Pinet *v.* St. Thomas Psychiatric Hospital, [2004] 1 S.C.R. 528, 2004 SCC 21

Michael Roger Pinet *Appellant*

v.

Attorney General of Ontario and Administrator of St. Thomas Psychiatric Hospital *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: Pinet *v.* St. Thomas Psychiatric Hospital

Neutral citation: 2004 SCC 21.

File No.: 29254.

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.

In 1976 the appellant was found not guilty of murder by reason of insanity and was placed under a warrant of the Commissioner of the Northwest Territories. He was then transferred to a maximum security hospital. In 1995, the appellant was transferred to a medium security facility at his request by Review Board order. In June 2000, on the recommendation of the facility, a differently constituted panel of the Review Board ordered that he be sent back to the maximum security unit. 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". The Court of Appeal concluded that the "least onerous and least restrictive" test did not apply to conditions imposed under paras. (*b*) and (*c*) of s. 672.54 and dismissed the appellant's appeal.

Held: The appeal should be allowed.

In this appeal, as in the companion case, *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20, the Court is required to consider whether the Ontario Review Board struck an appropriate balance between the twin goals of public safety and the fair treatment of an accused who has been found not criminally responsible ("NCR") by reason of mental disorder. The principles of fundamental justice require that the liberty interest of such individuals be taken into account at all stages of a Review Board's consideration. In this process of

reconciliation, public safety is paramount. Within the outer boundaries defined by public safety, however, the liberty interest of an NCR accused should be a major preoccupation of the Review Board when it makes its disposition order.

Even where a risk to the public safety is established, the conditions of the disposition order are to be "the least onerous and least restrictive to the accused" consistent with the level of risk posed considering the mental condition of the NCR accused, his or her other needs, and the objective of eventual reintegration into the community. The proposition accepted by the Review Board that NCR detainees who are not at present candidates for community access may, by reason of that fact alone, be detained under conditions of maximum security, even though they do not present a risk to the safety of the public, is clearly not compatible with the "least onerous and least restrictive" requirement of s. 672.54.

In terms of judicial review, the Review Board committed an error of law when it held that the conditions of the appellant's continued detention were not required by s. 672.54 to be "the least onerous and least restrictive" of the appellant's liberty after taking into consideration the other factors set out in that section. The Review Board order must therefore be set aside unless the Crown were able to discharge its onus of showing that no "substantial wrong" was done (s. 672.78). This would require satisfying the appellate court that a Review Board, acting reasonably, and properly informed of the law, would necessarily have reached the same conclusion absent the legal error. Since this onus has not been satisfied in this case, the appellant is entitled to a re-hearing.

Cases Cited

Applied: *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20, rev'g (2001), 158 C.C.C. (3d) 325; **referred to:** *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.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7.

Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54 [ad. 1991, c. 43, s. 4], 672.78 [*idem*], 672.78(3)(*a*) [*idem*; am. 1997, c. 18, s. 89].

APPEAL from a judgment of the Ontario Court of Appeal, [2002] O.J. No. 958 (QL), affirming a decision of the Ontario Review Board. Appeal allowed.

Suzan E. Fraser and *Richard Macklin*, for the appellant.

Riun Shandler, *Christine Bartlett-Hughes* and *Melissa Ragsdale*, for the respondent the Attorney General of Ontario.

Janice E. Blackburn, for the respondent the Administrator of St. Thomas Psychiatric Hospital.

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. — In this appeal, as in the companion case, *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, 2004 SCC 20 ("*Tulikorpi*"), the Court is required to consider whether the Ontario Review Board struck an appropriate balance between the twin goals of public safety and the needs of an accused who has been found not criminally responsible ("NCR") by reason of mental disorder.

2 At the hearing of the appeal, the focus of the argument was on whether the requirement in s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46, that the disposition order be the "least onerous and least restrictive" of the liberty of the NCR accused, having regard to the factors enumerated in s. 672.54, applied not only to the general disposition of the case (absolute discharge, conditional discharge or detention on conditions), but also to the conditions that form part of that disposition order. The issue of statutory interpretation was not clearly addressed in its reasons, but the Review Board seems to have proceeded on the basis that the conditions merely had to be shown to be "appropriate". In taking that approach, the Review Board followed the earlier jurisprudence of the Ontario Court of Appeal.

3 For reasons given in *Tulikorpi*, released concurrently, we hold that the "least onerous and least restrictive" requirement does apply to the disposition order as a whole, including the conditions. There is no need to repeat that analysis here.

4 In the result, the Review Board applied the wrong legal test to the appellant's case. However, s. 672.78 of the *Criminal Code* provides that its order may still stand if it can be shown that no "substantial wrong" was committed. Here, however, we cannot say that, if the Review Board had acted reasonably on the correct legal test, the result would necessarily have been the same.

5 Accordingly, by order dated November 7, 2003, we directed a rehearing. The reasons for that decision are as follows.

I. Facts

6 The appellant was tried for murdering four members of his wife's family in Yellowknife, N.W.T. On December 9, 1976, he was found not guilty by reason of insanity and was placed under a warrant of the Commissioner of the Northwest Territories. He was then transferred to the maximum security Oak Ridge Division of the Mental Health Centre in Penetanguishene, Ontario. He has been detained in mental hospitals for the past 27 years.

7 The appellant, who is now 50 years old, has been diagnosed as having a mixed personality disorder with characteristics of anti-social, borderline and narcissistic traits, possibly sadistic paraphilia, and a history of drug and alcohol abuse.

8 On January 30, 1984, he was transferred to a medium security facility at the St. Thomas Psychiatric Hospital in St. Thomas, Ontario. While there, he had a sexual relationship with a member of the staff. When the relationship ended, the appellant's mental stability deteriorated. He was depressed, and suicidal. There was evidence that he contemplated taking hostages. On October 2, 1985, the appellant was returned to the maximum security facility at Oak Ridge.

9 In 1995, the appellant requested to be transferred to a medium security facility. Over the objections of St. Thomas Psychiatric Hospital, he was returned to that facility by Review Board order dated June 23, 1995. The hospital believes that the appellant's subsequent conduct justified its opposition to his 1995 transfer. On June 30, 2000, on the recommendation of St. Thomas Psychiatric Hospital, a differently constituted panel of the Review Board ordered that the appellant be sent back to the maximum security unit of the Oak Ridge Division of the Penetanguishene Mental Health Centre. The appropriateness of that disposition is at issue in this appeal.

II. Relevant Statutory Provisions

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

> **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.

672.78 (1) [Powers of court of appeal] The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(*a*) it is unreasonable or cannot be supported by the evidence;

(*b*) it is based on a wrong decision on a question of law; or

(*c*) there was a miscarriage of justice.

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

(*a*) that paragraphs (1)(*a*), (*b*) and (*c*) do not apply; or

(*b*) that paragraph (1)(*b*) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

(*a*) make any disposition under section 672.54 or any placement decision that the Review Board could have made;

(*b*) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or

(*c*) make any other order that justice requires. [Emphasis added.]

III. History of the Proceedings

A. *Ontario Review Board*

11 The Review Board ordered the appellant returned to the maximum security hospital at Oak Ridge on the basis of factors that it felt required the appellant to be in a more structured environment. The Review Board stated:

> The Board finds that a medium secure milieu is no longer appropriate for [the appellant]. The live issues are those of risk and trust. Secondarily, but also important is the availability of programming, which by the nature of maximum security will be more accessible to [the appellant] in Oak Ridge. Ms. Fraser, on behalf of her client, submitted that the submissions of the other parties amount to "writing off" [the appellant]. The Board is of the view, that this is not the case, given [the appellant's] proven ability in the past, to progress in areas of education, behaviour and participate appropriately in programming and activities, that he could again form a more positive therapeutic alliance with those charged with the responsibility of caring for him. The Board has found that this can be best accomplished in a maximum secure facility, with a maximum amount of structure and attention paid to the challenges which he presents.

12 The Board found that although the appellant could be managed within a medium secure environment, this was not the most suitable setting for him because of better programming opportunities at Oak Ridge, given that the appellant's off-ward activities at St. Thomas have been terminated.

13 The Review Board further ordered that St. Thomas permit the appellant to be transferred for a psychosexual assessment.

B. *Court of Appeal*, [2002] O.J. No. 958 (QL)

14 A unanimous Court of Appeal for Ontario dismissed the appellant's appeal from the bench. The court stated, at para. 7:

> In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (2001), 158 C.C.C. (3d) 325 at 333-337 this court held that the

> judgment of the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)* [[1999] 2 S.C.R. 625] did not alter this court's decision in *Pinet v. Ontario* (1995), 100 C.C.C. (3d) 343 to the effect that "the least onerous, least restrictive" test does not apply to conditions imposed under clauses (*b*) and (*c*) of s. 672.54. [Emphasis added.]

15 The court concluded that the Board's decision could reasonably be supported by the evidence and that the Board took the proper considerations into account when reaching its decision.

16 The Court of Appeal declined to accept the fresh evidence offered by the appellant regarding changes in his condition. In the court's view, the proposed evidence did not meet the applicable admissibility conditions and was more properly admissible in the appellant's next review by the Review Board. No appeal is taken from that aspect of the Court of Appeal's decision.

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 parties were subsequently granted leave to file additional evidence of legislative fact in relation to the constitutional questions. This was done.

V. Analysis

19 The principles of fundamental justice require that the liberty interest of individuals, like the appellant, who have been found not criminally responsible ("NCR") for a criminal offence on account of mental disorder be taken into account at all stages of a Review Board's consideration. The objective is to reconcile the twin goals of public safety and treatment. In this process of reconciliation, public safety is paramount. However, within the outer boundaries defined by public safety, the liberty interest of an NCR accused should be a major preoccupation of the Review Board when, taking into consideration public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society, it makes its disposition order.

20 Thus, the Court, in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, interpreted s. 672.54 of the *Criminal Code* to require that persons found NCR be granted an absolute discharge unless the court or a review board is able to conclude that the individual poses a significant risk to the safety of the public. Having thus construed the intention of Parliament, the Court rejected the challenge to the constitutional validity of Part XX.1 of the *Criminal Code* brought under s. 7 of the *Canadian Charter of Rights and Freedoms.* It is because the appellant claims that his liberty interests were given short shrift by the conditions of detention considered appropriate by the Review Board in this case that the s. 7 *Charter* challenge has been revived.

21 As stated in *Tulikorpi, supra*, released concurrently, the Court holds that, even where a risk to the public safety is established, the conditions of the disposition

order are to be "the least onerous and least restrictive to the accused" consistent with the level of risk posed considering the mental condition of the NCR accused, the objective of eventual reintegration into the community and his or her other needs.

22 In *R. v. Owen*, [2003] 1 S.C.R. 779, 2003 SCC 33, the Court acknowledged the expertise of the members appointed to Review Boards, and established that their views of how best to manage the risks posed by a particular NCR accused should not be interfered with so long as the conditions of detention lie within a range of reasonable judgment.

23 The present appeal requires the application of the general principles affirmed in these cases, but with a new twist. Unlike *Owen*, the Review Board's decision here proceeded on the basis of an error of law. Unlike *Tulikorpi*, the Review Board here did not accept that the conditions of the appellant's continued detention were required by s. 672.54 of the *Criminal Code* to be "the least onerous and least restrictive" of the appellant's liberty after taking into consideration the other factors set out in that section. The Review Board used its expertise, therefore, to structure a disposition order that rested on a faulty legal foundation.

A. *Standard of Review*

24 Parliament has spelled out in s. 672.78 of the *Criminal Code* the precise standard of appellate review, namely that the court may set aside an order of the Review Board only where it is of the opinion that:

(a) the decision is unreasonable or cannot be supported by the evidence; or,

(b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or,

(c) there was a miscarriage of justice.

25 *Owen*, *supra*, was decided under the first branch of this power of appellate review. The present case engages the second branch. Given that the Review Board disposition order was based on a wrong decision on a question of law, as decided in *Tulikorpi*, can it be said that no substantial wrong or miscarriage of justice has occurred? A miscarriage of justice is itself a "substantial wrong" of course, but not all "substantial wrongs" rise to the level of a miscarriage of justice. Effectively, therefore, an error of law having been established by the appellant, the onus shifts to the respondent Crown to attempt to salvage the Review Board order on the basis that no "substantial wrong" was done.

26 In my view, for the reasons that follow, the Crown did not discharge this onus. Indeed, the reasons of the Review Board in this case afford an example of the difficulties encountered if the "appropriateness" of the disposition order is not anchored in the liberty interest of the NCR accused when applying the four factors specified in s. 672.54, namely the safety of the public, the mental condition of the NCR accused, his "other needs", and his potential reintegration into society.

27 The job of the appellate court is not to reweigh the evidence, nor to substitute our views for those of the Review Board. We accept the findings of the Review Board with regard to the appellant and other relevant circumstances, which are

supported by the evidence. The problem is that the result was skewed by the Review Board's error of law.

28 In my view, the reference to no "substantial wrong" in s. 672.78 requires the party seeking to uphold the order (here it is the Crown) to satisfy the appellate court that a Review Board, acting reasonably, and properly informed of the law, would necessarily have reached the same conclusion absent the legal error.

29 Neither the respondent Crown nor the respondent Administrator of St. Thomas Psychiatric Hospital has satisfied this onus. That being the case, we cannot say that no substantial wrong was done. The appellant is therefore entitled to a re-hearing.

B. *Significant Threat to the Safety of the Public*

30 Much of the Review Board's decision is not controversial. After considering the evidence, the Review Board quickly concluded that the appellant was a continuing and significant threat to the safety of the public. His reintegration into the community could not be contemplated in the near term. He was therefore not a suitable candidate for an absolute discharge or a conditional release. Accordingly, his continued detention in hospital is required, and the task remaining for the Review Board was to craft "appropriate" conditions of that detention.

C. *The Review Board Found That Detention in a Maximum Security Hospital Was Not Required for Public Safety*

31 The appellant has been incarcerated in various mental hospitals in Ontario for more than 27 years. The Review Board noted at the outset that he has exhibited no

signs of violence since 1987, is not an escape risk, and presents a danger neither to himself nor others. He is not psychotic. Further, the Review Board at the outset acknowledged that maximum security is not "the only level of security capable of containing" the appellant. Nevertheless, this result is, in their view, dictated by "other factors":

> Although [the appellant] has not been overtly violent, by way of being assaultive and he has not shown that he is an elopement risk, such that maximum security is the only level of security capable of containing him, there are other factors which the Board feels are equally important in his case which necessitate his return to the structure offered within maximum security. [Emphasis added.]

32 These "other factors" ought to have been put into the balance against the liberty interest of the appellant to determine whether the package of conditions, taken in their entirety, could reasonably be regarded as the "least onerous and least restrictive" conditions of detention appropriate in the circumstances.

33 The Review Board took a different approach. In its view, the purpose of a medium or minimum security hospital is to assist the reintegration of an NCR accused into the community. Reintegration requires a certain level of confidence and trust between the hospital and the NCR accused. In the case of the appellant, trust was not present. Therefore the appellant was not a candidate for reintegration. As such, it was "appropriate" to accept the recommendation of the Administrator of the St. Thomas medium security hospital to return the appellant to the Oak Ridge maximum security hospital.

34 The premise of this argument is that the unique role of a medium security hospital is to function as a sort of extended halfway house in the "cascade" between

maximum security and reintegration of an NCR accused into the community. Such an approach excludes from consideration any lesser liberty interest of the NCR accused. As Dr. John Bradford, currently Clinical Director of the Integrated Forensic Program at the Royal Ottawa Health Care Group, testified in the supplementary evidence on the constitutional question, "[e]ven if an NCR accused's progress appears slow, and requires a long term of detention in a medium security facility, that fact alone is not a basis to transfer the patient to a maximum security facility, where incremental increases in liberty are not possible."

D. *Factors Found by the Review Board to Favour the Appellant's Return to Maximum Security*

35 In the order of priority listed by the Review Board, the "other factors . . . equally important" in justifying the return of the appellant to maximum security were:

(i) The Appellant's Credibility Problem

- "[He] was seen handling another patient's pants and was believed to have taken [$20.00] from the patient. He admitted taking the money at first, but later retracted his admission."

"In April of 1998, [he] brought a screwdriver on the ward from the workshop at the Vocational Centre. When he produced the screwdriver, he said that he had forgotten to remove it before coming back to the ward."

"A lighter belonging to a staff member went missing after it was left in the smoke room. [The appellant] claimed to have found the missing lighter in a toilet paper dispenser."

- He acknowledged that he "manufactured or overdramatized" some of the allegations he had made about a sexual relationship with one of his nurses.

- The appellant purchased a computer and, when told it would have to be inspected, became angry and ordered it returned. Later he said he had returned it because he thought it was unsatisfactory.

36 The Review Board noted that the screwdriver and the lighter (together with a small knife thrown by the appellant onto the hospital roof and some pills "found" by the appellant on other occasions) were objects that "could be dangerous or unsafe". The Review Board does not actually make a finding that the appellant lied about any of these incidents (except a few matters admitted by the appellant himself, discussed below) which the Review Board acknowledged "may seem petty and minor" when viewed in isolation. It was the series of incidents taken collectively that concerned the Review Board.

37 The Review Board had the advantage of hearing the witnesses, including the appellant, and we accept its finding that the appellant is not a credible person.

(ii) <u>The Appellant's History of Involvement with Female Staff</u>

38 The appellant seems to have had complex romantic involvements (or fantasies) involving female staff members for the past 20 years, listed by the Review Board as including:

- receiving visits and correspondence from the female employee of the St. Thomas Psychiatric Hospital from 1985-1989;
- becoming emotionally involved with a female recreationist, with [the appellant] reporting sexual fantasies and sharing of sexual thoughts (1989);
- becoming "sexually infatuated" with a female senior clinician, and relenting after clear limits were set on their relationship;
- from 1992-1993 starting an "intense and covertly sexual relationship with a female employee";
- in 1992, declaring his love for a nurse assigned to him, and subsequently, befriending the husband of the nurse, who "has remained supportive to him until this time".

39 It is common ground that this sexual misconduct, if it occurred, was consensual.

40 The principal witness for St. Thomas Psychiatric Hospital in these matters was Dr. William Komer, who acknowledged that any intimate relationships, if established, would be contrary to the professional duties of the female caregivers. It is the appellant, after all, who is the person suffering from the mental disorder.

(iii) <u>The Appellant's Manipulative Behaviour Towards Mr. and Mrs. Blackwell</u>

41 Between 1992 and 1997, the appellant was befriended by one of his primary caregivers, a nurse, and subsequently by her husband. The nurse developed what the

College of Nurses described as a "'mothering' relationship" towards the appellant which the hospital wished to discourage. In its view, professional relationships had been blurred. Her husband, recently retired, stepped into the gap and spent hundreds of hours with the appellant, at times visiting him on several occasions a week and taking him on outings, sometimes accompanied by his wife. These included such activities as a trip to Port Stanley, where the appellant went swimming; a steak dinner at a restaurant in St. Thomas; a trip to see some animals on a hiking trail; a visit to a park, where the appellant fished; a visit to a winery and a drive to look at old houses.

42 The couple, who discussed the possibility of adopting the appellant, voluntarily set aside about $7,000 for his education. Eventually, the friendship soured in part because the Blackwells concluded that the appellant's "progress had stopped, [evidenced by] his withdrawal from patient council, in resuming smoking, in becoming involved with a copatient and . . . [in] not holding up his end of the bargain".

43 The appellant subsequently alleged in a letter to the Blackwells that he and Mrs. Blackwell had conducted an inappropriate sexual relationship which he threatened to report to the College of Nurses (or a journalist) unless the Blackwells handed over the $7,000. He subsequently admitted that some of the allegations in the letter were exaggerated or manufactured. The Blackwells viewed the appellant's conduct as an attempt at extortion, and reported it to the hospital authorities. The Review Board declined to find whether or not there had been a sexual relationship, but stated that "[e]ither way, [the appellant] has attempted to use a relationship with another person as a blunt instrument to get what he wants embellished by falsehood when it suits him."

44 The Review Board viewed this distasteful episode as an example of the trust and reliability concerns that made it unlikely the appellant could be reintegrated into the community in the foreseeable future.

(iv) The Appellant Is Not a Candidate for Community Access

45 The Review Board held that "[p]atients who are housed in medium security who enjoy indirectly supervised hospital and grounds privileges and community access, must be capable of a degree of trust before these privileges can be used. In [the appellant's] case, for reasons which are well-documented and were fully supported by the evidence heard, [the appellant] has been unable to maintain the level of trust which he enjoyed for a period of time at this facility."

46 In my view, with respect, the proposition that NCR detainees who are not at present candidates for community access should, by reason of that fact alone, be detained under conditions of maximum security, even though they do not present a risk to the safety of the public themselves, is clearly not compatible with the "least onerous and least restrictive" requirement of s. 672.54.

(v) Lack of Programs

47 The Review Board concluded that while the "live issues" were those of risk and trust, secondarily, "but also important" was the availability of programming, which, by virtue of the cancellation of his off-ward privileges, was no longer available to the appellant at St. Thomas.

E. *Factors Not Considered by the Review Board in Its Decision to Return the Appellant to Maximum Security*

48 In my view, with respect, the error of law committed by the Review Board caused it to overlook at least three important factors:

(i) Whether the Return to Maximum Security Was the "Least Onerous and Least Restrictive" Disposition of the Appellant's Case

49 While Dr. Komer in his testimony referred at times to "the least onerous, least restrictive" conditions of detention, nowhere in the Review Board's reasons is there any reference to the "least onerous and least restrictive" requirement in relation to the conditions of its disposition; nor is there any consideration of the appellant's liberty interests. The Review Board seems to have concluded that such considerations had no bearing on the "appropriateness" of the conditions they set. In taking this position, it no doubt relied on the previous jurisprudence of the Ontario Court of Appeal, discussed in *Tulikorpi*, *supra*, but in doing so, it erred in law.

(ii) The Cancellation of the Appellant's Off-ward Privileges Were the Result — Not the Cause — of the Hospital's Recommendation

50 As stated, the Review Board placed weight on its view that, as the appellant no longer had access to off-ward programs at St. Thomas, he would be better off at Oak Ridge. The Ontario Court of Appeal, in upholding the Review Board's decision, also laid stress on this factor.

51 In fact, however, as Dr. Komer made clear in his testimony (and as the Review Board acknowledged in passing), the appellant's off-ward privileges were

terminated "given the hospital's recommendation that [the appellant] be returned to maximum security". As Dr. Komer testified:

> Around the time we decided that we were going to send him to Penetang [Oak Ridge Division], and even before that because I can't remember exactly when we had the pre-board conference, but we had cancelled his privileges thinking that if we are looking at maximum security, we're looking at [the appellant] is not progressing, we should be looking at maximum security and keeping him in medium secure without any privileges until the Board can convene and that's why he has not had any off-ward privileges.

52 In my view, with respect, the hospital administrator could not buttress his case to put the appellant in maximum security by reducing his liberty at the medium security institution to the point where even the maximum security hospital could be portrayed as less restrictive than the medium security hospital.

(iii) There Was Evidence of Other Medium Security Institutions That Met the Criteria Formulated by the Review Board

53 The appellant indicated a willingness to be transferred to either of two other medium security institutions rather than be returned to Oak Ridge, namely the medium security hospitals in Brockville or Whitby.

54 Dr. Komer testified that the transfer to Oak Ridge will likely have a negative impact on the appellant.

55 Dr. Komer acknowledged that Whitby offered a range of programs and facilities more extensive than St. Thomas could offer within a medium security perimeter. The Review Board found there had been a breakdown in the trust relationship

between St. Thomas and the appellant, but in its search for a more structured environment, it did not address in its reasons other potential medium security facilities for which the appellant had requested consideration.

F. *Conclusion*

56 I accept the Review Board's view that the appellant is untruthful and manipulative, that he has a history of hostility and/or inappropriate behaviour towards female staff, that he behaved abominably towards the Blackwells who had befriended him, that he is not a candidate for early access to the community and that he would benefit from some of the programs at Oak Ridge. Nevertheless, none of these considerations was weighed in the balance against the appellant's liberty interest. At no point did the Review Board consider (no doubt because it did not think itself obliged to consider) whether the package of conditions that included returning the appellant to Oak Ridge was the "least onerous and least restrictive" order appropriate under the circumstances. To the extent the Review Board took into account the fact the appellant's off-ward privileges at St. Thomas had been cancelled, the risk of a substantial wrong to the appellant is increased, because cancellation was made by the hospital on the assumption the appellant would be sent back to Oak Ridge, which of course was the essential point in issue for the Review Board to determine. For these reasons, it cannot be said that the Review Board, if properly informed of the law and acting reasonably, would necessarily have reached the same conclusion. Therefore it cannot be said that the error of law resulted in "no substantial wrong". Applying s. 672.78(1)(*b*) of the *Criminal Code*, the appeal is accordingly allowed.

VI. Disposition

57 The resolution of the "least onerous and least restrictive" issue in favour of the appellant knocks the basis out from under his *Charter* challenge, which is rejected for the reasons previously set out by the Court in *Winko, supra*.

58 As to the merits of the appeal, as noted at the outset, the parties were advised by order dated November 7, 2003 that the appeal was allowed with reasons to follow. The judgment of the Court of Appeal was set aside. An expedited hearing before the Ontario Review Board was ordered in accordance with the reasons to follow. The order setting aside the judgment of the Court of Appeal was stayed pending the Board's decision on the expedited hearing. These reasons make no change in that disposition.

59 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.

Solicitors for the appellant: Suzan E. Fraser; Falconer Charney Macklin, Toronto.

Solicitor for the respondent the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondent the Administrator of St. Thomas Psychiatric Hospital: Paterson, MacDougall, Toronto.

Solicitor for the intervener the Attorney General of Canada: Department of Justice Canada, Toronto.

Solicitors for the interveners the Ontario Review Board and the Nunavut Review Board: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition: Hiltz Szigeti, Toronto.