COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Germaine***,
2009 YKCA 3

Date: 20090430
Docket: 08-YU604

Between:

Veronica Lydia Germaine

Appellant

And

The Government of Yukon

Respondent

And

Director of Public Prosecutions

Respondent

And

Na'Cho Nyak Dun First Nation

Respondent

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

D. Christie	Counsel for the Appellant
D. McWhinnie	Counsel for the Respondent Director of Public Prosecutions
S. Schorr	Counsel for the Respondent The Government of Yukon
Place and Date of Hearing:	Vancouver, British Columbia December 19, 2008

Place and Date of Judgment: Vancouver, British Columbia
April 30, 2009

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The question raised on this appeal is whether it is unreasonable or constitutionally impermissible to house a person found not criminally responsible for several violent crimes by reason of a mental disorder in a prison.

[2] On September 18, 2007, the appellant, Veronica Germaine, was found not criminally responsible for several criminal charges by reason of a mental disorder, and was remanded under the jurisdiction of the Yukon Review Board. On April 30, 2008, the Board found that she continued to pose a significant risk of significant harm to the public and that a custodial hospital disposition was the least onerous and least restrictive disposition. It ordered that the appellant be detained in the Whitehorse Correctional Centre ("WCC"), a designated "hospital" for the purpose of s. 672.1(1) of the *Criminal Code* (the "Order").

[3] The appellant's grounds of appeal focus on her detention at WCC. She maintains that her detention in WCC does not meet the requirements of s. 672.54 of the *Code*, was unreasonable, and violated her rights under ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*.

[4] In my opinion, the Order was not unreasonable, was not based on a wrong decision on a question of law, and was not a miscarriage of justice. The Board acted on a thorough review of all of the available evidence, applying the principles set out in s. 672.54 of the *Code*, which required it to balance the protection of the

safety of the public with the needs of the accused in finding the least onerous and least restrictive disposition. I am also of the opinion, in the circumstances of this particular case, taking into account the factors the Board was required to consider in s. 672.54 of the *Code*, and the specific conditions attached to the Order, the appellant's *Charter* rights were not infringed. It follows that I would dismiss the appeal.

Relevant Legislation

Criminal Code – Part XX.1 Mental Disorder

672.1(1) In this Part,

. . .

> "hospital" means a place in a province that is designated by the Minister of Health for the province for the custody, treatment or assessment of an accused in respect of whom an assessment order, a disposition or a placement decision is made;

. . .

672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, 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.

. . .

672.72(1) Any party may appeal against a disposition made by a court or a Review Board, or a placement decision made by a Review Board, to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.

. . .

672.78(1) 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 re-hearing, 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.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Hospitals designated for the custody, treatment or assessment of an accused, Y. M.O. 1993/011

Pursuant to section 672.1 of the *Criminal Code* (Canada), the Minister of Health and Social Services orders as follows:

1. The following be designated as hospitals for the custody, treatment or assessment of an accused in respect of whom an assessment order, a disposition, or a placement is made under the *Criminal Code* (Canada):

Whitehorse General Hospital,
Whitehorse, Yukon Territory

Mental Health Services, Health Canada,
Whitehorse, Yukon Territory

Whitehorse Correctional Centre,
Whitehorse, Yukon Territory

Constitutional History of the Legislation

[5] Part XX.1 of the *Code* was enacted after the Supreme Court of Canada in *R. v. Swain*, [1991] 1 S.C.R. 933, struck down as an infringement of s. 7 of the *Charter* former s. 542(2) of the *Code*, which provided for the automatic, indefinite detention of accused persons found to be “insane”. Part XX.1 of the *Code* 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”: see *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498 at para. 21.

[6] Part XX.1 was challenged as a violation of s. 7 of the *Charter* in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. The Supreme Court of Canada concluded that the scheme was constitutional because of the requirement 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 of safety to the public” (*Winko* at para. 3). Justice McLachlin (as she then was), for the majority of the Court, described the approach to be taken to an NCR accused person (at para. 42):

> By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, 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 NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and

> least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.

[7] In *Penetanguishene*, the Supreme Court of Canada again considered whether Part XX.1 (in particular s. 672.54(c)) infringed s. 7 of the *Charter*. The Court concluded that the “least onerous and least restrictive” requirement of s. 672.54 applied not only to the choice among the three potential dispositions of the case of an NCR accused person – absolute discharge, conditional discharge, or continued detention – but also to the particular conditions forming part of the disposition. Mr. Justice Binnie, for the Court said (at para. 3):

> [T]he *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.

[8] He said further (at para. 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 *[R. v.] Owen* [[2003] 1 S.C.R. 779, 2003 SCC 33] 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.

[9] Thus, the Court concluded (at para. 74) that s. 672.54, properly interpreted as applying the “least onerous and least restrictive” requirement to the conditions under which an NCR accused is detained, did not infringe s. 7 of the *Charter*, for the reasons given in *Winko*.

Standard of Review

[10] The Supreme Court of Canada also considered in *Penetanguishene* the process to be undertaken by an appeal court in reviewing a decision of a Review Board that is alleged to be unreasonable on an appeal under s. 672.78(1) of the *Code* (at paras. 71-73):

> 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.
>
> 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.
>
> 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.

Background to the Order

[11] On September 18, 2007, Judge K. Ruddy of the Yukon Territorial Court found the appellant not criminally responsible by reason of a mental disorder in connection

with criminal charges arising from a series of violent incidents occurring between May 2006 and April 2007. The offences included arson, assault with a weapon, aggravated assault, breaking and entering, and possession of a weapon for a dangerous purpose. Each incident occurred while the appellant was under the influence of alcohol or drugs, triggering her underlying psychological disorder. Judge Ruddy remanded the appellant to the Board for disposition, and she has remained under the Board's jurisdiction since that time.

[12] The Board has made four dispositions in respect of the appellant.

[13] The first hearing was on November 6, 2007. The Board determined that the appellant continued to pose a significant risk of significant harm to the public, and concluded that the appropriate disposition was a secure custodial hospital disposition, "that allows for a substantial degree of flexibility and which provides opportunities for [the appellant] to take advantage of the resources that are presently available in Yukon to assist her in dealing with her mental disorder and substance abuse problems."

[14] No forensic hospital resources were available either inside or outside Yukon. Whitehorse General Hospital does not have a secure psychiatric facility. Alberta Hospital in Edmonton, a psychiatric facility with which Yukon has contracted for psychiatric beds, had advised that its programs were not appropriate for the appellant's particular psychiatric disorders. The only secure designated "hospital" facility available for the appellant was WCC.

[15] As a consequence of WCC being the designated placement hospital, the Director of WCC was added as a party to the proceedings, and both the Director of Mental Health Services for Yukon and the Director of WCC were directed to develop a Plan for the appellant's "assessment, counselling, treatment and rehabilitation, which shall be aimed at furthering the [appellant's] rehabilitation and reintegration into society." The Board ordered that:

> The Director shall ensure that the Plan is consistent with the *Criminal Code* requirements that it be the least onerous and least restrictive as may be appropriate for the situation and needs of the [appellant] and for the protection of the public.

[16] The Board's order of November 6, 2007 also included the following conditions:

> 3. The Plan shall provide the [appellant] with ongoing counselling and treatment for alcohol and drug abuse and to help her address past traumas and personal abuse, including child abuse, physical and sexual abuse. It shall provide the [appellant] with liberal access to individual and group therapy opportunities, including appointments with Dr. Heredia, her psychologist, Bill Stewart, and to other therapists as the Directors consider advisable in consultation with those therapists. The [appellant] shall be given reasonable access to such educational upgrade opportunities as may be available. The Plan shall also provide the [appellant] with opportunities to develop an increased awareness of her aboriginal culture and identity. The Na'cho Nyak Dun First Nation, as a party to this proceeding, shall be given opportunities to assist in that process.
>
> 4. The Director of the Whitehorse Correctional Centre is responsible for adjusting security arrangements appropriate to its designated hospital status. The Whitehorse Correctional Centre shall develop and provide reasonable security that is least restrictive, least onerous while remaining reasonably consistent with the requirements of a secure hospital setting in accordance with the Plan. Such security arrangements shall enable the [appellant] to access the programs and treatment

> outlined in the Plan. The Directors may allow the [appellant] such absences from the hospital as necessary to attend therapeutic and rehabilitation programs arranged by them in accordance with the Plan.
>
> 5. Pursuant to s. 672.56 of the *Criminal Code* the Review Board hereby delegates to the Director of the Whitehorse Correctional Centre authority to increase or decrease the liberty of the [appellant] subject to the other provisions of this Disposition Order and otherwise in accordance with s. 672.54 of the *Criminal Code*. If the Director of the Whitehorse Correctional Centre decreases the liberties of the [appellant], he or she must promptly provide notice in accordance with s. 672.56(2) of the *Criminal Code*.

[17] On March 7, 2008, there was a second hearing. The Board found that the appellant continued to pose a significant risk of significant harm to the public, but, based on the evidence of the appellant's caregivers about her condition, and submissions from counsel concerning the legal implications of continuing to place her at WCC, it concluded that a continued hospital disposition, whether at WCC or any forensic psychiatric hospital, was not warranted.

[18] The opinion of the appellant's psychiatrist was:

> … a structured residential setting, one that provides 24-hour supervision, with appropriate opportunities for ongoing programming allowing the [appellant] to access rehabilitation, counselling, medical professionals and so on, would be the most appropriate situation for her.

[19] The Board commented: "This advice is consistent with the obligation to design a disposition that is the least onerous and least restrictive consistent with managing the [appellant's] risk to the public."

[20] The Board considered the circumstances for the appellant at WCC, noting that:

> [D]espite the constraints imposed by [WCC's] status as primarily a penal facility, a correctional centre, the staff there have done a commendable job in trying to adapt the programming and the security requirements to accommodate [the appellant's] status as a person with a mental disorder. …
>
> However, that said, there are a number of aspects about the [WCC] which simply do not address the needs of [the appellant].

[21] It cited two Yukon court decisions, *D.J. v. Yukon (Review Board)*, 2000 YTSC 513 and *R. v. Rathburn*, 2004 YKTC 24 (both relied on by the appellant in support of her appeal), in which the NCR accused's placement at WCC was found to violate his rights under s. 7 of the *Charter*.

[22] The Board also referred to *R. v. Lewis* (1999), 132 C.C.C. (3d) 163 (P.E.I. S.C.A.D.) (also relied on by the appellant), in which the Prince Edward Island Court of Appeal commented on the obligation of the provincial government to provide appropriate resources and facilities to implement the provision of Part XX.1 of the *Code* so that the Review Board can fulfill its mandate. The Board commented:

> ... at this moment in time, there is no immediate appropriate resource within which to place [the appellant] at the conclusion of today's hearing. … [S]ince the [WCC] is no longer an option, the Government of Yukon is going to have to develop a practical solution to comply with the requirements of the law.

[23] The Board therefore ordered a conditional discharge into the community, with a substantial array of supports and structure. A critical component of that disposition

was that the appellant would attend a three-week substance abuse program at Whitehorse's Alcohol and Drug Services ("ADS").

[24] After one week in the ADS program, the appellant absconded and remained unlawfully at large for a period of ten days, during which she used alcohol and drugs. She was arrested and returned to WCC.

[25] The Board's next hearing was on April 30, 2008. Present at the hearing, in person or by telephone, in addition to the appellant, the three members of the Board, counsel for the appellant, the Government of Yukon, and the federal Director of Public Prosecutions ("DPP"), were the appellant's psychiatrist, three counsellors, the Director of Mental Health Services, the Director of WCC, and Chief Simon Mervyn and Ms. Rosemary Mervyn of the Na'Cho Nyak Dun First Nation. All of those at the hearing had been involved in the appellant's case over the preceding months. The Board also had before it written reports and assessments prepared for the previous hearings. The hearing again focused on identifying the disposition that was the least onerous and least restrictive to the appellant, while protecting the public and meeting the appellant's needs, against the backdrop of the failure of the previous conditional discharge into the community.

[26] The Director of Mental Health Services recommended a hospital disposition. Her opinion was that it would be more onerous and restrictive for the appellant to live in the community with around the clock one-on-one supervision, than to live in the structured environment of WCC where she was familiar with the rules, and from which she could have liberal absences for treatment and socialization. She advised

the Board that one Canadian institution met the appellant's requirements for a residential setting with appropriate programming for her mental disorder, the Centre for Addiction and Mental Health ("CAMH") in Toronto. There was a six-month waiting list for CAMH, the appellant could apply to that program only from another hospital, and the only "hospital" available was WCC.

[27] The appellant's psychiatrist favoured a hospital-type of disposition through a forensic specialized institute like CAMH, to provide a "better environment for treatment" than could be offered in the community. He commented that WCC was not the "best place … the appropriate or adequate place" to wait for entry to CAMH for treatment, but "it's the place that would be available to her; and … she would still be receiving services while she was there."

[28] The counsellors and First Nation representatives were in favour of residential First Nation cultural programming combined with treatment from the appellant's psychiatrist and counsellors. They strongly opposed sending the appellant out of Yukon to a psychiatric hospital.

[29] The appellant spoke about the reasons she left ADS and went off her psychiatric medications, and how she felt about being in WCC. She admitted the routine of the jail was comfortable and free of risk, but said "I am institutionalized … it's becoming a negative in my life".

[30] The Board found that the appellant continued to be a significant threat to the safety of the public, and that, in light of her departure from the ADS program and her activities while at large, "she does not yet possess the coping skills necessary to

sustain her in a community disposition … and her risk and need for structure may actually be greater than assessed at the last hearing." The Board ordered the appellant to return to a custodial hospital disposition at WCC, "the only available designated hospital facility", for a period of six months, with liberal access to a wide array of therapeutic programming both within and outside the facility. The Order included the provisions that were in the order of November 6, 2007, with the addition, in paragraph 3, of a requirement that "the Directors and the Na'Cho Nyak Dun First Nation collaborate on incorporating into the overall planning a significant aboriginal cultural component and community programming."

[31] The Board also considered that a hospital disposition at WCC would "remove one of the pre-conditions for considering an application to the [CAMH] in Toronto." The appellant had indicated, however, that she did not wish to leave Yukon, but wished "to remain close to the people within her First Nation community who are committed to her healing and reintegration back into their community." Thus, the Board included a condition in the Order that the appellant would not be transferred to another hospital facility without a further order of the Board.

[32] This Order is the subject of the present appeal.

[33] At a further review hearing on October 29, 2008, the Board concluded that the appellant continued to remain at significantly high risk of causing significant harm to the public such that continued supervision by the Board was warranted. The Board noted that both the appellant's psychiatrist and counsellor:

> … shared the view that, despite the largely non-therapeutic conditions inherent in WCC being a correctional facility rather than a hospital, [the appellant] has been making steady progress in coming to grips with her condition and moving toward being capable of living more independently outside of a custodial setting.

[34] The Board also commented on the counterproductive aspects to the appellant's rehabilitation of her continued placement at WCC: "the attitudes of the inmate population to [her] special status put undue pressures upon her", and the "authoritarian culture … tends to trigger [her] reactions associated with childhood traumas".

[35] Based on the psychiatrist's opinion, the Board found that the appellant would require a progressive transition from WCC to a conditional placement within the City of Whitehorse. It ordered her continued detention at WCC for a period of three months, to "give the professional staff at Mental Health Services a reasonable time within which to develop and implement a suitable placement resource".

Grounds of Appeal

[36] The appellant raises the following grounds of appeal:

> (a) Did the Board apply the proper legal test in determining the disposition of the appellant? Did it balance the need to protect the public from dangerous persons, the mental condition of the appellant, the reintegration of the appellant into society, and the other needs of the appellant as required by s. 672.54 of the *Code* in determining that the appellant's continued detention was required?

(b) Did the Board act unreasonably in determining that a hospital disposition afforded the appellant as much liberty as is compatible with public safety such that is it the least onerous and least restrictive order?

(c) Does the detention of the appellant in WCC infringe her rights under ss. 7, 9 and 12 of the *Charter*?

(d) Does the designation of WCC as a "hospital" for the purpose of Part XX.1 of the *Code* infringe the appellant's rights under ss. 7, 9 and 12 of the *Charter*?

[37] The appellant seeks an order that the designation of WCC as a hospital be declared unconstitutional and of no force and effect, and that she be granted a conditional discharge or alternatively, that this matter be referred back to the Board for a re-hearing to determine the appropriate terms and conditions for a conditional discharge.

[38] The DPP raises the following additional grounds of appeal:

(a) Did the Board err in law by ordering the appellant's detention at WCC as a designated hospital?

(b) Does the Order amount to a miscarriage of justice?

[39] The DPP seeks an order allowing the appeal, and, subject to any subsequent exercise of the Board's ongoing jurisdiction over the appellant, varying the Order to

require the detention of the appellant at an appropriate hospital facility other than WCC.

[40] The grounds of appeal raise one overriding issue: does the detention of the appellant in WCC, which is a prison designated as a hospital for the purpose of Part XX.1 of the *Code*, satisfy the requirement of s. 672.54 of the *Code* that the disposition be "the least onerous and least restrictive to the accused"? The essence of the appellant's argument is that detention in a prison cannot satisfy the legal principles applicable to either Part XX.1 of the *Code* (in this part of her argument, she is supported by the DPP) or ss. 7, 9, and 12 of the *Charter*.

Discussion

[41] The short answer to this argument is found in *Penetanguishene* (at para. 24):

> The "least restrictive regime", in ordinary language, would include not only the place or mode of detention but the conditions governing it. … 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 a mental hospital, can also have serious ramifications for his or her liberty interest …

[42] There can be no question that the detention of an NCR accused person in a prison is, on its face, contrary to the principles of Part XX.1 of the *Code* as articulated in *Winko*. An NCR accused person is not to be punished, but is to receive treatment for their mental illness under the least onerous and least restrictive disposition that balances the protection of the public with the needs of the accused. As the Yukon Review Board said (quoted in *D.J.* at para. 15): "Calling a prison a

hospital does not change the nature of the facility from a penal environment to a therapeutic environment." There is ample evidence in this case, and commentary in the authorities referred to by the parties, of the deleterious effect of incarceration on mentally ill persons. I agree with the appellant and the cases cited that placing an NCR accused in a prison that is not capable of providing any therapeutic treatment services, without providing for such services to be obtained elsewhere, for reasons of administrative convenience or lack of funding, does not meet the requirements of Part XX.1 of the *Code* or the *Charter*.

[43] Those are not, however, the circumstances of this case. It is true that there were no other available resources in Whitehorse which could provide the secure supervision the appellant required, and that there were detrimental aspects to the appellant's continued detention at WCC. However, the Board was clearly aware of its obligation to balance the factors set out in s. 672.54 of the *Code*, the implications of the continued detention of the appellant in WCC in the context of the purposes of Part XX.1 of the *Code*, and the necessity to provide conditions for the appellant's treatment in addition to her security and the protection of the public. None of its orders, including the Order, reflect that the detention of the appellant at WCC was for reasons of administrative convenience, lack of funding, or simply the lack of other suitable alternatives. They reflect full consideration of all possible alternatives for the appellant's treatment in the community, based on the evidence the Board received from the appellant's various caregivers and supporters.

[44] In ordering a conditional discharge on March 7, 2008, the Board ordered conditions for the appellant's security and treatment that she could not tolerate given

her mental disorder. When it made the Order, it was required to reassess the risk to the public and the appellant's rehabilitation of another conditional discharge or continued detention, and in weighing the evidence and the alternatives, determined that the balance favoured detention.

[45] There is no question that WCC is not the ideal place for the appellant, or for any person suffering a mental disorder. But there is no evidence that there is any other place in Canada that offers the ideal setting for the appellant in her particular circumstances, or that a conditional discharge into the community with the required supervision would meet the needs of the public and the appellant. The Board must make a disposition – it cannot abandon its obligation to do so because the available alternatives are not ideal – it must balance all of the factors it is required to consider, and make the disposition that best meets the interests of the public and the appellant, and is the least onerous and least restrictive to the NCR accused.

[46] I have set out the reasons of the Board in some detail to indicate its consideration of the principles applicable to a disposition of an NCR accused. The Board did not make any error of law in determining the disposition and the conditions, either by failing to consider the requirement to make the disposition that was least onerous and least restrictive to the appellant, or by failing to balance the factors set out in s. 672.54 of the *Code*. It was not an error of law to order the appellant be detained in WCC, which is a designated hospital for the purpose of Part XX.1 of the *Code*. Nor can it be said that the Order was in any way unreasonable.

[47] For similar reasons, in my opinion, the Order was not a miscarriage of justice and did not infringe on the appellant's rights under the *Charter*.

[48] The facts in the cases relied on by the appellant are different from those in this case.

[49] In *D.J.*, after pleading guilty to a number of criminal charges, the accused was brought before the Board for disposition. Pending assessment and the availability of treatment facilities, the accused was placed "temporarily" in WCC. Because of the risk the accused posed to the public and himself, the Board recommended that he be placed in administrative segregation. There is nothing in the reasons for judgment to indicate that any treatment of any kind was ordered. A month later, the Board reconvened and recommended that the accused be transferred to another facility for assessment and treatment, and in the meantime remain in administrative segregation at WCC. Two months later, the Board was advised that there was no available placement in Western Canada to treat the accused's fetal alcohol syndrome and attention deficit hyperactivity disorder. In the absence of suitable facilities to supervise and treat the accused without exposing the public to unacceptable risk, the Board ordered the accused's continued detention in segregation at WCC, while expressing its unhappiness and frustration with this disposition. The Court noted (at para. 17): "The only treatment that the applicant receives is outings to the community for socialization, escorts to a paying job in the community with Challenge and escorts to see his therapist at the Sex Offender Unit."

[50] Five months later, the Board identified a facility called the Adult Resource Centre ("ARC") as the least onerous and least restrictive disposition, but long-term funding was not available due to an intervening election in the Yukon. A month later, the circumstances had not changed. The accused then applied to the Yukon Supreme Court for an order of *habeas corpus*, resulting in the decision that the accused's detention in WCC infringed his *Charter* rights and an order that the accused be released into the care and custody of the ARC.

[51] In *Rathburn*, the accused had been detained in WCC for about five weeks after his arrest, on remand status pending his trial. Because of his psychotic behaviour, he required ongoing segregation. He had been treated unsuccessfully with antipsychotic medication. The opinion of the psychiatrist was that continued segregation in WCC would be detrimental to his recovery. The trial judge attended at WCC to view the segregation area. He found that the use of the segregation area as a "hospital room" was inconsistent with the wording and intent of s. 672.54 of the *Code*, with international norms, and with ss. 7 and 12 of the *Charter*, and held that the designation of WCC as a hospital under s. 672.1(1) of the *Code* was inoperative for the purposes of that case. He ordered that the accused not be detained at WCC, but at the Whitehorse General Hospital, the Alberta Hospital in Edmonton, or the Forensic Psychiatric Hospital in Port Coquitlam, B.C.

[52] It appears from the reasons for decision in *D.J.* and *Rathburn* that the detention of the accused in WCC in those cases bore no relationship to his mental condition, reintegration into society or other needs. The only factor that was reflected in the disposition was the protection of the public. In both cases, other

facilities were identified as better able to meet the accused's needs while offering the required level of security that would be less onerous and less restrictive. For administrative reasons, however, the accused was detained in WCC. His liberty was constrained more than was necessary, and not on the basis of balancing protection of the public and the accused's needs, a process that was found to be constitutional in *WInko* (at para. 69).

[53] In this case, by contrast, the Board's decisions to order a hospital disposition at WCC, with the range of conditions that provided for the appellant's treatment both inside WCC and in the community, for security arrangements consistent with a hospital, for temporary attendance at other facility or residential programs and staged temporary placements in the community, and for increasing her liberty consistent with s. 672.54 of the *Code*, were all made in the context of the Board's express consideration of the evidence of the appellant's needs, the legal and factual implications of her detention at WCC, and the legal principles of Part XX.1 of the *Code*. Isolating the place of the appellant's detention, WCC, as violating her *Charter* rights, ignores all of the other aspects of the Order that resulted in the Order meeting the requirements of Part XX.1 of the *Code*.

[54] There were no alternative dispositions suggested to the Board, and none suggested on appeal, that would better meet the twin goals of protection of the public and treatment of the appellant in a less onerous and less restrictive manner. The Board and the appellant's caregivers all expressed their reservations about WCC as a hospital, and its effects on the appellant, but none of them were of the view that any other hospital or a conditional discharge into the community, with the

conditions that would be required to meet the goals of Part XX.1 of the *Code*, would better serve the public or the appellant at that time. It is disingenuous to suggest that the Order was unreasonable and unfair, and the Board should have designed an alternative disposition to satisfy the law, when no suitable, practical or possible alternative was available in Yukon, and any outside of Yukon were rejected by the appellant.

[55] It is my opinion that the Order reflected the conclusion of the Supreme Court of Canada in *Penetanguishene* (at para. 24) that: "The 'least restrictive regime' … would include not only the place or mode of detention but the conditions governing it", and that "the conditions under which an NCR accused is detained … can also have serious ramifications for his or her liberty interest". As in that case, the Order met the requirements of s. 672.54 of the *Code*, and for the reasons given in *Winko*, did not violate the appellant's rights under s. 7 of the *Charter*. I would add that for similar reasons, neither ss. 9 nor 12 of the *Charter* were infringed. In meeting the requirements of s. 672.54, the Order did not amount to either an "arbitrary" detention, nor "cruel and unusual punishment or treatment".

[56] This conclusion should not be taken to justify the continued use of WCC, or any prison, as a hospital for NCR accused generally. As shown by *D.J.* and *Rathburn*, the detention of NCR accused in a prison, without conditions that ameliorate the ramifications for his or her liberty interest, or neglect treatment and rehabilitative needs, may be constitutionally impermissible. The point to be made is that s. 672.54 of the *Code* and the *Charter* demand that a Review Board discharge its obligation bearing in mind the high value that society places on both individual

liberty and the need to protect society from significant threats (see *Winko* at para. 69), while providing the NCR accused with appropriate opportunities for treatment, in the circumstances of the particular case. It is my opinion that the Board did so in this case.

International Law

[57] The appellant argues that her detention in WCC violates standards of international law which have been endorsed by Canada. The United Nations *Standard Minimum Rules for the Treatment of Prisoners* provide that: "Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible" (*Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, annex I, para. 82(1)). The *Standard Minimum Rules* were referred to in *Rathburn* (at paras. 34-35) and by the Ontario Court of Justice in *R. v. Kravchov* (2002), 4 C.R. (6th) 137 at para. 45, where the Court noted:

> The *Standard Minimum Rules* were adopted in 1955 at the first U.N. Congress on the Prevention of Crime and approved in 1957 by the U.N. Economic and Social Council. At the fifth U.N. Congress on the Prevention of Crime in 1975 Canada's delegation officially endorsed the rules and agreed to embody them within both federal and provincial legislative frameworks. See: *Fifty Years of Human Rights Developments in Federal Corrections* Correctional Service of Canada August 1998.

[58] I agree with the Court in *Kravchov* (at para. 46) that these statements of international norms are not legally binding, but provide a court with a "benchmark,

recognized by both the world community and the representatives of this country", in this case, to measure the designation of a prison as a hospital.

[59] The use of a prison as a hospital, as I have said, is far from ideal. It is only justified, under the principles of Part XX.1 of the *Code* and under the *Charter*, where all of the particular circumstances, including most importantly the conditions that govern the hospital disposition of the NCR accused, demonstrate that it balances protection of the public with the needs of the NCR accused in the least onerous and least restrictive manner. That is the case here.

Fresh Evidence

[60] Yukon sought the admission on the appeal of fresh evidence in the form of affidavits of two officials of the Government of Yukon, advising that the Government has provided funding for a psychiatric unit and staff at Whitehorse General Hospital, which was expected to be completed by March 31, 2009, and that planning for a new correctional centre, scheduled for occupancy in late 2011, includes Special Handling Units for men and women requiring specialized supervision.

[61] While this evidence is not relevant or necessary to the conclusions reached on this appeal, I would simply note that these developments may remove the serious concerns raised about the use of WCC as a "hospital" for the purpose of Part XX.1 of the *Code*.

Parties and Style of Cause

[62] One further matter needs to be addressed. Having regard to s. 672.5(3) of the *Code*, the definition of "Attorney General" in s. 2 of the *Code*, and s. 3 of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, S. 151, the Director of Public Prosecutions, not the Public Prosecution Service of Canada, was a party before the Board, and is a respondent on this appeal.

[63] I would order that the style of cause be amended to reflect this.

Summary and Conclusion

[64] The Order was not unreasonable, was not based on a wrong decision on a question of law, and there was no miscarriage of justice. Thus, paragraphs (a), (b) and (c) of s. 672.78(1) of the *Code* do not apply.

[65] Nor did the Order infringe the appellant's rights under ss. 7, 9 or 12 of the *Charter*.

[66] I would dismiss the appeal.

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The Honourable Madam Justice Levine

I AGREE:

_____
The Honourable Mr. Justice Frankel

I AGREE:

_____
The Honourable Mr. Justice Tysoe