

# Civil Commitment and the “Unsuitable” Voluntary Patient

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## Introduction

Under Alberta’s *Mental Health Act*, three requirements must be satisfied before someone may be detained in a psychiatric facility as an involuntary (formal) patient.<sup>1</sup> The patient must be (1) suffering from a mental disorder as defined in the Act, (2) likely to cause harm to self or others or to suffer substantial mental or physical deterioration or serious physical impairment, and (3) unsuitable to be admitted to (or continue at) the psychiatric facility other than as a formal patient.

By comparison with its two neighbours, the third criterion has received very little attention – from legislators, judges, academics, and (perhaps) even in practice. For example, the two other criteria have been the subject of important legislative changes over the years. The recent amendments to the *Mental Health Act* have focused attention on the second criterion, and in particular, the shift from “danger” to “harm” and “mental or physical deterioration.”<sup>2</sup> Likewise, the definition of the first criterion – “mental disorder” – was the subject of a significant amendment when the Act last underwent substantial revision (in 1988), with the previous definition – “lack of reason or lack of control of behaviour”<sup>3</sup> – being changed to the current definition: “a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality, or ability to meet the ordinary demands of life.”<sup>4</sup>

By contrast, the third criterion remains exactly the same as it was when the *Mental Health Act* was first enacted in 1972 – “unsuitable for admission to a facility other

than as a formal patient.”<sup>5</sup> Also, when compared to the amount of case-law dealing with the first two criteria, there is very little judicial discussion of the meaning of the third criterion.

Hence, the purpose of the present article is to discuss the third criterion – what does it mean to be “unsuitable” to be in a psychiatric facility other than as a formal patient?

## The Unwilling Patient

As Peter Carver has pointed out,<sup>6</sup> the underlying purpose of the third criterion is to “ensure that certification for involuntary hospitalization occurs only in the last resort, where an individual cannot be admitted to a psychiatric facility on a voluntary basis.” The most obvious (and most common) example of this being satisfied is where the individual refuses to be admitted or to stay voluntarily. By definition such a person is unsuitable to be at the facility other than as a formal patient. This is recognized by case-law,<sup>7</sup> and it is also why patients at Review Panel hearings are typically asked what they will do if their certificates are cancelled by the panel. A response which indicates that the patient intends to leave the hospital if the certificates are cancelled generally would be taken as satisfying the third criterion for certification.<sup>8</sup>

Conversely, however, where the patient expresses a willingness to remain at the hospital voluntarily, this does not necessarily mean that the third criterion is absent. The patient’s statement must be assessed in all the circumstances, including factors such as insight,



judgment, impulsivity, and history of leaving the hospital contrary to medical advice. This assessment may well lead to the conclusion that the patient's stated willingness to remain as a voluntary patient is not reliable,<sup>9</sup> and hence the third criterion is satisfied.

### The Mentally Incompetent Patient

Another situation where a person would be unsuitable for hospital admission (or continuation) other than as a formal patient is where that person lacks the mental capacity to consent to being a voluntary patient. Confinement within a hospital constitutes the tort of false imprisonment unless it is done with the consent of the patient,<sup>10</sup> and as with all cases of consent, the

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defence is valid only if the person giving the consent has the mental capacity to do so. Therefore, an individual who lacks the mental capacity to understand the nature and consequences of agreeing to be a voluntary patient in a psychiatric facility cannot validly give this consent,<sup>11</sup> and hence is not "suitable" to be there other than as a formal patient.<sup>12</sup>

Even where there is a legal guardian who has the power to decide where the patient shall live, it is questionable whether this makes the patient "suitable" to be a voluntary patient.<sup>13</sup> However, the recently proclaimed *Adult Guardianship and Trusteeship Act*<sup>14</sup> is relevant here. Under section 87 of the Act, an individual may be admitted to a "residential facility" for a temporary period (which is defined in the regulations as a period not exceeding six months)<sup>15</sup> based on the consent of the nearest relative, if the individual lacks the mental capacity to consent to the admission. A "residential facility" is defined as including an approved hospital under the

*Hospitals Act*,<sup>16</sup> which would include a designated facility under the *Mental Health Act*. Therefore, under the *Adult Guardianship and Trusteeship Act*, it appears that the nearest relative can now consent to the admission of a mentally incompetent patient to a psychiatric facility.

### The Need for Restrictions on the Patient's Freedom

The rights of voluntary patients in a psychiatric facility are no different from those in a general hospital, in particular with respect to their liberty interest. Patients are free to leave the hospital ward (or indeed the hospital) if they choose, and they cannot be forced to behave or be forced to refrain from behaving in a particular manner merely because it is in their best interests to do so.

In some circumstances constraints may have to be placed on a psychiatric patient's behaviour and freedom within the hospital, and these constraints may be incompatible with that person being a voluntary patient. In other words, even though they may be willing to remain at the hospital voluntarily, the need to constrain their freedom within the hospital makes them unsuitable to be there other than as a formal patient. For example, mentally ill patients with a tendency to water intoxication may require a number of constraints on their liberty interest within the hospital to ensure their safety, including limitations on privileges, access to fluids, and mandatory weight assessments. Patients who are unwilling to agree to these and similar constraints on their liberty are therefore not suitable to be in the facility other than as a formal patient, because without the authority of formal certification the hospital would lack the legal power to enforce these constraints on the patient's liberty.

It is important to draw a distinction between this type of "control" and the power of control which is conferred by section 30 of the *Mental Health Act*. Section 30, which applies only to formal patients,<sup>17</sup> provides that the authority to "control" the patient (which is conferred by the admission or renewal certificates) "is authority to control the person without the person's consent to the extent necessary to prevent serious bodily harm to the person or to another person by the minimal use of such force, mechanical means or medication as is reasonable, having regard to the physical and mental condition of the person." Given that section 30 is restricted to cases of preventing serious bodily harm, it is probably redundant, because the power to use reasonable, minimal force



to prevent serious bodily harm already exists under the common law defences of necessity and protection of a third party.<sup>18</sup> Therefore, since the type of control contemplated by section 30 already exists at common law, and applies to formal and informal patients alike, section 30 should not be used as a basis for claiming that someone is not suitable to be a voluntary patient.

## Medical Treatment

Probably the most difficult issue surrounding the third criterion for civil commitment is whether need for treatment is a relevant factor in determining whether someone is unsuitable to be a voluntary patient. In particular, what if the patient is (1) mentally incompetent to consent to the proposed treatment, or (2) mentally competent but refuses to consent? Do either of these conditions render the patient unsuitable to be a voluntary patient?

The answer to the first question (involving the mentally incompetent patient) is now fairly clear, as a result of the recent proclamation of the *Adult Guardianship and Trusteeship Act*.<sup>19</sup> Prior to this Act being proclaimed, it may have been possible to advance the following argument. Patients who lack the capacity to consent to medical treatment can receive treatment if they are certified as formal patients under the *Mental Health Act*, because the Act provides for substitute consent on behalf of mentally incompetent, formal patients;<sup>20</sup> but mentally incompetent voluntary patients cannot be treated, because neither the legislation nor the common law provides a mechanism for substitute consent by family members.<sup>21</sup> Therefore, patients who are mentally incompetent to consent to treatment are not suitable to be at the facility voluntarily, because without formal certification they cannot receive treatment.

This line of reasoning is no longer tenable in light of the substitute consent provisions in the *Adult Guardianship and Trusteeship Act*. Under section 87 of the Act, the nearest relative (or the Public Guardian, in the absence of a nearest relative) has the authority to consent to health care on behalf of a mentally incompetent patient. Hence, this removes any basis for the contention that incapacity to consent to medical treatment renders an individual “unsuitable” to be a voluntary patient under the *Mental Health Act*.

The second situation is more problematic: is a mentally competent patient who refuses consent to psychiatric

treatment thereby “unsuitable” to be a voluntary patient? There is case-law in support of an affirmative answer. In *M. v. Alberta*,<sup>22</sup> Mr. Justice McDonald, in upholding the certification of a formal patient, observed that:<sup>23</sup>

I am further satisfied that M. will not voluntarily continue with his present medication and that the only way he will receive it is if the provisions of the Mental Health Act are resorted to such that he can be compelled to receive weekly injections. Therefore M. is unsuitable for “continuation” at the No. 2 Hospital, which is a “facility”, “other than as a formal patient”.

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**On application by the hospital, the Review Panel has the power to authorize the treatment if it considers it to be in the best interests of the patient, notwithstanding the refusal of consent by the competent patient (or if incompetent, the refusal of consent by the nearest relative).**

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Although the Act at the time of the decision in *M. v. Alberta* was materially different from the current legislation with respect to compulsory treatment of formal patients, the current Act still provides a mechanism for compulsory treatment. On application by the hospital, the Review Panel has the power to authorize the treatment if it considers it to be in the best interests of the patient, notwithstanding the refusal of consent by the competent patient (or if incompetent, the refusal of consent by the nearest relative).<sup>24</sup> Thus, under the present legislation, it is still possible to use the reasoning in *M. v. Alberta*, namely, that a competent patient who needs treatment but who refuses to consent to it is not suitable to be a voluntary patient, because certification as a formal patient is the only way to ensure that the patient receives the treatment.

In most situations this is likely to be a moot point in terms of the third criterion, because a patient who refuses to accept treatment is also unlikely to be willing to remain at the hospital voluntarily, and hence for that reason the



“unsuitability” criterion will be satisfied. However, there is one situation in which the issue is far from moot, and that involves individuals who are detained in a psychiatric facility under the provisions of the *Criminal Code*, having been found not criminally responsible (NCR) by reason of mental disorder, and whose disposition is determined by the Review Board.<sup>25</sup>

The Supreme Court of Canada has held that the *Criminal Code* does not empower the Review Board to prescribe or require treatment for a NCR individual.<sup>26</sup> However, it is important to note that this decision is not rooted in any objection to compulsory treatment. Rather, it is based on the division of legislative powers as between the provinces and the federal parliament. As the Supreme Court has pointed out,<sup>27</sup> “Legislative authority to enact laws governing the administration of medical services and treatment for all persons in a hospital facility (including NCR accused persons) rests with the provinces under s. 92(7) of the *Constitution Act, 1867*, not with Parliament.” Therefore, it can be argued that there is nothing to prevent a psychiatric facility taking the benefit of the compulsory treatment provisions of the provincial *Mental Health Act* for an NCR patient by certifying the patient, even though the patient is already detained in the facility under the authority of a federal statute. Indeed, according to some authors, this is commonly done in practice.<sup>28</sup>

However, is this inconsistent with the *Mental Health Act*? In particular, section 3 of the Act provides that:<sup>29</sup>

If a person has been detained under the *Criminal Code* (Canada) or the *Youth Criminal Justice Act* (Canada) as unfit to stand trial, not criminally responsible on account of mental disorder or not guilty by reason of insanity and the person’s detention under the *Criminal Code* (Canada) or the *Youth Criminal Justice Act* (Canada) is about to expire, a physician is authorized to examine the person and assess the person’s mental condition and may, if the prerequisites for the issuance of an admission certificate set out in section 2 are met, issue an admission certificate in the prescribed form with respect to the person.

The fact that the Legislature considered section 3 to be necessary in order to certify an NCR patient at the end of his detention in the facility might well be interpreted

as meaning that the authority to certify prior to this time does not exist under the Act.

In addition, having a patient who is simultaneously detained in a psychiatric facility under both federal jurisdiction (the *Criminal Code*) and provincial jurisdiction (the *Mental Health Act*) gives rise to potential problems of demarcation of authority. For example, section 20 of the *Mental Health Act* provides that the board of a facility may grant a formal patient leave of absence from the facility. Clearly this creates problems in the case of a certified NCR patient whose disposition from the Review Board does not include the privilege of leaving the hospital. Which takes precedence: the federal or the provincial statute?

## Conclusion

The third criterion for civil commitment is not as straightforward as it may first appear. The “unwilling” patient may not be the only one who is unsuitable to be a voluntary patient. NCR patients, in particular, are probably the most contentious, because their certification as formal patients while they are already detained in the facility may be seen by some as an inappropriate way of doing under the *Mental Health Act* what cannot be done under the *Criminal Code*, namely, provide treatment without consent. However, in the final analysis, the real issue is perhaps not the appropriateness of certification in this type of case, but rather the appropriateness (and constitutional validity) of section 29 of the *Mental Health Act*, which permits the Review Panel to override the objections of a mentally competent patient (or those of an incompetent patient’s nearest relative) and authorize treatment based solely on its assessment of what is in the patient’s best interests.<sup>30</sup>

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## Endnotes

- 1 *Mental Health Act*, R.S.A. 2000, c. M-13, ss. 2, 8(1), as am. by *Mental Health Amendment Act, 2007*, S.A. 2007, c. 35, ss. 3, 6.



- 2 *Mental Health Amendment Act*, S.A. 2007, c. 35.
- 3 *Mental Health Act*, R.S.A. 1980, c. M-13, s. 1(h).
- 4 *Mental Health Act*, S.A. 1988, c. M-13.1, s. 1(f) [now R.S.A. 2000, c. M-13, s. 1(g)].
- 5 *Mental Health Act*, S.A. 1972, c. 118, s. 29(1).
- 6 Peter J. Carver, "Mental Health Law in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, eds., *Canadian Health Law and Policy*, 3rd ed. (Toronto: LexisNexis Canada, 2007) 399 at 412. See also Julio Arboleda-Flórez & Margaret Copithorne, *Mental Health Law and Practice: A Guide to the Alberta Mental Health Act and Related Canadian Legislation* (Calgary: Carswell, 1994) at para. 1.147.
- 7 See, for example, *E.W. v. Alberta Hospital (Edmonton)*, 1999 ABQB 566 at paras. 61-64, 249 A.R. 122; *Franks v. Ruddiman*, 2004 BCSC 632 at para. 24, [2004] B.C.J. No. 1009.
- 8 A more difficult issue arises if the response is conditional, as in "I will stay for a few weeks , then I'll leave."
- 9 See the discussion in Arboleda-Flórez & Copithorne, *supra* note 6 at para. 1.151.
- 10 See generally Ellen I. Picard & Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed. (Toronto: Thomson Carswell, 2007) at 427-430.
- 11 The Mental Health Act in some provinces contains express provisions to this effect: see, for example, *Mental Health Act*, C.C.S.M, c. M110, s. 4(2). However, it is submitted that even in the absence of express statutory provision, voluntary admission requires the patient to have the mental capacity to consent to such admission.
- 12 See Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2nd ed. (Toronto: Thomson Canada, 1994) at 370-371, 395-396; John E. Gray, Margaret A. Shone & Peter F. Liddle, *Canadian Mental Health Law and Policy* (Markham: Butterworths, 2000) at 106-107, 168.
- 13 See Robertson, *ibid.* at 152-155; Arboleda-Flórez & Copithorne, *supra* note 6 at para. 1.150. But see Gray, Shone & Liddle, *ibid.* at 171-172.
- 14 S.A. 2008, c. A-4.2. For a discussion of the Act see Karin L. Kellogg, "Specific Health Care Decisions under Alberta's Adult Guardianship and Trusteeship Act" (2010) 18:2 Health Law Review 45.
- 15 *Adult Guardianship and Trusteeship Regulation*, Alta. Reg. 219/2009, s. 1(2)(e).
- 16 *Ibid.*, s. 1(2)(c).
- 17 Section 30 applies only to formal patients because the section refers to the "authority to control a person under this Act". This is a reference to the authority to "control" which flows from the admission or renewal certificates under sections 7(1) and 8(3) of the Act respectively. Therefore, section 30 does not apply to voluntary patients. See Charles Pearson, "Consent to Psychiatric Treatment in Canada: Specific Issues" (1993) 2:2 Health Law Review 3.
- 18 See generally Lewis N. Klar, *Tort Law*, 4th ed. (Toronto: Thomson Carswell, 2008) at chapter 3.
- 19 *Supra* note 14.
- 20 *Supra* note 1, s. 28.
- 21 *Supra* note 10 at 72.
- 22 63 A.R. 14, [1985] A.J. No. 915 (Q.B.).
- 23 *Ibid.* at para. 51.
- 24 *Supra* note 1, s. 29.
- 25 *Criminal Code*, R.S.C. 1985, c. C-46, Part XX.1.
- 26 *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326.
- 27 *Ibid.* at para. 34.
- 28 See, for example, Carver, *supra* note 6 at 424.
- 29 *Supra* note 1.
- 30 In that regard see in particular *Fleming v. Reid*, 4 O.R. (3d) 74, [1991] O.J. No. 1083 (C.A.). See also Robertson, *supra* note 12 at 479-486.

