purposes for which community access is authorized (such as medical or dental treatment, education, employment, recreation, or social activities). Equally, the conditions may place particular restrictions on a detainee's liberty. In a conditional discharge under s. 672.54(*b*) for example, such restrictions may include a prohibition against consuming alcohol or drugs, using or possessing firearms, associating with particular persons or classes of persons, and reporting requirements.

33 A simple disposition under para. (*b*) or (*c*) of s. 672.54 tells only part of the relevant story, and even that part may be an oversimplification. One might expect, for example, that a disposition under (*c*) that "the accused be detained in custody in a hospital" means that the detainee will in fact reside in the hospital but that would be wrong. In some Ontario mental health hospitals, a significant percentage of detainees (at times over 50 percent) may reside in the community on "appropriate" conditions.

34 Dr. John Bradford is the Clinical Director of the Integrated Forensic Program, and the Co-Director of the Sexual Behaviours Clinic of the Royal Ottawa Health Care Group. He is also a Professor of Psychiatry, and the Head of the Division of Forensic Psychiatry at the Faculty of Medicine, University of Ottawa. In the supplementary material filed on the constitutional questions, he testified that "[b]ecause of the wide range of increments of liberty which can be effected within a medium security institution, the level of security of the institution in which an NCR accused is detained is not, standing alone, the best measure of the relative liberty available to the individual." The Crown agreed that the mix of conditions might make a medium security facility less attractive to a detainee than the maximum security facility at Oak Ridge, stating in its factum:

> The commonly used security level classifications are not defined and there are many other conditions relating to the freedom of movement provided to the patient within the facility that will determine the relative liberty available to the NCR accused.

A severely restricted NCR accused, for example, might find more programs and amenities accessible within the secure perimeter at Oak Ridge than at a less secure hospital where he might be "restricted to the ward he is placed in".

35 Moreover, Dr. Stephen Hucker, the Crown expert, testified as follows:

> Q. And would you agree with me, with possibly a few exceptions, NCR or unfit patients are not clamouring to be transferred to or to stay at Oak Ridge?
>
> A. Some have asked to be returned. Some have claimed to have re-offended because they wanted to go back, if you want to believe their story. There are some that find conditions in medium to be more restrictive than

> they thought. The common sense would be, here I am in maximum, medium must be better, it must be least restrictive and onerous. But in practice that may not be true.

36 Even this brief review of the factual context in which s. 672.54 operates is enough, I think, to show how closely the issue of statutory interpretation is bound up with the appellant's *Charter* argument. The Crown's argument that the appellant's liberty interest is restricted to the simple choice between absolute discharge, conditional discharge and hospital detention on "appropriate" conditions is, on the facts, an oversimplification.

37 I turn, then, to the Crown's arguments.

C. *The Statutory Interpretation Argument*

38 The Crown adopts the analysis of McKinlay J.A. in *Pinet No. 1*, at p. 101:

> In my view, the correct reading of s. 672.54 is that only three dispositions are possible — (a) absolute discharge, (b) discharge subject to conditions, and (c) detention in a hospital subject to conditions — and that the criteria set out in the preceding portion of the section are relevant only to a choice between dispositions (a), (b), or (c). Thus consideration of the least onerous and least restrictive disposition is required only with respect to a determination as to whether the accused should be absolutely discharged, discharged subject to conditions, or detained in a hospital subject to conditions. That determination having been made, and the requirements in the first part of s. 672.54 having been satisfied, it is not necessary that the Board, in imposing conditions under (b) or (c), consider whether the type of hospital or the conditions contemplated under (b) or (c) would be the least onerous and least restrictive.

39 Moldaver J.A., in the present appeal, signalled some unease with this position when he noted the "forceful argument . . . that the naming of a specific hospital

or type of hospital within which the NCR accused is to be detained is not a condition at all but rather, an integral part of the disposition under subs. (c) . . . [In which case the] Board would of course be obliged to apply the 'least onerous, least restrictive test' in arriving at its decision" (para. 27). (Given his conclusion that *Pinet No. 1* remained the law of Ontario, however, he held that the Review Board applied the wrong legal test.)

40 I agree that the type of hospital in which the NCR accused is to be detained is "an integral part of the disposition under subs. (c)". Moreover, in terms of the liberty interest, the "disposition" and its "conditions" cannot, as a practical matter, be isolated from one another as was shown, I believe, in the foregoing discussion of the factual context.

41 As to the statutory text, the French language equivalent of "disposition" is "*décision*", and the Review Board is required to "*rend[re] la décision la moins sévère et la moins privative de liberté parmi celles qui suivent . . .*" (s. 672.54). One would not normally attempt to isolate conceptually a "*décision*" from the terms of which it is composed.

42 Similarly, in the English text, s. 672.1 provides that "'disposition' means an order made by a court or Review Board under section 672.54 . . ." (emphasis added). The order, of course, includes the conditions.

43 The "conditions" are not something that is bolted onto the disposition after it is made.

44 In Gonthier J.'s concurring judgment in *Winko, supra*, which was not in disagreement with the majority on this point, he made it clear that the "least onerous and least restrictive" requirement extended to the conditions that formed part of the disposition (at paras. 148 and 165):

> 9. When deciding whether to make an order for a conditional discharge or for detention in a hospital and when crafting the appropriate conditions, if any, the court or Review Board must again consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused, and make the order that is the least onerous and least restrictive to the NCR accused.
>
> . . .
>
> Dangerous NCR accused can be subjected only to the disposition and the conditions that are the least onerous and restrictive upon them, taking into account the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. . . . [Emphasis added.]

45 My reading of s. 672.54 as a whole is that Parliament intended the Review Board to consider at every step of s. 672.54 "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused", and there is no textual or contextual reason to isolate the governing requirement of s. 672.54 ("the least onerous and least restrictive") from the preceding list and hold that it alone does not apply to the formulation of conditions that constitute part of the *décision* or disposition order.

46 However, the Crown points out that in both (*b*) and (*c*), Parliament has used the expression "subject to such conditions as the court or Review Board considers appropriate" in English and "*sous réserve des modalités que le tribunal ou la commission juge indiquées*" in French (emphasis added).

47 From this, the Crown contends that, in fashioning terms or conditions, the courts and Review Board are constrained only by what they consider "appropriate" in the circumstances, and therefore do not need to consider whether the conditions are the least onerous and least restrictive to the NCR accused.

D. *The "Appropriateness Standard"*

48 The word "appropriate" ("*indiqué*") generally confers a very broad latitude and discretion. The Attorney General of Canada refers to the characterization of the expression "appropriate and just in the circumstances", and its French equivalent, in s. 24(1) of the *Charter* by relying upon *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965: "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."

49 That, of course, is one of the problems with the Crown's argument. The alleged presence of an "unfettered discretion" with respect to the terms of detention of an NCR accused is precisely the reason why the appellant argues that the whole scheme is unconstitutional as permitting arbitrary infringement of his liberty.

50 On the hearing of this appeal, the Ontario Review Board and the Nunavut Review Board filed a joint intervention arguing that the "appropriateness" standard urged by the Crown "does not provide guidance, consistency, clarity or fairness. Where a statutory provision affects the liberty of the individual, a clear standard must be established to justify that interference with liberty" (emphasis added). Thus, "[i]t is the position of the [Ontario Review Board] and [Nunavut Review Board] that these

[statutory] goals are accomplished by applying to the disposition as a whole, including the conditions, the least onerous and least restrictive standard."

51 In my view, with respect, the word "appropriate" in the context of s. 672.54 is not at all "unfettered". The word takes its meaning from the context. Conditions must be appropriate, yes, but appropriate having regard to the four enumerated factors (public safety, mental condition of the accused, other needs of the accused, and the reintegration of the accused into society) to fashion a disposition that is "the least onerous and least restrictive to the accused". This is clear from *Winko*, *supra*, where, in dealing with the *Charter* challenge under s. 7, McLachlin J. observed, at para. 71, that the scheme "ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety".

52 This dictum is entirely incompatible with an unfettered "appropriateness" standard. The unnecessary "trammelling" of liberty can often lie in the precise conditions attached to the order and not just in the general mode of detention. The devil, as is so often the case, lies in the details.

53 *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. In the following references to *Winko*, it will be noted, there is no distinction drawn between the "disposition", which the Crown concedes must be the "least onerous and least restrictive", keeping in mind the statutory factors, and the "conditions" that form part of the disposition. By way of introduction, McLachlin J. states, at para. 16:

> . . . Parliament intended to set up an assessment-treatment system that would identify those NCR accused who pose a significant threat to public safety, and treat those accused appropriately while impinging on their liberty rights as minimally as possible, having regard to the particular circumstances of each case. [Emphasis added.]

54 "[L]iberty rights" obviously extend to more than the bare mode of detention. In this respect, for ease of reference, I refer again to *Winko*, at para. 42:

> . . . Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation.

55 Then again, discussing the wording and function of s. 672.54, *Winko* says, at para. 47:

> . . . the court or Review Board shall make the order that is the least onerous and least restrictive to the accused, consistent with the evidence. [Emphasis added.]

56 In light of these pronouncements, and the *Charter* challenge to which they were addressed, it seems to me impossible to accept the contention that the word "appropriate" in s. 672.54(*b*) and (*c*) can be read as conferring a discretion unfettered except by the management expertise and medical judgment of the Review Board to fashion such conditions as it thinks fit. In my view, Parliament intended "appropriate" to be understood and applied in the framework of making the "least onerous and least restrictive" order consistent with public safety, the mental condition and other needs of the NCR accused, and the objective of his or her eventual reintegration into society.

E. *The Crown's Policy Arguments*

57 The Crown argues that the Review Board must maintain a high degree of flexibility to set conditions that are in the best interests of the treatment of the NCR accused, and that, if a "least onerous and least restrictive" requirement applied to each such condition, the result would "hamstring" proper treatment.

58 There are two sets of answers to this important question, one practical and one procedural.

1. Practical Considerations

59 Dr. John Bradford testified from practical experience:

> In making dispositions, the Review Board considers the whole package of conditions attached to a disposition, including the level of security of the hospital for a disposition of detention in custody of a hospital, and imposes the least onerous and least restrictive package of disposition and conditions, taking into account public safety, and the clinical progress and needs of the NCR accused. In my experience, the process of applying the least onerous and least restrictive test to the package of disposition and conditions has not posed difficulties for the Review Board.

60 The Review Board in this case itself applied the "least onerous and least restrictive" requirement to the conditions of the disposition order. Indeed, it was its insistence in doing so in this case that was characterized by the Court of Appeal as "an error of law".

61 The evidence was that this requirement did not hamstring treatment. Dr. Stephen Hucker, the Crown's expert, testified as follows:

> Q. In assessing the appropriateness of a disposition, would you agree with me that the relative restrictiveness of the conditions is a relevant factor?
>
> A. Yes.
>
> . . .
>
> Q. . . . Beginning at paragraph 33 in your affidavit, through to the end of the affidavit, you raise a number of what you describe as potential problems with what you see as applying the least onerous least restrictive test of conditions in a disposition?
>
> A. Yes. Could I just say, I mean, to try and aim for the least onerous and restrictive alternative is not something I'm opposing. It's just applying it is sometimes difficult.

62 Reference should also be made to the Ontario Government report entitled *Assessment, Treatment and Community Reintegration of the Mentally Disordered Offender*, Final Report of the Forensic Mental Health Services Expert Advisory Panel for the Ontario Ministry of Health and Long-Term Care (December 2002), at p. 129:

> . . . treatment and/or management must occur in the least restrictive and most humane <u>environment</u> that is clinically and legally prescribed; [Emphasis added.]

63 It thus appears, on the evidence, that the Crown's fears about "hamstringing" Review Boards are not shared by the experts in the field.

64 The Crown also expressed concern that each individual condition might be isolated and independently assessed according to a "least onerous and least restrictive" standard. That fear, too, seems not to be shared by the experts.

65 Dr. John Bradford testified that the overall requirement of "least onerous and least restrictive" is applied in practice by Review Boards to the whole "package" of conditions rather than each individual item:

> . . . the relative liberty depends on the whole package of conditions as outer limits on liberty set by the Review Board, and on the day-to-day management by the hospital of increments of liberty based on the patient's progress and public safety. [Emphasis added.]

66 Dr. Hucker, the Crown's expert, agreed with appellant's counsel that the s. 672.54 conditions are treated as a "total package" and, viewed in their entirety, are made the least restrictive possible "bearing in mind public safety . . . and . . . all those things [s. 672.54 of] the *Criminal Code* enunciates".

67 The heart of the Crown's argument is that a "least onerous and least restrictive" requirement may undermine treatment needs. The Crown argues the "least onerous and least restrictive" requirement would impose undue rigidity, whereas the "appropriateness" test guarantees flexibility. With respect, these arguments do not do justice to the wording of s. 672.54. Just as the Crown is wrong, I think, to try to detach the word "appropriate" from the factors listed in s. 672.54 in order to give Review Boards greater "flexibility", so, too, the Crown is wrong, with respect, to try to detach the "least onerous and least restrictive" requirement from its statutory context. Section 672.54 directs the Review Board to have regard to "the other needs of the accused" (emphasis added). At the forefront of these "other needs" is the need for treatment. Moreover, public safety, another key factor listed in s. 672.54, is ultimately assured by facilitating the recovery of the NCR accused. The "least onerous and least restrictive" requirement cannot be divorced from the statutory factors that condition its exercise. It is not a free-standing requirement. It operates once the Review Board has duly taken

into consideration public safety, the mental condition and other needs of the NCR accused and the desired result that, at some point, when ready, he or she will be reintegrated into the community.

68 Moreover, the Crown's argument that allowing this appeal would result in excessive rigidity overlooks s. 672.56 of the *Criminal Code*, which permits the Review Board to delegate to the person in charge of the hospital "authority to direct that the restrictions on the liberty of the [NCR] accused be increased or decreased within any limits and subject to any conditions set out in that disposition . . .". Thus, within the outer envelope established by the Review Board order, a hospital administrator may move to restrict the detainee's liberty if circumstances warrant, although if the restriction is significant and lasts longer than seven days, the Review Board must be notified and a hearing held: see "Wording of Custodial Disposition Orders", s. 4 in *Manual of Operating Guidelines for Provincial Psychiatric Hospitals* (June 1995). If problems arise, such as a deterioration in the mental condition of a hospital detainee permitted residence in the community, the detainee can be returned to the hospital without the need of any prior order of a court or the Review Board.

69 The delegated authority, of course, must be exercised having due regard to the detainee's liberty interest in light of the twin goals of public safety and treatment, but it permits a degree of day-to-day fine tuning that, if properly exercised, will prevent the "least onerous and least restrictive" requirement from compromising achievement of treatment objectives.

70 The evidence therefore establishes that, while imposition of the "least onerous and least restrictive" requirement on the conditions of detention viewed in their

entirety may create difficulty in some situations, the difficulty is manageable and in fact *is* being managed by Ontario Review Board at the present time.

2. Procedural Considerations

71 The Review Board's exercise of its mandate is protected by a "reasonableness" standard of review as set out in s. 672.78(1)(*a*) and *Owen*, *supra*, at paras. 31-33. An appeal court will necessarily respect the medical expertise of the members of the Review Board who face the difficult task of reconciling the various objectives set out in s. 672.54, some of which may be in tension in a particular case. The various conditions have to be viewed collectively, and the "least onerous and least restrictive" requirement applied to the package as a whole. The court does not evaluate each condition in isolation from the package of provisions of which it forms a part.

72 Thus, in *Owen*, *supra*, the Court made it clear that so long as the proper legal test is applied, an appellate court has no mandate to intervene based on whether the hours of curfew, or a radius of travel was "least restrictive", as was the sort of concern expressed in this case by the Ontario Court of Appeal.

73 The Court in *Owen* further stated that "it is not for the Court to micromanage the leave conditions" (para. 69). Thus, so long as the Board's determination of what is least onerous and least restrictive is supported by reasons, and does not demonstrate flaws such as an "assumption that had no basis in the evidence" or a "defect . . . in the logical process", it will be affirmed (*Owen*, at para. 46, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56). It is hard

to see how micromanagement of the conditions attached to a disposition will result, given the "reasonableness" standard of review.

VI. The Constitutional Issue

74 In light of the resolution of the issue of statutory interpretation, the basis of the appellant's renewed constitutional challenge disappears. For the reasons given by the Court in *Winko*, s. 672.54 does not infringe s. 7 of the *Charter*.

VII. Application to the Facts

75 The Oak Ridge facility, where the appellant is detained, is set up to "incapacitate" an NCR accused, not to initiate incremental steps by which he might be reintegrated into the community. As Dr. Brian Jones, an expert for the Crown explained:

> A. . . . medium and minimum secure facilities specialize in risk management at the community interface. Their operation is geared towards managing risk during the community reintegration phase of rehabilitation.
>
> Whereas maximum security doesn't manage risk to the community. It incapacitates risk. So there is no risk to the community.
>
> Q. By not allowing access to the community?
>
> A. That's right. There's risk to staff and patients inside the building, and I consider that part of the community as well. But to the community at large we don't manage risk in maximum security. We incapacitate people.

76 On the evidence, it was reasonable for the Review Board, applying as it did the correct legal test, to order the appellant transferred to the Whitby medium security hospital with hospital and grounds privileges, staff accompanied. This disposition not only offered him the potential of substantially greater liberty, but represented an essential

step in the appellant's treatment and his potential eventual reintegration into the community.

77 In this case, unlike *Pinet v. St. Thomas Psychiatric Hospital*, *supra*, released concurrently, the Board made no error of law. Accordingly, as in *Owen*, the appeal court can only intervene if the decision of the Review Board can be shown to be unreasonable.

78 In my view, on a "reasonableness" standard of review, the Review Board decision should stand.

VIII. Disposition

79 While this Court, by order dated November 7, 2003, allowed the appeal and set aside the decision of the Court of Appeal, it stayed the effect of its order pending an up-to-date assessment of the appellant by the Review Board.

80 The evidentiary record before us is out of date because of the length of time it has taken for the case to reach this Court. The most recent information we have about the appellant's mental condition and other relevant circumstances dates from 2000. Important developments could well have taken place during the period this case has been moving through the courts.

81 The assessment shall be carried out in accordance with the general principles set out in these reasons.

82 I would answer the constitutional questions as follows:

1. Does s. 672.54(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

   Answer: No.

2. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

   Answer: It is unnecessary to decide this question.

Appeal allowed.

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