COURT OF APPEAL

ON APPEAL FROM the order of Justice Blok of the Supreme Court of B.C. pronounced on the 1st day of November, 2022.

BETWEEN:

A.T.

APPELLANT
(Petitioner)

AND:

BRITISH COLUMBIA (MENTAL HEALTH REVIEW BOARD)

RESPONDENT
(Respondent)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, DISABILITY ALLIANCE BC SOCIETY

INTERVENERS

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OPENING STATEMENT

Individuals who experience mental illness have a long history of discrimination in which their rights and freedoms have been trampled in a way that would be "unimaginable" if applied to other health conditions.[1] In this context, courts must be diligent in ensuring the state does not extend its paternal arm in a manner that erodes the essence of what s. 7 protects.

The chambers judge's interpretation of the first criterion favours speculative and remote concerns about safety and society's perceived interest in reducing the administrative impracticalities and resource-heavy burden of cyclical re-hospitalizations in the mental health system over individual and constitutional rights. The chambers judge's interpretation of the first criterion would allow what is not permitted in other contexts of state detention and create an imbalance between the impact of the decision and the protections the regime provides.

The Mental Health Review Board's lack of authority to render a decision that is minimally restrictive on liberty makes the only constitutionally acceptable interpretation of the first criterion a narrow one.

In the context of non-punitive detention of highly vulnerable individuals, involuntary detention under the *Mental Health Act*, R.S.B.C. 1996, c. 288 ("*Act*"), is only justified if the state can demonstrate that the individual is seriously impaired because of a mental disorder *at the time*. To violate an individual's liberty and fundamental human dignity because they lack judgment or disagree with the proposed treatment is antithetical to the protections afforded by the *Charter* and developed by the courts. The state cannot detain a vulnerable person who has committed no wrongdoing and presents no public safety risk, simply because the person has a different conception of what is in their own best interest.

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[1] H. Stuart, J. Arboleda-Flórez and N. Sartorius, *Paradigms Lost: Fighting Stigma and the Lessons Learned* (2012), at pp. 103-11, cited in *Ontario (Attorney General) v. G.*, 2020 SCC 38 at para. 38.

PART 1 - STATEMENT OF FACTS

1. The BCCLA agrees with the appellant's statement of facts, as augmented by the following fact.
    a. At a review hearing for a patient who has been involuntarily detained under s. 22, the Board is empowered to effect one of two outcomes: the patient's detention continuing on the same conditions, or the patient being discharged (ss. 23, 25(2) and (4.1)). The Board has no authority to impose any terms or conditions on a patient's involuntary detention under the *Act*.

PART 2 - ISSUES ON APPEAL

2. The chambers judge's interpretation of the first criterion for involuntary detention is incorrect and unduly broad.
    a. The chambers judge erred by failing to prioritize individual rights and freedoms in the interpretive analysis, as is required when the state detains individuals for non-punitive purposes.
    b. The chambers judge erred in concluding that the first criterion is fulfilled based on the perception that the patient, if discharged, would not follow their treatment plan, despite not exhibiting acute or active symptoms of a mental disorder.

PART 3 - ARGUMENT

3. The correct interpretation of s. 22(3)(a)(iii) in conjunction with the definition of "person with a mental disorder" in s. 1 is a narrow one. It minimally requires that (1) the assessment of impairment to occur at the time of the hearing; and (2) to prove a patient is "seriously impaired", the state must demonstrate more than the patient merely exhibiting a lack of insight or negative attitudes toward medication, the treatment plan, or both. This is so for three reasons:

First, where liberty is not restricted for punitive or public safety reasons, individual rights must be given primacy.

Second, under the modern approach to statutory interpretation, the broad interpretation of "person with a mental disorder", as found by the chambers judge, is inconsistent with the scheme of the *Act* and the intentions of Parliament. Looking at other contexts of punitive and non-punitive detention, it is clear that far more procedural protections are required where the state deprives vulnerable people of their fundamental liberty for non-punitive purposes.

Third, the broad interpretation creates absurdities within the law of state detention.

I. Individual rights and freedoms must be given primacy where liberty is not restricted for punitive reasons

4. Notwithstanding the rule of strict construction of penal statutes, where an individual is detained by the state, not for punishment, but for the safety of the individual or the public, the individual's liberty must be restricted "no more than necessary" to deal with the risk presented. The *Charter* demands that even if an individual presents *some* risk to themselves or others, the state cannot detain them. Individual autonomy and liberty are paramount when balanced against an uncertain or remote risk.

P.S. v. Ontario, 2014 ONCA 900 ("*P.S.*") at paras. 84, 91, 112–113
A.H. v. Fraser Health Authority, 2019 BCSC 227 ("*A.H.*") at paras. 1, 15, 102, 108

5. In *Winko,* for example, the Supreme Court found that Part XX.1 of the *Criminal Code,* which deals with individuals found not-criminally responsible due to mental disorder

(NCRMD), demonstrates Parliament's "commitment" to liberty. Indeed, the Court held that Part XX.1 of the *Code* only survived s. 7 *Charter* scrutiny because "at every step of the process consideration of the liberty interest of the NCR accused was built into the statutory framework." Therefore, if the NCR accused was dangerous, but not a "significant" threat to their own safety or the safety of the public, they must be absolutely discharged from the regime and released from custody. The regime therefore also rejected the prejudicial idea that mentally ill individuals are inherently and permanently incapable, and dangerous.

Centre for Addiction and Mental Health v. R, 2014 SCC 60 at paras. 89–90
Winko v. Forensic Psychiatric Institute, [1999] 2 S.C.R. 625 at paras. 3, 16, 35, 41–42, 47, 70, 89
P.S. at para. 84–85

6. Liberty and autonomy are given primacy over paternalism even in cases of serious risk to the individual. For example, in *A.H.*, Justice Warren held that ss. 7 and 9 *Charter* rights were breached when the state involuntarily detained a highly vulnerable woman, who had cognitive impairments, mental health issues, and a history of substance abuse, family violence, and sexual abuse under the *Adult Guardianship Act* for over a year. Despite the finding that she was incapable of making decisions to accept support or assistance and a near-certain risk to her personal safety should she return to her abusive mother, the Court held that A.H. could not be detained against her will under the involuntary detention provision.[2]

A.H. at para. 15, 20, 23–24, 28, 30 101, 108
Adult Guardianship Act, R.S.B.C. 1996, c. 6 at ss. 2, 56, 59

7. Involuntary detention under the *Mental Health Act* equally requires individual liberty and autonomy to be maximized, even when there may be some risk to the individual or

[2] Ironically, Warren J. noted, in *obiter*, that the *Mental Health Act* did not allow certification of A.H. in the circumstances because she "had no acute psychotic symptoms and was stable from a mental health perspective" and was therefore "socially" admitted to the facility. It was because A.H. could not be certified under the *Mental Health Act* that Fraser Health turned to the *Adult Guardianship Act* to protect A.H.

the public. A broad reading of “person with a mental disorder”, where lack of insight or disagreement with a treatment plan is considered a sufficiently serious impairment, is wholly inconsistent with this principle.

8. Without more – such as a finding of serious risk to individual or public safety, or that the patient is truly incapable – the state cannot detain mentally ill individuals against their will “for their own good”. To do so would be antithetical to the protections afforded by the *Charter* and developed by the courts in other contexts, including *Starson v. Swazye,* where the Supreme Court of Canada made clear that mentally ill individuals have as much of a right to personal autonomy and self-determination as those suffering from physical ailments: their physical autonomy must be given primacy. The wisdom of a patient’s treatment decision – even if foolish – is irrelevant to the determination of their capacity and whether they should be involuntarily treated.

Starson v Swayze, 2003 SCC 32

II. A broad interpretation of the first criterion is inconsistent with the scheme of the *Act* and the intentions of Parliament

9. The jurisprudence from other contexts of state detention highlights the principle that broad statutory authority to involuntarily and preventatively detain individuals for significant periods of time must be accompanied by robust procedural or substantive protections, protections that are not included in the text of the *Mental Health Act*. The scheme therefore indicates Parliament’s intention for “person with a mental disorder” to be read narrowly, consistent with the procedural and substantive protections it intended to afford.

10. Where a decision affects the rights, privileges, or interests of an individual, the common law duty of procedural fairness is triggered. The greater the effect a decision has on the life and liberty of an individual, the more robust the procedural protections must be to fulfil the duty of fairness and the principles of fundamental justice under s. 7 of the *Charter*. Therefore, the duty of fairness varies with the context within which it is applied, and proceedings where one’s liberty is at stake “will merit greater vigilance by the courts.”

Charkaoui v. Canada (Minister of Citizenship and Immigration), 2007 SCC 9 at para. 25, quoting *Dehghani v. Canada (Minister of Employment and Immigration),* [1993] 1 S.C.R. 1053 at 1077

11. Only statutory language or necessary implication can displace the duty of procedural fairness. Under the *Act*, the Mental Health Review Board has extremely limited authority. It can only determine whether the patient should continue to be involuntarily detained with reference to the criteria in s. 22. The Board is not authorized to impose conditions on release or determine the level of autonomy the patient is given during their involuntary detention. Although the Director of the designated facility may release the patient on leave (s. 37) or transfer them to an approved home (s. 38), both actions are at the sole discretion of the Director.

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52 at para. 22

12. A broad reading of "person with a mental disorder" increases the impact that s. 22(3)(a)(ii) has on the lives of individuals who lack insight, have a different perspective, or disagree with their treatment plan. For these individuals, the functional nature of the detention review conducted under a broad reading of "person with a mental disorder" and its potential impact on them are significant. Indeed, such an interpretation theoretically permits the state to indefinitely detain individuals regardless of the fact that they present speculative or remote risk to their own safety or the safety of the public.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 ("*Baker*") at para. 25

13. Similarly impactful decisions in other contexts of state detention generally involve significant procedural or substantive protections, or both – none of which are present in the *Act*. First, courts have consistently held that for the state to involuntarily detain an individual in accordance with the *Charter*, decision-makers must be imbued with the authority to impose terms and conditions to neutralize the risk presented if released. This is true regardless of whether the individual has committed any wrongdoing prior to the detention. In addition to maximizing liberty by vesting the decision-makers with

appropriate discretion, the statutory regimes often also provide the individual with substantive protections, by imposing a significant burden on the state to detain them.

14. **Immigration detention**: In *Charkaoui*, the Supreme Court of Canada assessed the constitutionality of the detention regime for those found inadmissible on the basis of criminality in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Court concluded that to be compliant with ss. 7 and 12 of the *Charter*, the legislation must provide a mechanism for review that permits the decision-maker to set conditions that would neutralize the risk upon release. The Court emphasized proportionality between the risk the individual presents, and the measures imposed to mitigate that risk, holding that a decision failing to consider such a balance will be set aside.

Charkaoui at paras. 107–110, 117–123

Brown v. Canada (Minister of Citizenship and Immigration), 2020 FCA 130 at paras. 96–97, 109, 116

15. **Detention of dangerous offender under Part XXIV of the *Criminal Code***: After being convicted, an offender may be designated a dangerous offender, and potentially be indefinitely detained, if the state demonstrates beyond a reasonable doubt that they present a high likelihood of harmful recidivism in the future (s. 753 *Criminal Code*). The Supreme Court in *Boutilier* commented that this prospective assessment of risk ensures that "only offenders who pose a tremendous risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention." Proportionality was built into the regime, and the Court held that the regime was constitutional because its substantive requirements for designation are stringent and require the court to conclude no less restrictive measures could neutralize the risk. Detention is also only imposed for as long as circumstances require.

R. v. Boutilier, 2017 SCC 64 at para. 28, 33–38, 46, 57, 69–70

R. v. Lyons, [1987] 2 S.C.R. 309 at 327-328, 339, 341

16. **Administrative segregation in carceral institutions**: To segregate an inmate in a carceral institution, segregation must be the only reasonable alternative. In other words, it must be the least restrictive measure to neutralize the risk the individual presents.

Canadian Civil Liberties Association v. Canada, 2019 ONCA 243 at para. 122, leave to intervene to SCC granted, 2020 CanLII 10506

British Columbia Civil Liberties Association v. Canada, 2019 BCCA 228

Bacon v. Surrey Pretrial Services Centre (Warden), 2010 BCSC 805 at paras. 259, 321

17. **Detention of NCR accused under Part XX.1 of the *Criminal Code*:** In *Winko*, the Supreme Court of Canada considered the constitutionality of the *Criminal Code* provisions dealing with the review of NCR accused. The Court held the regime was constitutional because the Review Board had the authority to impose appropriate conditions regardless of whether it directed the NCR accused be detained or discharged conditionally. Therefore, the regime "ensures that the NCR accused's liberty will be trammelled no more than necessary to protect public safety." To continue any form of detention, the Review Board must be satisfied the person poses a "significant risk of committing a serious criminal offence" or a "significant threat to public safety". In so doing, the Court noted that regime rejected the invidious stereotypes about persons with mental illness being inherently, and permanently dangerous.

Winko at paras. 8–9, 33, 35, 47, 57, 59, 70–71, 88

18. In *Penetanguishene* and *Demers,* the Supreme Court further emphasized the importance of the authority vested in the decision-maker to impose context-specific conditions: "the "unnecessary 'trammelling' of liberty can often lie in the precise conditions attached to the order and not just in the general mode of detention. The devil, as is so often the case, lies in the details." *Demers* likewise established that without vesting the supervising body with adequate procedural powers, the regime will be unconstitutional. In that case, the court considered the application of Part XX.1 of the *Criminal Code* to an accused who was permanently unfit to stand trial, but the review board could not order psychiatric assessments to determine whether he continued to pose a risk to society. The Court held that this power was necessary to impose the least restrictive conditions on their liberty.

Penetanguishene Mental Health Centre v. Ontario (Attorney General), 2004 SCC 20 at paras. 24, 49,52–53

R. c. Demers, 2004 SCC 46 at para. 40, 47, 52, 55

19. **Adult guardianship**: In British Columbia, to be involuntarily detained under the *Adult Guardianship Act*, the adult must be believed to be "abused or neglected" and where measures must be "necessary" to preserve the adult's life, prevent serious physical or mental harm, or protect the adult's property from significant damage or loss. These substantive protections significantly narrow who is impacted by the involuntary measures provision and ensure that it is only being used where necessary. The decision-maker must also choose "the most effective, but the least restrictive and intrusive, way of providing support and assistance" (s. 56(5)). To do so, the court is empowered to make any order it thinks appropriate in the best interests of the adult (ss. 56(3)(e), 57(4)(a)).

A.H., at paras. 8, 15, 101, 102, 108
Adult Guardianship Act, R.S.B.C. 1996, c. 6

20. BCCLA submits that a broad interpretation of "person with a mental disorder" is inconsistent with the interpretive principle that Parliament intends to draft constitutional legislation. The broad interpretation of "person with a mental disorder", that provides for involuntary, non-punitive detention based on a lack of insight alone, introduces an imbalance between:

a. the impact s. 22(3)(a)(iii) has on the life, liberty and security of the patient, like A.T. (who through a perceived lack of insight has found himself indefinitely detained by the state), and

b. the procedural protections provided by the *Act* to fulfil the duty of fairness and fundamental justice under s. 7.

Baker at para. 25

21. The fact that the B.C. *Mental Health Act* specifically precludes the Board from imposing terms or conditions on detention, whether the individual is involuntarily detained in a facility or involuntarily detained in the community on extended leave, is an important consideration in interpreting the impact of the regime. In *P.S.*, for example, the Ontario Court of Appeal held that the involuntary detention regime in the Ontario *Mental Health Act* violated s. 7 of the *Charter* because it failed to give the decision-maker the authority

to tailor terms and conditions to address the specific risk the patient poses, to ensure their liberty is only being restricted where necessary. This case is no different.

P.S. at paras. 84–90, 111–115, 127, 129

22. As the law currently stands, there is no room for common law procedural fairness in the *Act* to allow the Board to impose conditions. The interpretation of the chambers judge is inconsistent with the interpretive principle that Parliament drafts constitutional legislation: Parliament cannot have intended to create an imbalance between the impact of the decision on the individual and the procedural protections.

R. v. Sharpe, 2001 SCC 2 at para. 33

III. The broad interpretation creates absurdities within the overarching legal context of state detention

23. The chambers judge's interpretation of the first criterion – that allows mentally ill individuals who have committed no wrongdoing and who present no risk to public safety to remain detained under the *Act* – creates numerous absurdities within the broader legal context of state detention:

a. Those same individuals, if they were NCR accused, would be released under Part XX.1 of the *Criminal Code* because they do not present a "significant" threat to public or individual safety.

b. Those same individuals, if they were subject to the dangerous and long-term offender regime in the *Criminal Code*, would be ineligible for indefinite sentences, because they do not present a "high likelihood" of harmful recidivism in the future.

c. Those same individuals, if they were subject to adult guardianship legislation, would not be involuntarily detained because measures are not "necessary" to preserve their lives, or prevent serious physical or mental harm.

24. In the BCCLA's respectful view, a broad interpretation of the first criterion cannot be sustained in this context.

PART 4 - NATURE OF ORDER SOUGHT

25. The BCCLA requests permission to present oral argument at the hearing of the appeal.

26. The BCCLA seeks no order as to costs and asks that no award of costs be made against it.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 4th day of May, 2023.

Carly Peddle
Counsel for the Intervener, British Columbia Civil Liberties Association

APPENDICES: LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
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APPENDICES: ENACTMENTS

ADULT GUARDIANSHIP ACT

[RSBC 1996] CHAPTER 6

Guiding principles

2 This Act is to be administered and interpreted in accordance with the following principles:

(a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;

(b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

(c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

Support and assistance orders

56 (1) On hearing the application for the provision of services to the adult, the court must consider whether or not the adult

(a) is abused or neglected,

(b) is unable to seek support and assistance because of an illness, disease, injury or other condition that affects his or her ability to make decisions about the abuse or neglect, and

(c) needs and would benefit from the services proposed in the support and assistance plan.

(2) When considering the things referred to in subsection (1), the court must take into account the information in the documents mentioned in section 54 (3)

(3) If the court is satisfied about the matters set out in subsection (1), the court may

(a) make an order for the provision of support and assistance to the adult without his or her consent,

(b) make an order under Part 7 of the Family Law Act for the support of the adult,

(c) order a person the court finds has abused the adult

(i) to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises,

(ii) not to visit, communicate with, harass or interfere with the adult,

(iii) not to have any contact or association with the adult or the adult's financial affairs, or

(iv) to comply with any other restriction of relations with the adult,

(d) order a person the court finds has abused or neglected the adult to pay for, or contribute towards, the adult's maintenance or services to be provided for the adult, or

(e) make any other order the court thinks is appropriate and in the best interests of the adult.

(4) In an order under subsection (3) (a), the court must specify the kinds of support and assistance that are to be provided for the adult, including any of the following:

(a) admission to an available care facility, hospital or other facility for a specified period of up to one year;

(b) the provision of available health care;

(c) the provision of available social, recreational, educational, vocational or other similar services;

(d) supervised residence in a care home, the adult's home or some other person's home, for a specified period of up to one year;

(e) the provision, for a specified period of up to one year, of available services to ensure that the adult's financial affairs are properly managed and protected, including any services that may be offered by the Public Guardian and Trustee.

(5) In an order made under this section, the court must choose the most effective, but the least restrictive and intrusive, way of providing support and assistance.

(6) If an order is made under this section, the designated agency must serve a copy of the order on the persons who were served with the application under section 54 (2).

(7) An order made under subsection (3) (a) terminates one year after it is made or on an earlier date specified by the court.

Review of support and assistance orders

57 (1) A designated agency that obtained a support and assistance order under section 56 (3) (a) must review the need for the order if

(a) the designated agency has reason to believe that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly since the order was made, or

(b) the adult, or a spokesperson for the adult, requests a review and has a substantial reason for doing so.

(2) If the review under subsection (1) demonstrates that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly, the designated agency must apply to the court to have the order changed or cancelled.

(3) A designated agency that obtains a support and assistance order under section 56 (3) (a) may do either or both of the following:

(a) review the need for the order before it terminates;

(b) apply to the court for a renewal of the order.

(4) On application under subsection (2) or (3), the court may

(a) change or cancel the order if the court is satisfied that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly, or

(b) renew the order for a further period of up to one year if the court is satisfied that the adult still needs the support and assistance provided under section 56 (3) (a).

(5) A support and assistance order under section 56 (3) (a) may be renewed only once.

Emergency assistance

59 (1) A person from a designated agency may do anything referred to in subsection (2) without the adult's agreement if

(a) the adult is apparently abused or neglected,

(b) it is necessary, in the opinion of the person from the designated agency, to act without delay in order to

(i) preserve the adult's life,

(ii) prevent serious physical or mental harm to the adult, or

(iii) protect the adult's property from significant damage or loss, and

(c) the adult is apparently incapable of giving or refusing consent.

(2) In the circumstances described in subsection (1), the designated agency may do one or more of the following:

(a) enter, without a court order or a warrant, any premises where the adult may be located and use any reasonable force that may be necessary in the circumstances;

(b) remove the adult from the premises and convey him or her to a safe place;

(c) provide the adult with emergency health care;

(d) inform the Public Guardian and Trustee that the adult's financial affairs need immediate protection;

(e) take any other emergency measure that is necessary to protect the adult from harm.

(3) After providing the adult with the assistance and services mentioned in subsection (2), the designated agency may conduct investigations under sections 48 and 49.

MENTAL HEALTH ACT

[RSBC 1996] CHAPTER 288

Definitions

[…]

"**person with a mental disorder**" means a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability

(a) to react appropriately to the person's environment, or

(b) to associate with others;

Involuntary admissions

22 (1) The director of a designated facility may admit a person to the designated facility and detain the person for up to 48 hours for examination and treatment on receiving one medical certificate respecting the person completed by a physician or nurse practitioner in accordance with subsections (3) and (4).

(2) On receipt by the director of a second medical certificate completed by a physician in accordance with subsections (3) and (5) respecting the patient admitted under subsection (1), the detention and treatment of that patient may be continued beyond the 48 hour period referred to in subsection (1).

(2.1) If the medical certificate received under subsection (1) was completed by a physician, the medical certificate referred to in subsection (2) must be completed by a physician other than the physician who completed the first certificate.

(3) Each medical certificate under this section must be completed by a physician or nurse practitioner who has examined the person to be admitted, or the patient admitted, under subsection (1) and must set out

(a) a statement by the physician or nurse practitioner that he or she

(i) has examined the person or patient on the date or dates set out, and

(ii) is of the opinion that the person or patient is a person with a mental disorder,

(b) the reasons in summary form for the opinion, and

(c) a statement, separate from that under paragraph (a), by the physician or nurse practitioner that he or she is of the opinion that the person to be admitted, or the patient admitted, under subsection (1)

(i) requires treatment in or through a designated facility,

(ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and

(iii) cannot suitably be admitted as a voluntary patient.

(4) A medical certificate referred to in subsection (1) is not valid unless both it and the examination it describes are completed not more than 14 days before the date of admission.

(5) A second medical certificate referred to in subsection (2) is not valid unless both it and the examination it describes are completed within the 48 hour period following the time of admission.

(6) A medical certificate completed under subsection (1) in accordance with subsections (3) and (4) is authority for anyone to apprehend the person to be admitted, and for the transportation, admission and detention for treatment of that person in or through a designated facility.

(7) A patient admitted under subsection (1) to an observation unit must be transferred to a Provincial mental health facility or psychiatric unit within the prescribed period after a second medical certificate is received under subsection (2) by the director of the observation unit unless the patient is

(a) discharged, or

(b) released on leave or transferred to an approved home under section 37 or 38.

Duration of detention

23 A patient admitted under section 22 may be detained for one month after the date of the admission, and the patient must be discharged at the end of that month unless the authority for the detention is renewed in accordance with section 24.

Review of detention

24 (1) Unless the patient has previously been discharged, authority for the detention of a patient may be renewed under this section as follows:

(a) from the end of the period referred to in section 23 for a further period of one month;

(b) from the end of any period of renewal under paragraph (a) for a further period of 3 months;

(c) from the end of any period of renewal under paragraph (b) for a further period, or further successive periods, of 6 months.

(2) During

(a) every one month period referred to in section 23,

(b) every further one month period referred to in subsection (1) (a), and

(c) the last month of every 3 month or 6 month period referred to in subsection (1) (b) or (c),

the director or a physician authorized by the director must examine the patient and either discharge the patient or record a written report of the examination and include in it the reasons of the director or physician for concluding that section 22 (3) (a) (ii) and (c) continues to describe the condition of the patient.

(2.1) An examination under subsection (2) must include

(a) consideration of all reasonably available evidence concerning the patient's history of mental disorder including

(i) hospitalization for treatment, and

(ii) compliance with treatment plans following hospitalization, and

(b) an assessment of whether there is a significant risk that the patient, if discharged, will as a result of mental disorder fail to follow the treatment plan the director or physician considers necessary to minimize the possibility that the patient will again be detained under section 22.

(2.2) If an examination under subsection (2) concludes that section 22 (3) (a) (ii) and (c) continues to describe the condition of the patient, the director or physician must renew under subsection (2) the authority for the detention of that patient.

(3) The written report referred to in subsection (2) is a renewal of the authority for the detention of the patient referred to in that subsection.

Hearing by review panel

25 (1) A patient detained under section 22 is entitled, at the request of the patient or a person on the patient's behalf, to a hearing by a review panel

(a) within a prescribed time after the commencement of a one month period, or further one month period, referred to in section 23 or in section 24 (1) (a),

(b) within a prescribed time after the commencement of a 3 month period referred to in section 24 (1) (b), or

(c) during any 6 month period referred to in section 24 (1) (c), within a prescribed time after 90 days after the conclusion of any previous hearing.

(1.1) If a patient has been on leave or transferred to an approved home under section 37 or 38 for 12 or more consecutive months and a hearing under this section has not been requested or held within that period, the chair appointed under section 24.1 (1) (a) must review the patient's treatment record and, if satisfied from this record that there is a reasonable likelihood that the patient would be discharged following a hearing under this section, must order that a hearing under this section be held.

(2) The purpose of a hearing under this section is to determine whether the detention of the patient should continue because section 22 (3) (a) (ii) and (c) continues to describe the condition of the patient.

(2.1) A hearing by a review panel must include

(a) consideration of all reasonably available evidence concerning the patient's history of mental disorder including

(i) hospitalization for treatment, and

(ii) compliance with treatment plans following hospitalization, and

(b) an assessment of whether there is a significant risk that the patient, if discharged, will as a result of mental disorder fail to follow the treatment plan the director or a physician authorized by the director considers necessary to minimize the possibility that the patient will again be detained under section 22.

(2.2) Despite any defect or apparent defect in the authority for the initial or continued detention of a patient detained under section 22, a review panel must conduct a hearing and determine whether the detention should continue because the factors in section 22 (3) (a) (ii) and (c) continue to describe the condition of the patient.

(2.3) A review panel may proceed with a hearing

(a) despite a defect or apparent defect in any form required under this Act, and

(b) whether or not the patient has been transferred under section 22 (7) of this Act.

(2.4) A person who satisfies the review panel that he or she has a material interest in or knowledge of matters relevant to the hearing may give evidence or make submissions at the hearing.

(2.5) Unless the review panel orders otherwise, the hearing must be held in private.

(2.6) The chair of a review panel may

(a) exclude the patient from attendance at the hearing or any part of it, but only if the chair of the review panel is satisfied that the exclusion is in the best interests of the patient, or

(b) make orders respecting the taking, hearing or reproduction of evidence as the chair of the review panel considers necessary to protect the interests of the patient or any witness

(2.7) At any time before a hearing begins, a patient may withdraw the request for the hearing

(2.8) The review panel must issue a determination described in subsection (2) no later than 48 hours after the hearing is completed and must issue its reasons no later than 14 days after the determination has been issued.

(2.9) After a review panel has made a determination referred to in subsection (2.8), the chair of the review panel must, without delay, deliver a copy of the determination to the director and to the patient or the patient's counsel or agent, and if the patient is to be discharged the director must discharge the patient.

(3) The chair appointed under section 24.1 (1) (a) may shorten the time period in subsection (1) (c) if

(a) the chair considers it to be in the best interests of the patient, or

(b) new information relative to the patient's detention has become available.

(4) [Repealed 2004-45-118.]

(4.1) If the hearing under subsection (2) concludes that section 22 (3) (a) (ii) and (c) continues to describe the condition of the patient, the review panel must determine under subsection (2) that the detention of the patient be continued.

(5) to (8) [Repealed 2004-45-118.]

(9) Records of the proceedings of a hearing must be kept by the review panel office for at least one year.

Discharge

36 (1) The director may discharge a patient from the designated facility.

(2) An application, request, medical certificate or warrant made or issued under this Act before the discharge of the patient with respect to whom it is made or issued is not effective after the discharge for the purposes of this Act.

(3) If a person is discharged from a designated facility other than by the operation of section 41 (3), the director must, on receiving an application by or on behalf of the person, provide the person with a certificate of discharge, signed by the director, in the prescribed form.

Leave

37 Subject to section 40 and the regulations, if the director considers that leave would benefit a patient detained in the designated facility, the director may release the patient on leave from the designated facility providing appropriate support exists in the community to meet the conditions of the leave.

Approved homes

38 Subject to section 40 and the regulations, if the director considers that the transfer would benefit a patient detained in the designated facility, the director may transfer the patient to an approved home.