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No room at the inn:
A critical examination of the shortage of forensic mental health beds in criminal law

Introduction

Ciminal law can have a profound and intrusive impact on the lives of accused people. This is especially true for the mentally ill accused. In addition to having their liberty deprived pending disposition of their charges (when they are denied bail – which they frequently are), mentally ill accused face additional significant deprivations of their liberty when they are ordered detained at a hospital for assessment or treatment. It is important to realize just how common and easy it is for such orders to be made for mentally ill accused or just for those who are just *suspected* of being mentally ill.

In Part 1 of this paper I will briefly outline examine the 5 most common orders under the *Criminal Code*[1] that result in a person being ordered to detained at a hospital for an assessment or treatment of some kind in order to show the broad range of situations in which this can happen. The 5 orders are: (1) fitness assessments, (2) treatment orders for a person found unfit to stand trial, (3) keep fit orders for a person found fit to stand trial, (4) not criminally responsible (NCR) assessments, (5) assessments for disposition where a person has been found not criminally responsible on account of a mental disorder (NCRMD) or unfit to stand trial[2].

[1] *Criminal Code*, RSC, 1985, c. C-46
[2] In a presentation at the LSUC's 2012 6 Minute Criminal Judge program, Justice Richard Schneider of the Mental Health Court at Old City Hall indicated that these were among the most common orders

In Part 2 I will discuss what happens when an order is made directing an accused person to be detained at a hospital, but all the forensic beds are full and what the judicial response has been to this problem.

Finally, in Part 3, I will discuss some of the potential solutions to this problem that can be implemented by lawyers and other justice system participants.

Part 1: 5 orders that send mentally ill people to a hospital for assessment or treatment

1) Fitness assessments

By virtue of s. 672.22 of the *Criminal Code*, an accused is presumed to be *fit* to stand trial unless the court is satisfied on a balance of probabilities that the accused is *unfit* to stand trial. The court may deal with the issue of fitness at any stage of the proceedings (s. 672.12(1) and 672.23(1)), on its own motion or the application of the accused or the prosecutor (s. 672.12(1) and 672.23(1)). Whoever raises the issue of fitness has the burden of proving it (s. 672.23(2)). In addition, the Crown can only raise the issue of fitness in summary conviction cases if the accused raises the issue of fitness first (s. 672.12(2)(a)), or if the prosecutor satisfies the court that there are reasonable grounds to doubt the accused's fitness (s. 672.12(2)(b)).

In courts that are dedicated to dealing with the mentally ill, such as Old City Hall 102 Court in Toronto, visiting psychiatrists are often on site to conduct "stand down" fitness assessments (assessments while the case is temporarily "stood down") right at the court house in order to

avoid adjournments for assessments. However, for most courts, where such resources are not available, an adjournment will be granted and the accused will be ordered detained at a hospital for the assessment.

The *Criminal Code* specifies that orders detaining an accused at a hospital for a fitness assessment shall only be in force for a maximum of 5 days, excluding holidays and the time required for the accused to travel to and from the place where the assessment is to be made (s. 672.14(2)). If the accused and the prosecutor agree, this can be extended to a maximum of 30 days (s. 672.14(2)) and, if the court feels that there are exceptional circumstances, it can be extended (without the consent of the prosecutor or the accused) to a maximum of 60 days (s. 672.14(3)).

2) Treatment orders for a person found unfit to stand trial

Where an accused has been found unfit to stand trial, the prosecutor may apply to the court for an order under s. 672.58 that the accused be detained at a hospital for up to 60 days for treatment that is intended to make them fit to stand trial.

This is obviously a very intrusive power for a judge to have, since it not only removes the accused's liberty by detaining them at a hospital, it also authorizes treatment which can be forcibly administered. This treatment does not require the consent of the accused, however a judge cannot make a treatment order under s. 672.58 unless they have either the consent of the

hospital where the accused is to be treated (s. 672.62(1)(a)) or the consent of the person who has been assigned responsibility for the treatment of the accused by the court (s. 672.62(1)(b)).

3) "Keep fit" orders for a person found fit to stand trial

Where an accused is already in custody at the time they are found fit to stand trial, a judge may order that they be detained in a hospital until the completion of the trial, under s. 672.29, if the judge has reasonable grounds to believe that the accused would become unfit to stand trial if released. Such an order does not, however, authorize forcible treatment to keep the accused fit. It is simply to prevent the accused from becoming unfit if left to their own devices.

4) NCR assessments

By virtue of s. 16(2) of the *Criminal Code*, an accused is presumed *not* to suffer from a mental disorder that might render them not criminally responsible, unless it is proven to the contrary. S. 672.11(b) grants the court authority to order an assessment of an accused to determine this issue.

The court may deal with the issue of criminal responsibility at any stage of the proceedings (s. 672.12(1)), on its own motion or the application of the accused or the prosecutor (s. 672.12(1)). Whoever raises the issue has the burden of proving it (s. 16(3)), on a balance of probabilities (s. 16(2)). In addition, the Crown can only raise the issue of criminal responsibility if the accused puts their mental capacity for criminal intent in issue (s. 672.12(3)(a)) or if the prosecutor

satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible on account of mental disorder (s. 672.12(3)(b)).

NCR assessment orders can only be made for a period of up to 30 days (s. 672.14), however the court may extend this period, on its own motion, or on the application of the prosecutor (s. 672.15(1)), for up to 30 more days (s. 672.15(2)). The total period of time, including all assessments, must not exceed 60 days (s. 672.15(2)).

5) Assessments for disposition where a person has been found NCRMD

By virtue of s. 672.11(d), where a verdict of NCRMD has been rendered, or where an accused has been found unfit, a court may order an assessment to determine the appropriate disposition. The court may order this on its own motion or the application of the accused or the prosecutor (s. 672.12(1)). If the court does not order such an assessment, the Review Board has the power to do so (s. 672.121).

Disposition assessment orders can only be made for a period of up to 30 days (s. 672.14), however the court may extend this period, on its own motion or on the application of the prosecutor (s. 672.15(1)), for up to 30 more days (s. 672.15(2)). The total period of time, including all assessments, must not exceed 60 days (s. 672.15(2)).

<u>Part 2: No room at the inn</u>

An ideal world

In an ideal world, when a judge makes any of these orders for a mentally ill accused to be detained at a hospital, the accused would be taken to the hospital directly from court. Unfortunately, due to policies of deinstitutionalization of the mentally ill instituted over 30 years ago, there is a shortage of forensic hospital beds and this does not happen.

In 1998 a report in the Toronto Star stated that, on any given day in the previous year, there were 76 men and women wrongfully held in jail because of a shortage of beds[3]. The Minister of Heath himself responded to this article and acknowledged the shortage and stated that there was no short term fix for the problem[4]. It is unlikely even the minister knew how prophetic this statement would turn out to be!

In the 15 years since the Minister's acknowledgement, judges and other justice system participants, as well as advocates for the mentally ill, have continued to lament the problem. For example, in the 2006 case of *R v Rosete*[5], a representative from the Centre for Addiction and Mental Health (CAMH) in Toronto testified that, instead of operating at the ideal 80%, CAMH was routinely operating at 103-105% capacity[6]. Justice Schneider, presiding over that case, decried this state of affairs[7]. More recently, in the 2010 case of *Mental Health Centre Penetanguishene v R*, Justice Watt stated: "In an ideal world, the disposition made by a provincial Review Board directing transfer of a mental disorder detainee from one hospital to

[3] Theresa Boyle and Vincent Donovan, "They're behind bars, but not guilty", *Toronto Star* (January 11, 1998) D5
[4] Theresa Boyle, "Beds to open for jailed mental patients" *Toronto Star* (March 3, 1998) B1
[5] *R v Rosete*, 2006 ONCJ 141 [*Rosete*]
[6] *Ibid* at 5
[7] *Ibid* at 9

another would take place immediately. Not so in the harsh light of reality in the first decade of 21st century Ontario."[8] Although Justice Watt's comments were made in the context of people who have been found NCRMD being transferred from one hospital to another and not people being ordered from court to a hospital at some point prior to the disposition of their charges (as this paper focuses on), his strong words still highlight the same issue: there is a shortage of forensic hospital beds.

The real world

Because of this shortage of forensic hospital beds the result, when any of the orders discussed in Part 1 are made, is that the accused is usually forced to wait for a period of time for a bed to free up before they are admitted to the hospital for their assessment or treatment. This waiting period can last from several days to several months. When there is such a wait, the question becomes what to do with the accused until a bed becomes available.

The police are responsible for transporting people from the remand facilities across the province to the courthouses and back again. When an order is made in court for an accused to be detained at a hospital for assessment or treatment, the police can transport the accused from the courthouse to the hospital. However, if they do, the problem they often encounter is that the hospitals turn them away at the door, claiming (truthfully) that, notwithstanding the judge's order, all the beds are full and there is simply no room. This has resulted in a few incidents of police officers simply leaving the accused in the lobby of the hospital and making it their

[8] *Mental Health Centre Penetanguishene v R*, 2010 ONCA 197 at 1

problem[9], but usually, if turned away at the hospital, they will try to return the accused to the remand facility they came from originally.

The problem with this is that the remand facilities often take the position that they don't have any jurisdiction to accept the accused back, since the judge's order for assessment or treatment in a hospital supersedes the original order that remanded the accused into their custody to begin with. This position is not without merit and one can certainly understand that remand facilities don't want the liability of having custody of people when they shouldn't.

If the remand facility won't accept the accused back, the police are effectively left holding the bag and the only remaining option is for the accused to stay in their custody. In these situations, the mentally ill accused will be warehoused in a holding cell at the police station until they are accepted at either the hospital or the remand facility. But police holding cells are meant to be for *short term holding only*, not for extended stays, not to mention that police facilities are woefully ill-equipped to deal with the special needs of mentally ill people. These sentiments were expressed by Toronto Police Chief Bill Blair in a 2010 article in the Toronto Star[10].

The "forthwith" solution

In an attempt to counter hospitals forcing mentally ill people to wait until a bed became available, some frustrated judges began the practice of using "forthwith" language in their orders. They would order that an accused be delivered "forthwith" to the hospital with no "stop

[9] *Centre for Addiction and Mental Health v R*, 2012 ONCA 342 at 19
[10] Kirk Makin, "Judges push back against hospitals turning away mentally ill", *Toronto Star* (Nov 16, 2010)

overs" in jail. Alternatively, they sometimes issued Warrants of Committal for an accused to be detained at the hospital in an attempt to accomplish this same outcome.

Some examples where such orders were issued are: *R v Rosete* (2006)[11], *R v Hneihen* (2010)[12], *R v Consuelo* (2010)[13], *R v Procope* (2010)[14], *R v Conception* (2010)[15] and *Centre for Addiction & Mental Health v. Al-Sherewadi* (2011)[16]

Both forthwith assessment/treatment orders and Warrants of Committal have significant merit, although issuing a Warrant of Committal as opposed to a standard treatment order presents an additional problem, in that if an accused is accepted at the hospital, the hospital may claim they have no authority to treat the accused without their consent, since a Warrant of Committal does not explicitly grant such authority. However, one can certainly understand why frustrated judges on the front lines in the Ontario Court of Justice and the Superior Court took to this. In *Rosete*, Justice Schneider expressed his concerns and his reasons for issuing a forthwith order:

> 9 To my mind, where an individual's liberty is being infringed upon there must be explicit authority for that to occur. (The argument that there is nothing in the *Code* to *preclude* an interference with the accused's liberty is not sound). In Mr. Rosete's circumstances the court has the authority to detain him for the purposes of his psychiatric assessment; and for that purpose the court may send the accused to a hospital, as defined in section 672.1. There is no authority to incarcerate the accused in a jail. Nowhere in Part XX.1 of the *Code* is the court given the power to place an accused in jail at this juncture. He is not serving a sentence, he is presumed to be innocent, he has not even been arraigned. The only purpose for

[11] S*upra* note 5
[12] 2010 ONSC 5353 [*Hneihen*]
[13] (14 September 2010), Toronto, 10-10001715, 10-10004017, 10-70009469 (Ont Ct J)
[14] (6 October 2010), Toronto, 10009107, 1200160 (Ont Ct J)
[15] (April 13, 2010), Toronto Old City Hall Courtroom 102, (Ont Ct J)
[16] 2011 ONSC 2272

> interfering with Mr. Rosete's liberty is for the purpose of effecting his assessment to determine the issue of his fitness to stand trial. While an agreement with CAMH had been made which permits the delivery of the accused to hospital on the following day, the Memorandum of Understanding with CAMH, consistent with the provisions of the *Code* and judicial decisions on point, indicates that the accused is to be delivered to hospital 'forthwith'. To my mind all accused should be delivered to hospital on a forthwith basis with no 'stop-overs' at a jail along the way. As indicated earlier, these 'stop-overs' have been not for just several days but for several weeks.
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> 10 The fact that the Minister, in designating CAMH as a 'hospital', has not provided CAMH with adequate resources so that it may participate appropriately within the scheme set out in Part XX.1 of the *Code* does not justify an erosion of the accused's rights. As Sopinka J. observed in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.), "we don't tailor constitutional rights to available resources".
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> 11 For all of these reasons I am first of all of the view that Mr. Rosete's detention at the Toronto Jail is unlawful. As well, without having to specifically decide the issue, his detention runs afoul of *Charter* guarantees as set out in sections 7 and 9. At a minimum his detention, being unlawful, is 'arbitrary' and not in accordance with the principles of fundamental justice. The delay in delivering Mr. Rosete to hospital as Ordered by this court was entirely and exclusively the product of an insufficient number of beds at CAMH. This, as observed by Sopinka J., is not an answer. It is obviously perverse and inexcusable in our civilized society that we find ourselves with a system which jails mentally disordered individuals who are in need of assessment or treatment.

Despite the passionate words of Justice Schneider, the “forthwith” solution was soundly rejected by the Ontario Court of Appeal in *Phaneuf v Ontario*[17] and, more recently, in *Centre for Addiction and Mental Health* (*CAMH*) *v R*[18].

[17] 2010 ONCA 901 [*Phaneuf*]
[18] 2012 ONCA 342 [*CAMH*]

In *Phaneuf* , the accused was ordered to a hospital for an assessment but spent 16 days in a detention centre waiting for a bed to become available. The accused brought a civil action alleging that Crown had duty to place her in a hospital where her assessment was to be performed immediately. She was initially successful before the motions judge in having her claim certified as a class action to include all persons who had been detained in custody while awaiting a hospital bed since November 10, 2004 when Justice Desmarais, in *R v Hussein*[19], ordered that the Ontario government have sufficient hospital beds available at all times to permit the immediate transfer of in custody accused to a hospital for court ordered assessments. However, the claim, and the class proceeding, were ultimately dismissed when the case reached the Ontario Court of Appeal.

While the court noted that Parliament's intention was obviously that assessment orders be completed with dispatch[20], they went on to say that, practically speaking, there will inevitably be some time needed to move the accused from a detention centre to the hospital and some time after the assessment is completed, but before the person is returned to court, where detention in the hospital would be unnecessary and perhaps inappropriate[21] and, therefore, an accused *could* be detained at a detention centre prior to being transferred to a hospital. The court explicitly cited the contrary holdings on this point in *Rosete* and *Hussein* and overruled them. However, the court was quick to note in the postscript to *Phaneuf* that their reasons should not been seen as condoning the warehousing of the mentally ill who have been ordered assessed in a hospital[22].

[19] 26 CR (6th) 368 [*Hussein*]
[20] *Supra* note 18 at 16
[21] *Ibid* at 18
[22] *Ibid* at 28

The court ought to be lauded for this sentiment, but it remains difficult to see how their actual holding in *Phaneuf* does not do exactly this.

In *CAMH*, Brian Conception was made the subject of a 672.58 treatment order by Justice Hogan in 102 Court at Old City Hall in 2010. Justice Hogan's order directed that Mr. Conception be taken directly from court to the designated hospital and from the hospital directly back to Court and that he not be taken to a jail or correctional facility under any circumstances[23]. As Justice Blair noted in the Court of Appeal's decision some 2 years later, this was one of a number of similar orders that were made during the period where 102 Court judges were expressing their frustration by issuing "forthwith" or "no stop over in jail" orders or Warrants of Committal[24]. When the order was made, a representative from CAMH indicated that they could not take Mr. Conception until 6 days later due to bed shortages at the hospital, but Justice Hogan nonetheless made the order, stating: "…it is about time the Province provided sufficient beds to deal with our mental health needs…"[25]

When this case reached the Court of Appeal Mr. Conception's criminal charges had been dismissed (hence the style of cause of the case), but the court still proceeded to address the issues of whether (a) a willingness of the hospital to accept a patient at a later date constituted "consent" within the meaning of s. 672.62 (recall from Part 1, #2, that such consent is a necessary precondition for a s. 672.58 order) and (b) the requirement of consent from the hospital was constitutional.

[23] Supra note 19 at 18
[24] *Ibid* at 4
[25] *Ibid* at 17

On the first issue, Justice Blair found that consent to treat a patient when a bed became available in 6 days was *not* consent to treat a patient forthwith[26]. On the second issue, he acknowledged that Ontario's jails are not ideally equipped to deal with the special needs of mentally ill inmates[27] and that stop overs in jails that are not fully equipped to accommodate the mentally ill does engage a person's s.7 security of the person interest[28]. However, he went on to find that the treatment regime, as a whole, does not violate the principles of fundamental justice[29]. Citing the Supreme Court in *R v Mills*[30], Justice Blair observed that "[T]he principles of fundamental justice do not entitle the accused to the most favourable procedures that could possibly be imagined"[31] and that the consent requirement of s. 672.62 responds to a number of broader societal considerations, as well as to the needs of the individual unfit accused, in that way does not run afoul of the principles of fundamental justice[32].

Ultimately, Justice Blair's holding in *CAMH* was that "it is not unreasonable that an unfit accused may have to wait on some occasions for a short period of time while a bed becomes available in a designated psychiatric facility."[33] Unfit accused and NCR accused do not, he said, have a monopoly on scarce public resources to the exclusion of all others, including other similarly situated mentally ill accused and patients[34]. These sentiments are directly in line with *Phaneuf.*

[26] *Ibid* at 30
[27] *Ibid* at 35
[28] *Ibid* at 41
[29] *Ibid* at 45
[30] [1999] 3 SCR 668 at 72
[31] Supra note 19 at 49
[32] *Ibid* at 50
[33] *Ibid* at 58
[34] *Ibid* at 59

The result of the decisions in *Phaneuf* and *CAMH* would seem to be to effectively put an end to the practice of "forthwith" or "no stopover in jail" assessment/treatment orders (of any kind), or Warrants of Committal, where the necessary resources at the hospital are not available.

The new solution

The solution that the Court of Appeal appears to be suggesting in *Phaneuf* and *CAMH* is for judges to go along with the advice from hospitals and make orders that do not commence until a bed is available and to continue to detain the accused in a remand facility – which everyone acknowledges is not equipped to properly accommodate them – until then. But this seems exactly like the situation that caused the frustration that resulted in judges making forthwith orders in the first place! Also, what happens when hospitals are unable to predict when exactly a bed will free up so they can accept the accused? In those situations the accused still faces an indeterminate waiting period. To avoid simply issuing indeterminate orders with no return date, judges appear to have taken to issuing orders that direct an accused to be transferred to a hospital "within a reasonable period of time" but returned to court if not transferred by a certain date[35]. The problem with orders framed this way, as Justice Ducharme recently noted in *R v Chen*[36], is that there is no jurisprudence on what constitutes a "reasonable" amount of time for transfers to a hospital[37].

This essentially leaves us right back where we started and since no additional resources have been injected into the mental health system recently, it seems unlikely that wait times under

[35] R v Chen (July 12, 2012), Toronto Old City Hall Courtroom 102 (Ont Ct J)
[36] *R v Chen*, 2012 ONSC 4889 [*Chen*]
[37] *Ibid* at 19

"reasonable amount of time" orders will be any different than they were under any order before – which many judges and defence counsel found unacceptable to begin with. So what can lawyers, judges, and other justice system participants do about this? It is this question which I will discuss in the final part of this paper. I will outline 3 possible solutions for defence counsel, who are obviously at the heart of all of these cases, and then outline what other justice system participants can do – namely the police and Crown attorneys.

Part 3: Solutions

Solution #1 for defence counsel: avoid the issue all together

There are a number of ways which defence counsel can avoid this issue of bed shortages at forensic hospitals all together. I will discuss 3 ways in the following paragraphs, although there are certainly more. These options should be given serious consideration by defence counsel as it may be much more in their client's interests to skirt this problem than confront it.

The first way is to plead the accused guilty before they are sent for assessment or treatment. Obviously this is subject to ethical considerations (does the accused acknowledge their guilt) and practical considerations (is the accused actually competent to give instructions to plead guilty), but if the accused's defence is a technical one, with limited chances of success anyway, counsel may well be justified in advising them to forego exercising their right to a trial if they are likely to be ordered to a hospital for assessment or treatment while exercising that right. Often times,

in custody accused may have accumulated enough pre-sentence custody credit to be released with no additional penalty.

The second way is to convince the accused to get back on (or start taking) medication which is likely to alleviate the need for most forms of assessment or treatment – at least those related to the accused's current state (fitness assessment/treatment). Obviously this will not help if the assessment order is in relation to the accused's prior mental state (NCR assessments). Defence counsel often have excellent rapport with their clients, especially if they are repeat clients, as many mentally ill accused tend to be, and may be able to succeed in this endeavour, even where others have failed.

The third way is to obtain bail for the accused with a highly supervised outpatient treatment plan. Bail is governed by s. 515 of the *Criminal Code*, but the relationship between bail and assessments orders is addressed in s. 672.16. There is a presumption *against* custody for the sole purpose of an assessment unless circumstances in s.672.16(1)(a), (b) or (c) are met, that is, unless it is (a) necessary in order to assess the accused, or on medical evidence desirable in order to assess the accused, (b) that custody is required by any other provision of the *Criminal Code*, or (c) the prosecutor shows that detention is justified on the primary, secondary, or tertiary grounds set out in s. 515(10). Subsection (b) will either be met or it will not on the facts of any given case, but a highly supervised outpatient treatment plan may adequately address the concerns in subsections (a) and (c) and may result in bail for the accused. Since the presumption is against custody, they should then be released and would be free to attend the hospital for their assessment whenever it is scheduled.

Of course it is unlikely that many mentally ill accused will be able to arrange such a detailed plan on their own, so the responsibility falls to their defence counsel. This is unfortunate, since Legal Aid Ontario will not adequately compensate defence counsel for the work they put into crafting such a plan, and it is unlikely that any client requiring such a plan would have the funds to compensate them privately. This is yet another unfortunate example of how resource shortages adversely affect the most vulnerable in our society.

Option #2 for defence counsel: bring a *habeas corpus* application

Habeas corpus is one of the inherent powers granted to the Superior Courts by virtue of the *Constitution Act, 1867*[38]. This common law power dates back to 17th century constitutional struggles in England[39] and was eventually enshrined in s. 10(c) of the *Charter*. In addition, several provinces, including Ontario, have *Habeas Corpus Acts*[40] which deal mostly with civil proceedings. *Habeas corpus* is the remedy sought in order to force the government to justify the detention of a person to the court. This obviously may be applicable to accused persons detained somewhere other than a hospital while they are awaiting assessment or treatment.

After the issue of accused people being detained in jails and police holding facilities while awaiting transfer to a hospital became known to the public in 1998[41], lawyers began taking up the cause using *habeas corpus* applications. In the same year as the Toronto Star article, in the

[38] *The Constitution Act*, 1867, 30 & 31 Vict, c 3
[39] D.A. Cameron Harvey, *The Law of Habeas Corpus in Canada* (Toronto: Butterworths, 1974)
[40] *Habeas Corpus Act*, RSO 1990, c H.1
[41] See 1998 Toronto Star articles in footnotes 3 and 4

case of *R v Anthony D. et al.*[42], a lawyer filed a habeas corpus application on behalf of 6 people who were detained in jail awaiting a transfer. As Janet Leiper notes in her article *Cracks in the Façade of Liberty: The Resort to Habeas Corpus to Enforce Part XX.1 of the Criminal Code,* these men were not being treated any more expeditiously than if they had been subject to the former legislation of Lieutenant Governors Warrants that had been ruled unconstitutional in *R v Swain* in 1991[43]. 5 of the 6 men had been waiting between 4 and 5 months at the time of the application[44] and there was no indication that a transfer was on the horizon.

Unfortunately (fortunately for the applicants), the *habeas corpus* application was never litigated, as the applicants were all moved shortly after it was filed in accordance with their original court orders. This seems to be a common tactic to counter such applications, which is why there are almost no reported decisions in this area of the law. As Leiper notes, this has traditionally been an area that is in the shadows, with its problems kept quiet and the people affected by it kept hidden[45].

This was tactic was also used in *R v Hussein,* which is one of the most notorious habeas corpus cases of this kind and one of the only reported decisions. Although the applicants (Hussein and Dwornik) were moved after the application was filed but before it could be heard, their counsel argued that the matter should still be heard due to the ongoing nature of the problem. It was, but unfortunately for *habeas corpus* jurisprudence, the case was decided on a slightly different basis. After determining that the current system of bed shortages resulting in detention in jails awaiting

[42] (6 March 1998), Toronto u86/98 (Ont Sup Ct)
[43] Janet Leiper, "Cracks in the Façade of Liberty: The Resort to *Habeas Corpus* to Enforce Part XX.1 of the Criminal Code"(2009) 55 Crim LQ 134 at 153
[44] *Ibid* at 154
[45] *Ibid* at 136

transfer was unconstitutional, Justice Desmarais, citing *Eldridge v. British Columbia (Attorney General)*[46], stated that declaratory relief, as opposed to some kind of injunctive relief, was the appropriate remedy for the unconstitutionality, since it is not the role of the courts to direct *how* constitutionality should be accomplished[47]. Broad declaratory relief was also granted for the habeas corpus application in *R v Rosete*, which was another one of the notorious reported *habeas corpus* cases in this area of the law. Unfortunately, however, there was no significant change after either of these cases.

It seems that the practical effect of filing a *habeas corpus* application is to "force" the authorities to find a bed for the applicant and to transfer them to avoid having to deal with the issue. Whether or not, if push comes to shove, a *habeas corpus* application will always be successful in getting the applicant out of jail and into a hospital, is still open to debate. Also, one must consider what greater effect of a *habeas corpus* order would have over the initial judge's order for assessment or treatment, on a hospital who maintains that there are no vacant beds. If a hospital didn't (or couldn't) obey the original order, why (or how) will they be able to comply with the *habeas corpus* order? Again, the ultimate problem here is that there is simply a shortage of resources and even if one person is able to force their way to the front of the line for those resources, it just results in another person being pushed to the back of the line. Given Justice Blair's comments in *CAMH* that mentally ill accused do not have a monopoly on the state's limited resources[48], it seem unlikely that judges will be willing, going forward, to send them to the front of the line.

[46] [1997] 3 SCR 624
[47] *Supra* note 20 at 11 and 34
[48] *Supra* note 19 at 59

As to a remedy under the *Habeas Corpus Act*, in *R v Chen*[49] (which it should be noted post-dates both *Phaneuf* and *CAMH*), Justice Ducharme stated that the Ontario *Habeas Corpus Act* does not apply to criminal proceedings[50]. He also stated, since Justice Knazan had made an order that the applicants be transferred within a "reasonable" time and be held in jail until then (which, recall, is exactly what I suggested in Part 2 under the heading "The new solution", flowed from the Court of Appeal's decisions in *Phaneuf* and *CAMH*), that the applicants could not bring themselves within s. 1(1) of the *Act* as they were both imprison by an order of a court[51]. S. 1(1) of the *Habeas Corpus Act* refers to a person "other than a person imprisoned for debt, or by process in any action, or by the judgment, conviction or order of the Superior Court of Justice or other court of record…" In light of this, going forward, resort will have to be had to the Superior Court's inherent *habeas corpus* power only.

Option #3 for defence counsel: apply to the Superior Court for declaration of Charter violations

This option dovetails with the previous option of bringing a *habeas corpus* application. It stands to reason that a complaint about the legality of detention in jail would be framed in the context of a s. 9 claim (arbitrary detention), and/or a s. 7 *Charter* claim (interference with liberty and/or security of the person). In fact, in *Hussein* and *Rosete* (the *habeas corpus* cases mentioned above) the *habeas corpus* applications were both brought along with claims of violations of s. 7 and s. 9 and in both cases the judges found *Charter* breaches. However, the decisions in *Hussein* and *Rosete* were premised on an interpretation that the relevant *Criminal Code* provisions

[49] *Ibid* at 37
[50] *Supra* note 37 at 11
[51] *Ibid*

required an assessment or treatment order to be carried out immediately once ordered. With that interpretation, of course lengthy periods of being held in jail while awaiting a bed at the hospital would be a violation of the accused's *Charter* rights.

However, in *Phaneuf*, the Ontario Court of Appeal explicitly reversed this interpretation. They said: "We are satisfied that it is "plain and obvious" that the relevant provisions of the *Criminal Code* cannot be interpreted as requiring that accused who are ordered assessed in custody in a hospital must be taken immediately to that hospital and cannot be detained in a detention centre pending transfer to the hospital. To the extent that *R. v. Rosete*, supra, and *Hussein* are read as holding that the *Criminal Code* requires immediate transfer to a hospital, those cases are wrongly decided."[52] They went on to say that, "[t]he determination that the appellant was held in custody pursuant to lawful court orders made under a statutory power, the constitutionality of which is unchallenged, dooms the appellant's arguments that her incarceration in a detention centre violated s. 7 and/or s. 9 of the Charter."[53]

It is important to note that *Phaneuf* was a case where the judge had already used the "new" approach discussed in Part 2, by making it explicit in the order for assessment that the accused be transferred within a "reasonable" time and that she be held in jail until that time. This is what the court was referring to when it says that the appellant was held in custody pursuant to a "lawful court order". The Court of Appeal's decisions in *Phaneuf* and *CAMH* make it clear that such orders for being detained in jail for a "reasonable" time before a bed opens up *are* lawful.

[52] *Supra* note 18 at 19
[53] *Ibid* at 21

The court did make it clear in *Phaneuf* though, that their comments did not foreclose the possibility of a Charter claim being raised in the right case[54]. It stands to reason that what they are referring to is the interpretation of what a "reasonable" amount of time is for the accused to be held in jail awaiting a bed. Obviously such a wait could not be indefinite without offending the *Charter*, but what constitutes "reasonable" remains to be seen. As Justice Ducharme noted in *R v Chen*, there has yet to be any interpretation of what "reasonable" means in this context[55].

However, one still has to consider what the remedy will be in the event that an accused is detained for so long that the detention becomes unreasonable. Will the remedy be more broad and sweeping statements of declaratory relief, as were made but never followed up on in *Hussein* and *Rosete*? If the *Charter* claims are brought along with a *habeas corpus* application, the *habeas corpus* application may be granted and the court may issue an order that the accused be transferred immediately to remedy the *Charter* breaches, but, as noted above, how will hospitals comply with this order when there is still a shortage of beds? Presumably they didn't or weren't able to comply with the initial assessment/treatment order for the same reason.

The most effective remedy would be for the courts to order the government to provide sufficient funding for forensic hospital beds, but judges are very unlikely to do that because they understand it is not their role to direct the government how to allocate its limited resources. In fact, when Justice Desmarais *did* make such an order in *Rosete*, nothing happened and that was *before* the Court of Appeal made mincemeat out of *Rosete* in *Phaneuf*. It seems even less likely now that a judge would make such an order and, if they did, that anything would come of it.

[54] *Ibid* at 32
[55] *Supra* note 37 at 19

However, an accused might be able to get costs against the government for an unreasonable period of detention while waiting for a hospital bed. A Superior Court has the authority, through its inherent jurisdiction, to impose costs where a serious interference with the administration of justice has occurred[56]. However costs do not automatically flow from a finding of a *Charter* violation[57] and should not be routinely awarded[58]. There has been some success with costs for such detentions, though. In *R. v. Singer*[59], the accused was found unfit and ordered to CAMH on a Warrant of Committal pending disposition by the Ontario Review Board. The accused spent about 40 days in jail waiting for a transfer. Justice Kiteley found that this detention contravened the accused's s. 7, 9 and 10(c) rights and, despite the fact that the crown filed affidavit evidence from CAMH that they were unable to accept the accused earlier due to lack of available beds, Justice Kiteley awarded costs on the basis that the failure to comply with the order for the transfer of the applicant to CAMH constituted a serious affront to the authority of the court and a serious interference with the administration of justice. Of course it must be remembered that this was decided pre-*Phaneuf*/*CAMH*, when it was presumably much easier to find a *Charter* violation for detention and where the courts were still issuing orders for transfers "forthwith". Even still, costs will likely be inadequate to compensate an accused who spent weeks or months wrongfully detained in jail.

Options for the police

[56] *R v Pawlowski* (1993), 20 CR (4th) 233 (Ont CA)
[57] *R v Cole* (2000), 143 CCC (3d) 417 (NS CA)
[58] *R v Robinson* (1999), 142 CCC.(3d) 303 (Alta CA)
[59] 2010 ONSC 6196

It is trite to say that the law is a blunt instrument and not the appropriate tool to deal with every situation. This seems particularly true for dealing with mentally ill people. Given the difficulties noted above of lawyers and judges attempting to remedy a resource shortage issue using the law, perhaps it is time to turn the focus on other justice system participants and what they can do to remedy this situation.

The police are in a unique position to prevent these problems from occurring in the first place by not using the criminal justice system as a tool to deal with people with mental health problems. Obviously there will be some situations where a mentally ill person simply must be charged with an offence and then afforded the opportunity to deal with issues of fitness and criminal responsibility within that forum, however, it was my experience when I was a police officer that many people used the criminal justice system to deal with the mentally ill simply because they felt they had no other alternatives. They became frustrated with the lack of assistance they received from the underfunded social services in their community in dealing with the mentally ill person and so turned to the police to deal with issues that were probably better dealt with some other way. This was particularly true for those of a low socio economic status. Unfortunately, the primary tool of a police officer is their power to arrest and charge, which is not necessarily the best tool for dealing with the mentally ill in every situation.

While the primary role of the police is not to provide support or services to the mentally ill or those who must deal with them[60], the police *must* have alternatives to simply charging someone with the hope that the courts will be able to provide them with assistance they are not getting elsewhere. The best alternatives can come from utilizing the synergy that is created by

[60] The police are primarily in the business of *law enforcement*, not social work

partnering police with other mental health care professionals for a front line response. This model is currently used by many police services in Canada[61] and has enjoyed great success in diverting mentally ill people *away* from the criminal justice system, thereby helping to alleviate the issue of forensic bed shortages and keeping those limited resources available for the mentally ill who need them the most. This practice must continue as part of a holistic solution to the problem of bed shortages.

Options for Crown attorneys

Like police, Crown attorneys are similarly situated to implement early intervention strategies to prevent resource shortages from becoming a serious problem. By using the tools at their disposal, such as alternative measures or mental health diversion (which is now available in most major courthouses), Crowns are able to get mentally ill people out of the criminal justice system as quickly as possible and keep limited forensic hospital resources free for those situations where they are needed the most. This is wholly consistent with the Crown Policy Manual on mentally disordered offenders[62] and must also continue as part of a holistic solution.

Conclusion

By way of conclusion, I would make the following three brief observations: first, it is beyond dispute that there presently exists a crisis in the nature of a shortage of forensic hospital beds for

[61] For example, Durham Regional Police Service's Mental Health Response Unit <http://www.drps.ca/internet_explorer/our_organization/unit.asp?ID=78&Scope=Unit>
[62] Crown Policy Manual: *Mentally Disordered/Developmentally Disabled Offenders* (21 March 2005), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/MentallyDisorderedOffenders.pdf>

mentally ill accused. Second, it seems unlikely that there will suddenly be a massive influx of resources from the provincial or federal governments to remedy this crisis. Third, while defence counsel will always try to use the law to secure the best result for their clients, the law really is a blunt instrument, not well suited to solving this problem.

It is therefore incumbent on *all* participants in the criminal justice system to work co-operatively to ensure that there is enough room at the inn for those who need it.