Update on Ontario’s Bill 122 Amendments to the Mental Health Act and Health Care Consent Act

Bill 122 passed third reading and received Royal Assent on December 10, 2015, with the consequent amendments to the Mental Health Act and Health Care Consent Act having come into force on December 21, 2015. The amendments affect practice and procedure at Ontario’s Schedule 1 psychiatric facilities as they relate to the management of long-term involuntarily admitted psychiatric patients (patients detained involuntarily under the Mental Health Act for greater than six months).

Background to amendments: P.S. v. Ontario (2014 ONCA 900 (CanLII))

The amendments arise out of the Court of Appeal’s December 2014 decision in P.S. v. Ontario. The appellant, P.S., was a hearing impaired psychiatric patient who had been detained involuntarily at the same psychiatric facility for 19 years at the time of his appeal. The appellant alleged that the involuntary committal provisions in the Mental Health Act infringed on his right to liberty as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms, by allowing for the indeterminate detention of long-term psychiatric patients without adequate procedural protections. The Court agreed and determined that the provision of the Mental Health Act that provided for fourth certificates of involuntary admission to be issued, and renewed indefinitely, was unconstitutional and should be struck.

The appellant also alleged that his equality rights under section 15 of the Charter were violated as he had received insufficient access to interpretation, therapeutic and vocational services during his committal. Again the Court agreed and found that the Consent and Capacity Board’s (CCB or Board) jurisdiction was limited under the provisions of the Mental Health Act to simply reviewing whether the criteria for involuntary admission were met at the time of the hearing, and did not extend to making orders that would ensure that long-term psychiatric patients’ equality interests were minimally impaired.

In its analysis, the Court of Appeal stated that the protection of a detained person’s liberty implicitly requires the taking of appropriate steps to facilitate the patient’s reintegration into the community. The patient’s liberty must be restricted no more than is necessary to deal with the risk that they pose to themselves and to others.

The Court held that the Mental Health Act failed to confer upon the CCB the necessary authority to supervise the security classification, privileges, services, therapy and treatment required to adequately protect the liberty and equality interests of long-term involuntary patients. Much to the frustration of its members, the CCB did not have the power to lower the appellant’s security classification or provide appropriate translation services to facilitate his progression towards reintegration into the community.

The Court of Appeal’s decision was suspended for one year, to give the province time to amend the Mental Health Act, which the provincial legislature has now accomplished.

Impact of the Bill 122 Amendments

If they have not already done so, all Schedule 1 psychiatric facilities should review their Officer in Charge and Involuntary Admission policies to provide for procedures relating to the new certificate of continuation (Form 4A), which replaces what used to be the fourth certificate of renewal. Policies and procedures will also need to respond to the practical effect of the new powers of the CCB to issue orders affecting the management of long-term
psychiatric patients, including instances where a change in the clinical condition of the patient, makes it unsafe for the hospital to comply with a Board order.

**Certificates of continuation and the Board’s power to make orders**

The amendments replace the fourth and subsequent certificates of renewal with certificates of continuation, which allow for the continued involuntary detention of a patient for periods of three months. The attending physician must still determine whether the same Box A or Box B criteria are met before issuing a certificate of continuation; and rights advice is still required, although rights advisors must now inform patients of the expanded powers of the Board on review of a certificate of continuation. As with the previous fourth certificate of renewal, there is generally a mandatory review hearing before the CCB when the first certificate of continuation is issued and when every fourth certificate of continuation is issued thereafter. However, the similarity ends there.

The most significant amendments arise in sections 39 and 41.1, which deal with the hearings to review certificates of continuation (s. 39) and which provide the Board with additional powers to make orders affecting the management of patients who are subject to a certificate of continuation (s. 41.1).

Currently, the Board has the power to simply confirm or rescind a certificate of involuntary admission based on its determination of whether the criteria for involuntary admission are met. When the amendments came into force on December 21, 2015, the Board was granted the power to make a limited number of new orders, namely, orders to:

- transfer a patient to another psychiatric facility (the Form 19 application for transfer to another psychiatric facility has been revoked and replaced with the power to order a transfer within the context of a review of a certificate of continuation),
- place the patient on a leave of absence on the advice of a physician (this is in the context of a certificate of continuation review hearing; section 27, which deals with the authority of the Officer in Charge to place patients on a leave of absence at any time on the recommendation of the patient’s attending physician, remains unchanged),
- direct the Officer in Charge to provide to the patient:
  - a different security level;
  - different privileges within or outside of the psychiatric facility;
  - supervised or unsupervised access to the community; or
  - certain vocational, interpretive, or rehabilitative services.

In making an order, the Board is required to take into account the following factors:

- The safety of the public;
- The ability of the psychiatric facility or facilities to manage and provide care for the patient and others;
- The mental condition of the patient;
- The re-integration of the patient in to society;
- The other needs of the patient;
- Any limitations on the patient’s liberty should be the least restrictive limitations that are commensurate with the circumstances requiring the patient’s involuntary detention.
The Board is not permitted to make an order directing or requiring a physician to provide any psychiatric or other treatment to the patient; or to direct or require that the patient submit to such treatment. Treatment decisions therefore remain subject to the independent clinical opinion of the treating psychiatrist, subject to the patient’s capacity to consent to or refuse treatment, and subject to the law governing substitute consent where the patient is found incapable with respect to treatment decisions.

As noted above, the amendments do away with Form 19 applications for transfer to another psychiatric facility, under section 39.2. Instead the Board will have the power to order patients transferred to another facility in the context of a review of a certificates of continuation, where the patient, the Minister of Health, Deputy Minister or officer in charge of the psychiatric facility where the patient is detained, apply to the Board for an order for transfer. As was the case with Form 19 applications, notice must be given to the officer in charge of the potential receiving facility named in the application. Transfer orders cannot be made over the patient's objection.

The Board may make any s. 41.1 order on its own motion or in response to an application for orders brought by a patient, or in response to an application for transfer brought by the Minister, the officer in charge of the psychiatric facility where the patient is currently detained, or the patient. Where the Board is contemplating making an order on its own motion, it must provide notice to the statutory parties to a certificate of continuation hearing, namely the patient, the attending physician, the officer in charge of the psychiatric facility where the patient is currently detained, and if the order involves the transfer of the patient to another psychiatric facility, the officer in charge of that facility, the Minister (if the Minister has informed the Board that he or she intends to participate as a party), and such other persons as the Board may specify.

The orders may be made subject to the discretion of the officer in charge of the psychiatric facility, much like the discretion that may be exercised by the person in charge under Ontario Review Board dispositions regarding forensic patients detained or supervised under Part XX.1 of the Criminal Code. The CCB may also order an independent assessment of the patient, if that is necessary to determine whether certain orders are appropriate.

**Review of "temporary action" to depart from a Board Order**

Section 41.1 orders are considered binding. However, the amendments also contemplate what will happen if the Officer in Charge departs from an order of the Board to provide a patient with certain privileges. For example, if after having received an order from the Board to assign the patient a specific security level within a hospital, the Officer in Charge does not follow that order, but instead takes “temporary action” contrary to the order, then the Officer in Charge must apply to the Board to vary or cancel the order, if the temporary action exceeds a period of seven days. Section 41.2 of Mental Health Act contemplates that such “temporary action” may be taken where the patient poses a serious risk of bodily harm to the patient or others, such that it is not feasible to carry out the order. This is akin to a Restriction of Liberties hearing which is required for forensic patients detained or supervised under Ontario Review Board dispositions, where the person in charge of the forensic psychiatric facility “significantly restricts” the liberties of the patient for a period greater than seven days. In the CCB context, there are notice requirements to the patient and to the Board, which again are similar to the notice requirements for restriction of liberties under the Ontario Review Board.

**Transition provisions**

There are also transition provisions relating to patients who are on a fourth certificate of renewal just prior to the Bill coming into force on December 21, 2015, which will need to be observed and planned for. The provisions address the following circumstances:
Essentially, if a fourth or subsequent certificate of renewal was completed and filed in compliance with the Mental Health Act prior to December 21, 2015, it will remain in force for not more than three months from the date it was completed. Given that fourth or subsequent certificates of renewal have a period of three months, one would expect that all such certificates would have expired in the normal course by March 20, 2016.

When a third, fourth or subsequent certificate of renewal expires at a date following December 21, 2015, the attending physician may continue the patient’s involuntary detention by completing and filing a first certificate of continuation, now known as a Form 4A.

Where an involuntary patient has made an application for review of an involuntary certificate, whether a Form 3 or a Form 4, before December 21, 2015, the application shall continue until it is finally disposed of as it would have been dealt with prior to the amendments coming into force.

If that continued application is a mandatory review of the patient’s Fourth Form 4, and the Form 4 is confirmed such that the patient then becomes a subject of a first certificate of continuation when it expires, the patient may not make an application for review of the certificate of continuation until the second certificate has been completed and filed. This adjusts the clock for mandatory reviews of certificates of continuation.

With respect to applications for transfer to another psychiatric facility, any application that has been commenced prior to December 21 will continue until it is finally disposed of in accordance with the prior provisions of section 39.2.

**Conclusion**

The Mental Health Act amendments provide a substantial increase in the scope of authority for the CCB to review the conditions and privileges afforded long-term psychiatric patients who have been detained in psychiatric facilities for longer than six months. The amendments provide the CCB with powers similar to those exercised by the Ontario Review Board in its jurisdiction over the detention or supervision in the community of forensic psychiatric patients.

Notably, since the Board now has the power to affect the management of patients within the hospital, and with respect to the use of hospital resources, the Officer in Charge of the psychiatric facility will be made a party to a hearing where a certificate of continuation is being reviewed. In the past, only the patient who was the subject of the certificate and the physician who issued the certificate of renewal were statutory parties to a CCB hearing where the patient’s involuntary status was reviewed (subject to the Board’s power to specify additional parties, where warranted). Hospitals will have to consider who will be the delegate or representative of the Officer in Charge for the purpose of the Form 4A review hearings, and whether the Officer in Charge will require legal advice or representation in relation to these hearings.

Finally, Schedule 1 psychiatric facilities will need to bring their current Officer in Charge and Involuntary Admission policies into compliance with these new statutory provisions that come into force on December 21, 2015. Psychiatric facilities may wish to consult legal counsel as they amend their policies in response to Bill 122.

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