S.C.C. File No. 34930

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

BRIAN CONCEPTION

Appellant (Respondent)

-and-

HER MAJESTY THE QUEEN

Respondent (Respondent)

-and-

THE PERSONS IN CHARGE OF THE CENTRE FOR ADDICTION AND MENTAL HEALTH and THE MENTAL HEALTH CENTRE PENETANGUISHENE

Respondents (Appellants)

-and-

ATTORNEY GENERAL FOR CANADA
PROCUREUR GENERAL du QUEBEC
MENTAL HEALTH LEGAL COMMITTEE
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Jill R. Presser, Schreck Presser LLP
Anita Szigeti
Joanna Weiss
Bernadette Saad
c/o Schreck Presser LLP
6 Adelaide Street East, 5th Floor
Toronto, Ontario, M5C 1H6
Tel: (416) 977-6268
Email: presser@schreckpresser.com

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

Guy Régimbald
Address
Gowling Lafleur Henderson LLP
160 Elgin Street
26th Floor
Ottawa, Ontario
K1P 1C3
Telephone: (613) 786-0197
FAX: (613) 563-9869
E-mail: guy.regimbald@gowlings.com

Agents for the Intervener, Criminal Lawyers' Association of Ontario

Frank Addario Paul Burstein **Address** Addario Law Group 171 John Street Suite 101 Toronto, Ontario M5T 1X3 Telephone: (416) 979-6446 FAX: (866) 714-1196 E-mail: faddario@addario.ca Counsel for the Appellant	Raija Pulkkinen **Address** Sack Goldblatt Mitchell LLP 500 - 30 Metcalfe Street Ottawa, Ontario K1P 5L4 Telephone: (613) 235-5327 FAX: (613) 235-3041 E-mail: rpulkkinen@sgmlaw.com Agents for the Appellant
Grace Choi Riun Shandler Dena Bonnet **Address** Attorney General of Ontario 720 Bay Street 10th Floor Toronto, Ontario M7A 2S9 Telephone: (416) 326-4231 FAX: (416) 326-4656 E-mail: grace.choi@ontario.ca Counsel for the Respondent	Robert E. Houston, Q.C. **Address** Burke-Robertson 441 MacLaren Street Suite 200 Ottawa, Ontario K2P 2H3 Telephone: (613) 236-9665 FAX: (613) 235-4430 E-mail: rhouston@burkerobertson.com Agents for the Respondent

Jonathan C. Lisus
Eric R. Hoaken
Ian C. Matthews

Lax O'Sullivan Scott Lisus LLP
145 King Street West
Suite 2750
Toronto, Ontario
M5H 1J8
Telephone: (416) 598-1744
FAX: (416) 598-3730
E-mail: jlisus@counsel-toronto.com

James Thomson

Bersenas Jacobsen Chouest Thomson Blackburn LLP
33 Yonge Street, Suite 201
Toronto, Ontario
M5E 1G4
Telephone: (416) 982-3806
FAX: (416) 982-3801

Counsel for Person in Charge of Centre for Addiction and Mental Health

Marie-France Major

Supreme Advocacy LLP
397 Gladstone Avenue
Suite1
Ottawa, Ontario
K2P 0Y9
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agents for Person in Charge of Centre for Addiction and Mental Health

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PART I – OVERVIEW

1. This appeal raises the issue of how vulnerable mentally disordered accused are to be treated in the criminal justice system. In particular, this Honourable Court is asked to consider whether courts have jurisdiction to supervise delays in implementation of orders to give treatment to accused persons who are unfit to stand trial ["UST"] and who are typically detained in jail until a hospital bed becomes available. The orders under consideration are treatment orders under s. 672.58 of the *Criminal Code*, colloquially known as "make fit" orders. These are orders for treatment to restore UST accused to a state of fitness that would allow them to continue with their criminal trial. There are a number of statutory prerequisites to the issuance of these treatment orders. One of them, under s. 672.62(1)(a), is that the person in charge of the hospital that will provide the treatment must "consent." The elements of the consent required are not explicitly defined. At issue here is the nature of the consent requirement: is facility "consent" limited to consent to provide the treatment that would render the UST accused fit? Or, is facility "consent" broader, allowing the hospital to consent to the timing of the commencement of the treatment order? The answer to this question determines whether it is the court or the hospital that decides when a treatment order will take effect.

2. The Criminal Lawyers' Association of Ontario ["CLA"] intervenes in support of the position of the Appellant. The CLA takes the position that it must be judges who decide when a treatment order will take effect. Facility "consent" in s. 672.62(1)(a) must be limited to "consent" to provide the treatment, identified under s. 672.59, necessary to render the UST accused fit. An interpretation of "consent" that would allow psychiatric facilities to "consent" to the timing of the commencement of the treatment order would necessarily breach the right of the UST accused under s.7 of the *Charter* in a manner that is not saved by s.1.

3. In support of this position, the CLA focuses on the role of counsel in relation to delays in treatment of the UST accused engendered by either outright refusal or provisional consent of psychiatric hospitals based on bed-spacing issues as follows:

(1) to highlight the adverse, potentially dangerous effects on the UST accused of delays in implementing treatment orders, particularly where the UST accused, who is still presumed innocent, must wait in jail for treatment;

(2) to highlight the problem of lack of instructions and the potential for adverse effect on the solicitor-client relationship were counsel to act against the wishes or "instructions" of UST clients in deciding whether to seek to enforce treatment orders. These problems mean that counsel often cannot seek to enforce treatment orders; and

(3) to submit that in light of these factors (the deleterious effects of waiting in jail for treatment coupled with the uncertain and constrained role that counsel to the accused play in this context) the court has to maintain its supervisory role over treatment orders. The CLA takes the position that the requirement of facility consent to the *timing* of treatment orders before treatment orders may be made should be removed as a criterion.

PART II and III – ISSUES and ARGUMENT

(1) Deleterious Effects of Delays on UST Accused

4. UST accused who are detained in jails while waiting for forensic beds to become available instead of being remanded directly to treatment facilities suffer negative medical and legal consequences. This is because in jails they have inadequate or non-existent access to mental health support services, psychiatric care, treatment, or rehabilitative programming. Jails simply do not have the infrastructure, resources, or trained personnel to be able to meet the health needs of acutely

mentally ill individuals.[1] Overcrowding in jails means that the human and physical resources are not there to ensure proper care for inmates with special mental health needs.[2] UST accused may spend their time in custody in medical segregation or protective custody.[3] In prison, they are more frequently victims of intimidation, violence and/or self-destructive behaviour, including suicide, than other inmates.[4] These conditions of imprisonment mean that the mental health needs of UST accused tend to continue untreated while in custody, to their detriment.[5]

5. This terrible situation for UST accused in jails has a number of deleterious medical consequences. These include a worsening of the mental health condition and potentially greater treatment resistance. These medical consequences, in turn, may impede the ability of the UST accused to become fit even once treatment begins.[6] Herein lie the deleterious legal consequences for the UST accused. Deterioration caused by delay means that the road back to fitness will be harder, will take longer and may well prove more elusive. This further delays the UST accused's trial. The accused, the witnesses, the victim and the justice system as a whole must wait until fitness is restored so that the trial can be heard.

6. It is in the interests of justice and certainly in the interests of the UST accused legally to have criminal trials heard expeditiously. The high cost of delayed trials is constitutionally recognized. Speedy justice is enshrined in s. 11(b) of the *Charter*. In the context of s.11(b), but applicable here, this Honourable Court has spoken time and again about the cost of delays to accused persons,

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[1] Affidavit of Eduardo Almeida, Appellant's Record, Vol. 2 at pp. 2 -3, paras.6- 7; Affidavit of Linda Ogilvie, Appellant's Record Vol. 3, at p. 132, para. 12 and Ministry of Community Safety and Correctional Services: Ontario Correctional Services College Training Manual, Exhibit C, Affidavit of Linda Ogilvie, Appellant's Record, Vol. 3 at p. 143.
[2] Affidavit of Eduard Almeida, Appellant's Record, Vol. 2 at p. 4, para. 11.
[3] Affidavit of Linda Ogilvie, Appellant's Record Vol. 3, at pp. 130 – 133, paras. 5, 10, 13-14.
[4] Factum of the Appellant, at paras. 16 – 20.
[5] Affidavit of Eduardo Almeida, Appellant's Record Vol. 2, at p. 2, para. 5; Report of the Standing Committee on Public Safety and National Security: Mental Health and Drug and Alcohol Addiction in the Federal Correctional System, Exhibit B, Affidavit of Eduardo Almeida, Appellant's Record Vol. 2, at pp. 46-47.
[6] Factum of the Appellant, at para. 29.

witnesses and victims. In addition to safeguarding the liberty interest of accused persons by protecting their physical freedom against unduly lengthy incarceration:

> . . . s. 11(b) explicitly focuses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.
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> Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest.[7]

7. The serious medical and legal consequences of delay in commencement of treatment under "make fit" orders are concerns that speak to the need for minimization of delay. For the reasons that follow, it is often the case that defence counsel is not in a position to assist with enforcement of treatment orders.

(2) Challenges for Defence Counsel and Adverse Effects on the Solicitor-Client Relationship Mean that Counsel Cannot Seek to Enforce Treatment Orders

8. Representing UST accused poses particularly thorny and challenging problems for criminal defence lawyers. This means that counsel cannot seek to enforce treatment orders without threatening the lawyer-client relationship. As a result, courts alone can enforce treatment orders.

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[7] R. v. *Askov*, [1990] 2 S.C.R. 1199 at paras. 24, 43 – 47.

9. The challenges for defence counsel are exacerbated in the context of treatment orders and especially where the implementation of treatment orders is delayed by unavailability of forensic beds or lack of hospital consent to timing. Defence counsel are placed in the position of standing by doing nothing while the UST client gets sicker in jail waiting for a treatment order to commence. Or, counsel are in a position, of acting uninstructed, in what they believe to be the UST client's best interests in seeking to enforce a treatment order (for example, by seeking an order for *habeas corpus*[8]). The first option seems inhumane but may accord with the client's wishes. The second option may be best from the perspective of the justice system because it aims to secure restorative treatment as soon as possible, thereby making the accused fit to stand trial. However, this course is uninstructed and may run counter to the client's wishes. As such, it may corrode trust and destroy the relationship between lawyer and client. When treatment orders are routinely delayed by bed unavailability, as they are in Ontario, resulting problems in solicitor-client relationships become systemic problems of concern for the repute of the administration of justice.

10. UST accused are, by definition, unable to instruct counsel.[9] However, the UST client may express his/her wishes with respect to receiving treatment. Often the UST accused does not wish to be treated. Treatment orders under s. 672.58 operate as an exception to the general rule that informed consent is required to treat.[10] Under s. 672.62(2), "make fit" treatment orders explicitly do **not** require the consent of the UST accused who will be subject to the order. Nor do they require the consent of a substitute decision-maker. In other words, "make fit" treatment orders may be made over the objections of the UST accused, and the treatment itself may have to be forced over the objections of the UST accused.

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[8] Examples of cases in which counsel sought enforcement of fitness assessment orders where the clients were waiting in jail for hospital beds through *habeus corpus* include: R. *v. Hussein*, [2004] O.J. No. 4594 (S.C.) and R. v. *Rosete*, [2006] O.J. No. 1608 (C.J.); [2007] O.J. No. 3273 (C.A.).
[9] S. 672.23 of the *Criminal Code*; *R. v. Taylor*, [1992] O.J. No. 2394 (C.A.); *R. v. Steele*, [1991] A.Q. No. 240 (Que.C.A.).
[10] *Criminal Code of Canada*, R.S.C., 1985 c. C-46, s. 672.55; *Health Care Consent Act*, S.O., 1996, Chapter 2, s. 10.

11. As a result, delays in commencement of treatment orders are often, counter-intuitively, welcomed by UST accused who do not want to be treated. Counsel is thereby left in a quandary: should counsel respect the client's wishes and stand by doing nothing while the client waits for treatment in jail, deteriorating and exposed to danger? Or should counsel act without instructions, against the client's wishes, in what counsel believes to be the client's best interests? This problem worsens the longer the order remains unenforced: as the UST client languishes in jail waiting for the order to be enforced when beds become available, s/he gets sicker and sicker, and less and less capable of instructing the lawyer. The lawyer's dilemma is further complicated by the fact that a person may be unfit or incompetent in respect of some matters and not incompetent in respect of others, the concept of competence is fluid and dynamic, competence fluctuates and the line between competence and incompetence may be hard to define.[11]

12. The challenge for the lawyer representing a UST accused who is waiting in jail for a forensic bed so that his/her treatment order can take effect is aptly described as follows:

> Adherence to conventional informed consent practice in such cases is not only painful to the lawyer but may be morally irresponsible. The dilemma is plain: it may be morally wrong to intervene, and it may be morally wrong not to intervene.[12]

13. There is a recognized lack of uniformity in approach to lawyering for clients with mental health issues in the usual authorities: codes of professional conduct, academic treatises/articles and statutory and case law provide limited, contradictory or inadequate assistance.[13]

14. Codes of professional conduct offer general rules but do not unambiguously set out how lawyers should act for clients who are not able to instruct them. For example, the *Code of Professional*

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[11] Paul R. Tremblay, "On Persuasion and Paternalism: Lawyer Decision Making and the Questionably Competent Client" [1987] Utah L. Rev. 515 at p. 536. See also statutory recognition, in the context of capacity to consent to treatment, that a person may be capable in respect of some treatments and not others and that capacity may fluctuate over time, in ss. 15 and 16 of the *Health Care Consent Act.*

[12] Tremblay, *supra*, at p. 540. See also Allan S. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1981- 1982), 27 McGill L.J. 196 at p. 197.

[13] Melody Martin, "Defending the Mentally Ill Client in Criminal Matters: Ethics, Advocacy, and Responsibility" (1993-1994) 52 U. Toronto Fac. L. Rev. 73 at pp. 79 – 81.

Conduct for British Columbia[14] and the *Rules of Professional Conduct* of the Law Society of Upper Canada[15] endorse client-instructed advocacy[16]; advise lawyers to try to maintain "normal" lawyer-client relationships with clients whose ability to make decisions is impaired because of mental disability if possible[17]; ask lawyers to respect client confidentiality[18]; and admonish lawyers not to waive or abandon the client's legal rights or defences without the client's informed consent[19]. Both codes advise lawyers to seek appointment of a representative for the client who is legally incapable, a procedure not commonly employed in the criminal law context. The B.C. Code also authorizes counsel to act, uninstructed, on the incapable client's behalf if failing to act could result in imminent and irreparable harm.[20] These ethical guidelines for lawyers are difficult to interpret and apply when representing UST accused. Additionally, they may, and often do, conflict with each other. They offer little assistance where the client disavows mental illness, "instructs" counsel not to raise or pursue mental health issues, or indicates a wish that is not in the client's best interests as understood by the lawyer.[21]

15. The statutory provisions governing fitness to stand trial and the case law interpreting the provisions only relate to the determination of whether an accused is fit to stand trial. They offer little guidance or assistance on the relationship between the lawyer and the client or the lawyer's role as such, when fitness is in issue.[22] There is no case law considering defence counsel's obligations to a UST client awaiting implementation of a treatment order in jail.

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[14] *Code of Professional Conduct for British Columbia*, Law Society of British Columbia, 2013, [as amended], online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/page.cfm?cid=2578&t=Table-of-Contents > ["B.C. Code"].
[15] *Rules of Professional Conduct*, Law Society of Upper Canada, 2000, [as amended], online: The Law Society of Upper Canada <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>. ["LSUC Rules"].
[16] B.C. Code rule 2.1-3(f); LSUC Rules, rules 2.02(6) and 4.01(1) and commentary to each rule.
[17] B.C. Code, rule 3.2-9; LSUC Rules, rule 2.02(6) and commentary to this rule.
[18] B.C. Code, rule 3.3-1; LSUC Rules, rule 2.03(1)
[19] B.C. Code, rule 2.1-3(f); LSUC Rules, commentary to rule 2.02(6), commentary to rule 4.01(1)
[20] B.C. Code, commentary 2 to rule 3.2-9
[21] Manson, *supra*, note 12 at pp. 196-7, 216 – 220.
[22] Martin, *supra*, note 13 at p. 81.

16. The jurisprudence seems clear that, as an officer of the court, counsel is entitled and may even be bound to raise the issue of fitness if s/he believes that the client is unfit.[23] What remains undecided is whether counsel is entitled to raise the issue of fitness against the wishes of the client.[24] This is analogous to the issue of whether counsel is entitled to seek to enforce treatment orders against the wishes of the UST client. The caselaw has no answers on point.

17. The academic literature has approached the ethical issues in relation to lawyering in the absence of informed consent for the UST client. Two main models have been proposed to guide lawyers representing UST accused. One model suggests that the lawyer should substitute his/her judgment or act in what the lawyer perceives to be the client's best interests.[25] Some proponents of this model have suggested that the lawyer employ an "ethic-of-care moralism" approach when making decisions about what is in the unfit client's best interests.[26]

18. The other approach for lawyers representing UST accused is one which privileges client-centered and client-instructed advocacy. The goal is to respect the client's autonomy and dignity in making decisions.[27] Where the client is not capable of instructing the lawyer, adherence to the client's choices should remain the dominant approach to the extent possible.[28] The lawyer should undertake all reasonable efforts to ascertain the client's wishes and carry on a functional lawyer-client relationship.[29] This model allows for the personal empowerment of the client, as opposed to this approach considers to be the paternalistic substitute decision model.[30]

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[23] *R. v. Szostak*, 2012 ONCA 503 at para. 69.
[24] *Szostak, supra*, at para. 71.
[25] Martin, *supra*, note 13 at pp. 97 – 102; John D. King, "Candor, Zeal and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant," (December 2008) 58 American Univ. Law Review 2 at pp.257 – 264.
[26] Josephine Ross, "Autonomy Versus a Client's Best Interests: The Defence Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defence," (1997-1998) 35 Am. Crim. L. Rev. 1343 at pp. 1381 – 1384.
[27] Michel Proulx and David Layton, "Ethics in Canadian Criminal Law" (Irwin Law, 2001) at pp. 153 – 154; Diana A. Romano, "The Legal Advocate and the Questionably Competent Client in the Context of a Poverty Law Clinic," (1997) 35 Osgoode Hall L.J., pp. 737-761.
[28] Tremblay, *supra*, note 11 at p. 519.
[29] Proulx and Layton, *supra*, note 27 at p. 153.
[30] Romano, *supra*, note 27 at p. 16.

19. Defence counsel who act on the basis of substituted judgment or perceived best interests may act against the wishes of the client to pursue enforcement of a treatment order (for example, through *habeas corpus*). This approach may risk destroying the trust and confidence which are the hallmarks of the lawyer-client relationship.[31] However, it should not be assumed that counsel who chooses to act in the "best interests" of the accused would necessarily consider enforcement of the treatment order to be the preferred course. Lawyers, who use their own personal judgment to determine what is in the best interest of the accused, may determine that that is best accomplished by acting in accordance with the wishes of the accused. A best interests approach may lead to the conclusion that giving effect to the UST client's wishes serves the interest of the accused in more important ways than enforcement of the order for treatment would do. Either way, there is no guarantee that counsel to the accused would pursue any enforcement mechanisms respecting the treatment order. Respectfully, it would be a mistake for the Court to rely on any assumptions in this regard.

20. It is uncertain how lawyers should respond to UST accused waiting for treatments orders to start. However, the intervener CLA respectfully submits that this Honourable Court need not resolve the issue of how lawyers ought to approach representing UST accused in this context in order to determine this appeal. This is because either approach outlined above may result in a substantial number of counsels determining not to pursue a legal remedy to ensure that treatment orders are acted upon within a reasonable time. On either a best interests substituted judgment approach or on a client-centered approach, many counsel may well not pursue *habeas corpus* or other legal remedy. However counsel approach the job of representing UST accused, most often they will continue to languish in jail waiting for forensic beds, deteriorating.

21. It remains to the courts then, to supervise the enforcement of treatment orders.

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[31] *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177 at paras. 34, 35; *R. v. Neil*, [2002] 3 SCR 631 at paras. 12 -14.

(3) There Should be No Facility Consent to Timing of Treatment Orders

22. UST accused deteriorate and are exposed to danger in jail. Counsel is most often unable to help them access the treatment that has been ordered without destroying the solicitor-client relationship. For these reasons, it is the court alone that has the ability to ensure that treatment is provided in a timely manner. It is the court alone that has the obligation to ensure that treatment is provided or the s. 7 rights of the UST accused languishing in jail are breached. The UST accused is immediately at risk of indeterminate deprivation of liberty until fitness is restored. While detained in prison, the UST accused is at risk of deprivation of life and security of the person. These deprivations are not consistent with the principles of fundamental justice because they are contrary to a court order for treatment. For these reasons, the CLA respectfully submits that the consent requirement in s. 672.62(1)(a) must be interpreted as limited to whether the facility is prepared to administer the treatment. It should not include consent as to when treatment should begin. If hospitals can effectively stop or significantly delay an accused's access to court-ordered treatment, s.672.62 violates s. 7 of the *Charter* and is not saved by s. 1.

PART IV and V – COSTS and ORDER SOUGHT

23. The CLA does not seek costs and asks that no costs be awarded against it. The CLA also asks for leave to present 10 minutes of oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF SEPTEMBER, 2013.

Jill R. Presser, Anita Szigeti, Joanna Weiss & Bernadette Saad

Jill R. Presser
Anita Szigeti
Joanna Weiss
Bernadette Saad

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

PART VI – LIST OF AUTHORITIES

PART VII – LIST OF RELEVANT STATUTES

	Paragraph/s
Criminal Code of Canada, R.S.C. 1985, c. C-46.	1,2,10,22
Health Care Consent Act, S.O. 1996, CHAPTER 2.	10,11, FN11
Charter	2,6,22