DEPRIVATION OF LIBERTY AND INVOLUNTARY MEDICAL TREATMENT IN QUEBEC

Panel 8: deprivation of liberty and involuntary medical treatment
4th World Congress on Adult Guardianship

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Introduction

1. Fundamental rights and their application in the context of deprivation of liberty and involuntary medical treatment

2. A critic of the current system: power of experts professionals in care versus reluctant judges

Conclusion: food for thoughts
Introduction: mixed legal system in Quebec

- Criminal code
- Principles of fundamental justice - Natural law
- Quebec Charter of HR and freedoms (1975)
- Civil Procedural Code (1965-2016)
- Act respecting the protection of persons whose mental state presents a danger to themselves or to others - P 38 – 1997
- Public Curator Act - 1989
- Act respecting health services and social services - 1991
1-Fundamental rights and their application in the context of deprivation of liberty and involuntary medical treatment
1.1 Fundamental rights: substantive rights – not absolute - minimal infringement

- **Right to self-determination** (autonomy & dignity)
  - Ex: a person under supervisory protection (tutor/curator) is presumed capable to consent to care
  - Ex: P-38 tribunal must make its own mind re dangerousness (testimony person)

- **Right to integrity** (security): physical and psychological integrity
  - Ex: Only the judge can force a major full of age incapable to consent to care who refuses categorically the care + when no one is there to for the major full of age who is found incapable of consenting to care

- **Right to liberty**
  - Ex: 118.1 act respecting health services and social services – exceptional use of isolation/mechanicals & chemicals means to place person under control
  - Safeguards against arbitrary detention – Confinement under P 38 is detention
1.2 procedural rights / judicial rights /

- Audi alteram partem (droit à une défense pleine et entière)
  - Right to be informed of one’s right (confinement - art 10a Canadian Charter) Archambault c. R. 2016 QCCQ 5597 — personal integrity — 393 NCPC — 14-15 P38
  - Right to be notified re judicial proceedings — art 140 NCPC
  - Right to a lawyer (Archambault c. R. 2016 QCCQ 5597) — 90, 160, 393 NCPC — 17 P-38 (access to a lawyer while in confinement under P38)
  - Right to have access to information (re psychiatric report — art 29 CcQ)

- Right to appeal (as of right — 30 NCPC)

- Third parties: 
  - Obligation to give notice to the mandatary, tutor/curator (confinement — 19 P 38)
  - Right to communicate with a third party (confinement — art 17 P 38)
2- A critic of the current system: the power of the professionals vs the reluctant judge

• Lack of respect of the principle of fundamental justice: Audi alteram partem
• Creates an Imbalance of power
• Comforted by reluctant judges
• A specific concern: confinement as care (outside the ambit of P 38)
2.2 involuntary medical treatment - UNBALANCE OF POWER in Access to justice

- Presentation of the application for involuntary medical treatment is heard 5 to 10 days after notification.

- Expertise re incapacity to consent and need of care by the treating doctor (conflict of interest?) — often no-counter-expertise (cost — counter-expertise only in 3% of cases — 2012 study)

- Often no legal representation but now 90-160-393 NCPC

- Public curator is often absent from the proceedings / need guardian ad litem? Or support person?
2.2 involuntary medical treatment – what role for the judges - minimum infringement of fundamental rights

- Playing the doctor? Ensuring legal safeguards are respected (process) – protecting well being of the vulnerable (parens patriae) vs/and respecting right to self-determination

- According to Court of appeal
  - Is the person full of age incapable of consenting to care?
  - Did the person categorically refuse the care?
  - Is the care required and, if necessary, described with sufficient precision?
  - Do the beneficial effects to draw from this care exceed their effects harmful?
  - What should be the duration of the ordinance, if necessary?
  - Beyond the authorization to manage the plan of care and its duration, are there other required conclusions?

- No place for raising questions about alternative to a medical treatment/confinement

So Rubber-stamping the experts reports and testimonies as long as they are detailed?
2.2 involuntary medical treatment - Protection (power of health practitioner) vs right to Autonomy: its impact on substantive rights

1st question: Capacity to consent to care and right to self-determination

Test: Patients are deemed **incapable of giving consent** if they cannot understand:

1. the nature of their illness; insight, self critic
2. the nature and purpose of the treatment;
3. the risks associated with the treatment;
4. the risks involved if the treatment is not given;
5. that their state of health affects their capacity to consent.

Problems with control/application by judges

- Does not always interact with the adult full of age
- Often stops at step 1
- Problem with step 5: presumption that health affects capacity to consent to care results in presumption of incapacity to consent to care
2.3 Blurring the lines Confinement as care:

- Care under **art 11 CcQ** (authorized interpretation by Justice Ministre):
  - Forced Hospitalization in order to provide medical care
  - Deprivation of liberty in order to keep safe (nursing home)

- **PROBLEMS**
  - 3 to 5 years ordinance renewable
  - CcQ does not have the same safeguards as P-38 specifically no statutory revision
  - Delegate power to monitor the need to revise plan of care to Council of physicians
    - Prob confidentiality of deliberation of such council
    - Against audi alteram partem

- According to me: deprivation of liberty in the case of forced hospitalization is “detention” and all the warranties should apply
Conclusion

- Confinement is detention: procedural rights
- Role of judge: how to evaluate the proportionality of the measures restricting fundamental rights in the plan of care submitted by professionals to the need of protection of the person?
- Right to effective assistance in personal matters: support person in the sense of facilitator – public curator, student legal clinic – mobile legal clinic? – fiduciary duties
- But according to Quebec officials everything is just fine…
Introduction: instances of deprivation of liberty and involuntary medical treatment in Quebec

- **Deprivation of liberty:**
  - Civil: Confinement in some cases of Mental health. *Act respecting the protection of persons whose mental state presents a danger to themselves or to others (P-38) + Civil code of Quebec (Cour du Québec)*
  - Civil: Confinement in order to give medical care; or care (medicalized retirement home) - *Civil code of Quebec (Cour supérieure)*
  - Criminal: Detention in the case of 1) not criminally responsible on account of mental disorder; 2) unfit to stand trial (administrative tribunal) – CRITIC therapeutic tribunal – need to plead guilty in order to benefit from the services (vs presumption of innocence) -

- **Involuntary medical treatment**
  - Medical treatment: *Civil code of Quebec + 118.1 Act respecting health services and social services (Cour supérieure)*
  - Psychosocial evaluation: *Civil code of Quebec (Cour supérieure)*
  - Psychiatric evaluation: *P-38 + Civil code of Quebec (art 29) – (Cour du Québec)*
Introduction: Adult guardianship and the protection of the person (vs its assets): who consents to medical treatment?

- Protective supervision of the person instituted or Protection mandate homologated by the court
  - Private:
    - Mandatary
    - Curator (incapacity of that person to care for himself and to administer his property is total and permanent and that he needs to be represented in the exercise of his civil rights.) or tutor (incapacity of that person to care for himself or to administer his property is partial or temporary and that he needs to be represented in the exercise of his civil rights). The court then appoints a tutor to the person and to property, or a tutor either to the person or to property.
  - Public curator

- No protection mandate homologated nor protective supervision of the person
  - spouse: married, civil union or common-law;
  - close relative;
  - anyone showing a special interest in the person;
  - Public Curator if the person is isolated. (art 13(3) Public Curator Act)
2.1 Protection vs right to Autonomy and its impact on procedural rights (audi alteram partem): Confinement under P-38

- Exception within the law
  - Absence of notification possible in certain cases – still exceptional? Lack of motivation in the psychiatric report regarding harm
    - P-38 - 123 NCPC: "the court, if it considers that notification of an application concerning a person’s confinement in a health or social services institution for or after a psychiatric assessment would be harmful to the health or safety of the person concerned or of another person, or in an urgent situation, may exempt such an application from notification"
  - Possibility of temporary prohibition of communication with third parties (art 17 P 38)

- Lack of respect
  - Judge often does not interview the person (vs art 30 CcQ)
  - Lack of motivation/impartiality re dangerousness
  - Lack of respect of delays
2.1 Protection vs Autonomy and its impact on substantive rights: Confinement under P-38

- Legal definitions: dangerousness - from mental illness to mental state
  - Dame L. v. Larue (1959) B.R. 549: risk of harm (not hypothetical)
  - Danger for oneself or others
    - Manifestation of suicidal thoughts
    - Threatening remarks towards others (agressivity)
    - Defective perception or reality and or deterioration of judgement
    - Vulnerability and lack of resources
    - Faded judgement bringing behaviors misfits at the person (paranoia leading it to badger continuously with neighbors, nudity) and which exposes it (constantly) to the reactions of others;
    - Incapacity (because of his state mental) to adequately manage a treatment on which its life depends
**Confinement (& psychiatric evaluation) – Mental health (Quebec court)**

- **Preventive confinement outside of a judicial decision:** grave and imminent danger: maximum 72 hours
  - **Temporary confinement:** serious threat
    - 48 h
  - Confinement for a determinate length of time – statutorial revision
    - Tribunal confinement + psychiatric evaluation
    - 1st psychiatric evaluation (if confinement) – 24h
    - 2nd psychiatric evaluation
      - if patient was under preventive then temporary confinement within 48h
      - Otherwise: 96h
    - Tribunal

- Only confinement
  - 1st psychiatric evaluation (if confinement) – 24h
  - 2nd psychiatric evaluation
    - if patient was under preventive then temporary confinement within 48h
    - Otherwise: 96h

**Confinement for a determinate length of time – statutorial revision**

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Involuntary medical treatment (Superior Court – *parens patriae* – protection of best interest of the vulnerable & protection fundamental rights)

- Legal capacity different from capacity to consent to care (aptitude/de facto capacity) (*Institut Philippe Pinel de Montréal c. G.(A.), [1994] R.J.Q. 2523 (C.A.))

- Who evaluates the capacity to consent to care? treating doctor (conflict of interest?) then tribunal (Superior Court)

- Only the superior court can submit a person to a medical treatment (parens patriae) after checking the legality of the request for forced medical care as it infringes upon fundamental rights

1) 4 Case scenarii

   1. No supervisory protection (tutor) – capable to consent to care – refusal – OK
   2. Supervisory protection (tutor) – capable to consent to care – refusal – OK
   3. Supervisory protection (tutor/curator) – incapable to consent to care – substituted consent by guardian (curator/tutor); adult Ok – Ok
   4. Supervisory protection (tutor/curator) – incapable to consent to care – substituted consent by guardian (curator/tutor): if unmotivated refusal – Judge – art 16 & 12 CcQ
   5. Supervisory protection (tutor/curator) – incapable to consent to care – substituted consent by guardian (curator/tutor): if *categorical refusal of the person* – Judge – art 16 & 12 CcQ
   6. No Supervisory protection – incapable to consent to care - whether the person accepts or refuses the care: Judge – art 16 & 12 CcQ
2.3 Confinement as care:

- **Care under art 11 CcQ** (authorized interpretation by Justice Ministre):
  - Medical treatment
  - Forced Hospitalization in order to provide medical care
  - Deprivation of liberty in order to keep safe

- **PROBLEMS**
  - 3 to 5 years ordinance renewable
  - CcQ does not have the same safeguards as P-38 specifically no statutory revision
  - Delegate power to control need to revise plan of care to Council of physicians
    - Prob confidentiality of deliberation of such council (art 218)
    - Against audi alteram partem
  - Evaluation of incapacity to consent to care is often made by ergotherapeutes and/or social workers: confusion between incapacity to take care of one’s self and incapacity to consent to care

- According to me: deprivation of liberty in the case of forced hospitalization is “detention” and all the warranties should apply
FOR THESE REASONS, THE COURT:

GRANTS the Petitioner’s motion for an authorization of treatment required by the state of health of the Respondant;

DECLARES that the Respondant is incapable to accept or refuse treatment required by his state of health

DECLARES unjustified the Respondant and M.L.’s refusal of the treatment required by the Respondant’s state of health

AUTHORIZES the Petitioner to house J.V. ... for a period of three years in the facilities of the Petitioner or any other resource adapted to the Respondant’s condition designated by the petitioner.

AUTHORIZES the Petitioner or its facility to house the Respondant despite his refusal and against his will by taking the necessary measures to do so.

AUTHORIZES as required, any agent of the peace, any ambulance attendant, to use all appropriate means, including the use of force deemed necessary, to bring the Respondant to the Petitioner’s facilities or any other resource designated by the Petitioner.

AUTHORIZES as required, any agent of the peace to locate the Respondant wherever he might be, including in a domicile, to bring him to the facility of the Petitioner or any other resource designated my the Petitioner, in conformity with the present order, and to use such force as is necessary to enter into any domicile or place where the Respondant is located.

ORDERS the Petitioner, or the designated housing facility, to provide the impleaded parties, M.L, P.L and H.L., at the civil adresses submitted by them, as well as to the Council of Physicians, Dentists and Pharmacists, a brief written report on the Respondant’s adaptation to her care facility within a six (6) months following her admission and hence after, on the anniversary of her admission.

ORDERS as required, that the present authorizations and orders apply, with the necessary modifications, to any housing or health care institution where the Respondant might be transfered or treated.

ORDERS to Petitioner to serve the present judgment to the impleaded parties P.L. and H.L.,

ORDERS the provisional execution of the present judgment notwithstanding appeal;