

ONTARIO COURT OF JUSTICE

B E T W E E N :

DR. ELIZABETH RAE, ASSOCAITE MEDICAL OFFICER
OF HEALTH FOR THE CITY OF TORONTO

— AND —

CHRISTOPHER “BLAKE” COLLINS

Before Justice M. Greene
Reasons for judgment
Released December 06, 2018

C. Davies.....for the City
M. Perez.....for Mr. Collins

Introduction

[1] On November 14, 2018, the Associate Medical Officer of Health for the City of Toronto Health Unit brought an application pursuant to section 35 of the *Health Protection and Promotion Act* (HPPA) to have Mr. Collins, who is infected with tuberculosis to be detained in hospital for six months so as to avoid infecting others in the community.

[2] On November 14, 2018, I made an interim order for the detention of Mr. Collins at West Park Hospital. At the time I provided brief oral reasons for my decisions. The full hearing of the application was adjourned so that Mr. Collins could retain counsel. The full hearing of this matter occurred on November 30, 2018.

Summary of the Facts

[3] On September 24, 2018, Mr. Collins was found collapsed in an alleyway in Toronto. He was taken to hospital where, after some tests, he was diagnosed with tuberculosis and found to be very infectious. On September 28, 2018 Mr. Collins started receiving

treatment for his tuberculosis. Mr. Collins was incredibly ill and had to be intubated and receive oxygen.

[4] On October 9, 2018, Mr. Collins became medically stable. On October 12, 2018, a public health tuberculosis nurse met with Mr. Collins and explained to Mr. Collins the necessity of remaining in isolation given the infectious nature of his illness. He was told that he had to wear a mask while passing through public areas and that he could not be in an enclosed space with others while he was still infectious.

[5] Tuberculosis is a highly infectious disease and can be very difficult to treat. It is spread through the air and as a result those that are infectious must not be in enclosed spaces with other people and, if they must be in public, they must wear a mask. While the mask does not completely protect against infecting others, it is an adequate safety measure for someone who must be in public for a relatively short period of time and not in a small confined space.

[6] Mr. Collins lives at a supportive residence facility called Evangel Hall. Mr. Collins's residence is a relatively small room with a washroom. He does not have a full kitchen and he usually eats his meals in a communal dining area and attends at the drop in on the main floor. In light of Mr. Collins personal living arrangements and the fact that he has some cognitive impairments as a result of a brain injury he suffered in 1976, it was recommended to Mr. Collins that instead of attempting to live in isolation at his residence, that he move to West Park Healthcare Centre to continue his treatment until he was no longer infectious.

[7] West Park is a healthcare centre with an entire ward devoted to tuberculosis patients. It has 22 beds in individual rooms and the entire ward has a special ventilation system which allows for increased movement and freedom for those suffering from infectious tuberculosis than they would have in the community at large.

[8] Mr. Collins advised that he did not want to stay at West Park and decide to return home. On October 15, 2018, Mr. Collins left the hospital against medical advice.

[9] While in the community, the public health nurse, Nurse Pigeon, visited Mr. Collins daily to provide him with support and to provide him with his medication. While at Evangel Hall, Mr. Collins was observed by staff to be in the hallway and elevator without wearing his mask. On another occasion Nurse Pigeon found Mr. Collins on the ground of the mailroom struggling for breath and again not wearing his mask. Mr. Collins refused medical assistance and returned to his room.

[10] On October 16, 2018 Mr. Collins continued to walk about Evangel Hall without wearing a mask. Mr. Collins was reminded again of the importance of avoiding areas where others were present and, if in public, he had to wear his mask. After some further discussions, Mr. Collins agreed to visit West Park. While on route to West Park, Mr. Collins continuously took off his mask while in the taxi.

[11] Once at West Park, Mr. Collins agreed to be admitted. While he agreed to be admitted, he still refused to wear his mask while in the common areas and frequently spoke about wanting to leave.

[12] Mr. Collins' health continued to improve but he remained infectious. On October 30, 2018, while still infectious, Mr. Collins left West Park against medical advice. Mr. Collins was seen entering into a taxi without wearing a mask and did not take any medication with him.

[13] Given the infectious nature of the disease and Mr. Collins failure to follow medical advice to avoid the spread of his disease, Dr. Rae issued an order pursuant to section 22 of HPPA for Mr. Collins to comply with certain conditions in order to avoid the spread of a communicable disease, namely tuberculosis. It was Dr. Rae's evidence that this step was necessary to avoid putting the public at risk of exposure to tuberculosis.

[14] Over the next three days, extensive attempts were made to locate Mr. Collins, but he could not be found. He did not even return to his residence at Evangel Hall. On October 31, 2018 Mr. Collins did attend at his doctor's office and was advised to return to West Park but he refused to do so despite being warned about the risk he posed to others.

[15] On November 2, 2018, Mr. Collins was located at a local church he is known to frequent. Mr. Collins had told the priest about his situation and the priest called West Park. At this time, a public health nurse attended and gave Mr. Collins a copy of the section 22 order which required him to cooperate with his treatment; to conduct himself in a manner so as not to expose anyone to his illness; and, to not leave any treatment facility until he was no longer infectious. The public health nurse noted that Mr. Collins was not wearing a mask when he was at the church. Mr. Collins refused to put on the mask and refused to return to West Park. He did agree, however, to meet with a public health nurse in his unit at Evangel Hall later that day. The intention of the public health nurse was to bring food and medication for Mr. Collins. Upon arriving at Mr. Collins unit, Mr. Collins was not present.

[16] Mr. Collins was located again on November 4, 2018 entering Evangel Hall. On November 5, 2018 Mr. Collins reached out to the public health nurse for food. She attended and gave Mr. Collins his medication.

[17] In the days that followed, Mr. Collins was located by the public health nurse and took his medication without incident. He, however, continued to leave his room without wearing a mask. He was found on multiple occasions in the hallway, outside in the smoking area and in the drop in centre. According to Dr. Rae, all these areas are at high risk for spreading the disease given the nature of the space, the already at risk population that attends these locations, and the activities taking place in these locations.

[18] As previously stated, Mr. Collins suffered from a significant brain trauma in 1976. Since then he has showed signs of cognitive impairments. According to Dr. Rae, Mr.

Collins' treating psychiatrist is of the view that the impairments arising from the brain trauma impede Mr. Collins' insight into his illness.

[19] According to Dr. Rae, Mr. Collins's failure to comply with the isolation order and his failure to wear his mask when out in public has put many people at risk of contracting tuberculosis. Mr. Collins tends to mingle with the homeless community and those residing in the shelter system. Dr. Rae testified that this group is already at a greater risk of contracting tuberculosis. As a result of Mr. Collins actions, many people have had to be tested for tuberculosis. At this point no one else has tested positive for the tuberculosis, but the infection has a long incubation period so this does not mean that others have not been infected by Mr. Collins. It is Dr. Rae's opinion that Mr. Collins's detention in a hospital for six months is necessary to protect the public from the spread of tuberculosis.

[20] Since November 15, 2018, Mr. Collins has remained in West Park. A guard has been present to ensure that Mr. Collins does not leave the hospital. Mr. Collins has taken his medication daily and is wearing his mask when outside his room. Mr. Collins continues to improve medically but is still very contagious. Dr. Rae testified that she expects that Mr. Collins will be infectious for another two months. Even after he is no longer infectious, the disease will still be active in Mr. Collins and if he stops treatment, he will quickly become infectious again.

[21] Mr. Collins is very clear that he does not want to remain in West Park. He finds it particularly troubling that a guard is with him at all times. Moreover, when inside his room, Mr. Collins is locked in and has to page a nurse in order to be let out of his room. He also is dissatisfied with the quality and quantity of food that he is receiving. Given these conditions of his detention Mr. Collins feels like he is being treated like a criminal and that West Park, instead of being a hospital is a jail. Mr. Collins also explained that he did not wear his mask before because it inhibited his breathing. The hospital staff have now modified his mask so that it is more comfortable to wear. Mr. Collins testified that he is now willing to wear his mask and will comply with the section 22 order if he is released from West Park.

Issues

[22] Dr. Rae has asked for an order detaining Mr. Collins in West Park for six months as it is her medical opinion that it will take six months to fully rid Mr. Collins of tuberculosis. It is Dr. Rae's opinion that given Mr. Collins past noncompliance, once back in the community, Mr. Collins will stop wearing the mask and will not remain in isolation. It also her position that given his past non-compliance, Mr. Collins's detention is necessary even after he is no longer infectious so as to ensure that Mr. Collins continues to take his medication.

[23] Mr. Collins does not want to be detained at West Park and argued, through his lawyer, that if released back into the community he will take his medication, wear his

mask and remain in his room. In the alternative, Mr. Collins argued that he should be released from West Park as soon as he is no longer infectious. He also wants this court to order that the guard no longer follow him about the ward and that he no longer be locked in his bedroom.

Analysis

[24] There is very little case law on section 35 orders under the HPPA. In *Toronto (City) Medical Officer of Health v. McKay*, [2007] O.J. No. 3802 (OCJ), Justice Trotter, in addressing the issue of burden of proof on an extension application commented that the burden of proof under section 35 of the HPPA may be on a balance of probabilities but it is more likely a less onerous test. It was his view that given the language of the section and its similarity to section 672.54 of the *Criminal Code* that a judge need only be “satisfied” that the specified risk exists. Justice Trotter ultimately concluded that he did not need to reach a firm conclusion on this point due to the nature of the evidence presented before him. I find myself in a similar situation. Applying either burden in the case at bar will yield the same result

[25] I am mindful that in *McKay*, the court was dealing with an extension application as opposed to an original order, but in my view, the test is effectively the same. I can think of no principled basis to employ a different test at this stage.

[26] In the case at bar, there is no dispute that Mr. Collins suffers from infectious tuberculosis and that he failed to follow the s.22 order imposed on him after he left West Park against medical advice. The only issue to be decided at this point is whether Mr. Collins, if released from West Park now, will remain in his room and away from enclosed spaces with others and whether, when he must leave his room, he will wear his mask. Dr. Rae also argued that there is a real likelihood that Mr. Collins will not take his medication if released to the community further putting both himself and the community at risk.

[27] In relation to this latter point, but for the brief period of time when Mr. Collins was attempting to avoid detection in the community, Mr. Collins did not take his medication. At all other times, however, Mr. Collins has been willing to take his medication. Mr. Collins testified that he is feeling significantly better and sees the value in taking his medication. I accept his evidence on this point. Given this evidence, it is my view that Mr. Collins will continue to voluntarily take his medication, even if released from West Park.

[28] In relation to the risk of exposing others in the community to his illness, it is my view that if released from the hospital, Mr. Collins will be unable to comply with the isolation order and will therefore pose a significant risk to the physical health of others in the community. I appreciate that Mr. Collins does not want to infect others but his past actions lead me to conclude that he lacks insight into the steps required to avoid infecting

others with tuberculosis. Mr. Collins was told many times about the risk he posed to others and the necessity of remaining in isolation and wearing his mask. Nonetheless, he continued to leave his room, remain in enclosed spaces with others and not wear his mask. Even after being told about the section 22 Order, Mr. Collins continued to ignore the medical advice and orders. Mr. Collins actions put many people at risk of contracting tuberculosis.

[29] The only reasonable conclusion to be drawn from Mr. Collins's recent actions is that Mr. Collins did breach the section 22 Order and if released back to the community he will continue to breach the order and thereby put the public health at significant risk given the infectious nature of his disease. I am satisfied that if released, Mr. Collins will continue to engage in behaviour that will put those around him at risk of contracting tuberculosis. I therefore find that the city has met its burden and that Mr. Collins should remain in West Park at least until he is no longer infectious.

[30] Given Mr. Collins' general willingness to take his medication, it may be that he can be released once he is no longer infectious. I therefore order that this matter return before me within 48 hours of Mr. Collin's smear test confirming that he is no longer infectious to determine if his continued detention is necessary. I am told that this will likely be in the next two months. If Mr. Collins's tuberculosis ends up being harder to treat than expected this order shall only remain in effect for a maximum of six months, which is the maximum permitted by the statute.

Conditions of Detention

[31] In my view, it is necessary to address the conditions of Mr. Collins's detention. I am advised that West Park has assigned a guard to Mr. Collins and that this guard follows Mr. Collins around the ward. Mr. Collins expressed great concern about the lack of privacy associated with having this guard following him at all times. In my view, this invasion of privacy is totally unnecessary and an affront to Mr. Collins's personal dignity. While I appreciate that West Park must ensure that Mr. Collins does not leave the hospital, there are less intrusive means of doing this. If a guard is necessary, the guard can be stationed at the various exits as opposed to by Mr. Collins's side. Any intrusion on one's liberty and privacy by the state must be in accordance with a free and democratic society. Where less onerous and intrusive means can achieve the same end, the less intrusive means must be used.

[32] In this same vein, I have heard no evidence as to why it is necessary to lock Mr. Collins in his room each night. The psychological impact of being locked in a room, is real. Mr. Collins testified about feeling like he was in a jail cell. Given the absence of justification for this extreme step, it is my view that it is not permissible in law. I therefore order that the door to Mr. Collins' room not be locked from the outside.

[33] I am mindful that the staff from West Park were not present at this hearing. If the above steps are truly necessary to ensure public safety, they are invited to bring this matter back before me to revisit my decision on this point.

Released December 6, 2018

Justice Mara Greene