COURT FILE NO.: 05-DV-1152
05-DV-1200
DATE: 2006/01/26

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
CUNNINGHAM A.C.J., LANE AND HACKLAND JJ.

B E T W E E N:	)	
	)	
ANN GRAY by her litigation guardian JAMES GRAY	)	Brenda Hollingsworth and David Hollingsworth, for the Applicant
	)	
Applicant	)	
	)	
and	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, DALTON MCGUINTY, SANDRA PUPATELLO AND JOHN DOE	)	Dennis Brown, Q.C., Lise Favreau, Darrell Kloeze and Sean Hanley, for the Respondents
	)	
Respondents	)	
	)	
- and -	)	
	)	
FRANCES VENTOLA by her litigation guardian ANTONIETTA JEFFREY, KATHRINE ANNE MACPHERSON by her litigation guardian JUANITA MACPHERSON, AND DONALD BILLINGTON by his litigation guardian SUSAN BILLINGTON	)	R. Douglas Elliot and Gabriel R. Fabel for the Applicants
	)	
Applicants	)	
	)	
and	)	
	)	
SANDRA PUPATELLO, HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO, HURONIA REGIONAL CENTRE, and MICHAEL CILLIS	)	Dennis Brown, Q.C., Lise Favreau, Darrell Kloeze and Sean Hanley, for the Respondents
	)	
Respondents	)	

) Laurie S. Redden, for the Public Guardian
) and Trustee
)
) Raj Anand and Megan E. Ferrier, for the
) Intervenor, Community Living Ontario
)
)
) **HEARD:** Ottawa – December 12, 13, 2005

THE JUDGMENT OF THE COURT WAS DELIVERED BY:

[1] **HACKLAND, J.** On September 9, 2004, the Minister of Community and Social Services ("the Minister") announced her decision to close the Rideau Regional Centre (RRC), Huronia Regional Centre (HRC) and Southwestern Regional Centre (SRC) by March 31, 2009. These are the three remaining institutions, described as Schedule I facilities, under the *Developmental Services Act*, R.S.O. 1990. c.D. 11. These three institutions are currently home to approximately 1000 severely developmentally delayed adults, most of whom have lived there since childhood.

[2] The Applicants are the litigation guardians of several of the affected residents. Ann Gray resides at the RRC. Frances Ventola, Katherine Anne Macpherson and Donald Billington reside at the HRC. An action was commenced on behalf of Ann Gray under the *Class Proceedings Act*. At the same time, an interlocutory injunction was sought to prohibit the transfer out of the RRC of any residents without the consent of their substitute decision makers. By order dated September 29, 2005, Justice Robert Smith ordered that the proceedings be transferred to the Divisional Court, to be dealt with summarily pursuant to the provisions of the *Judicial Review Procedure Act*, see *Gray v. Ontario* [2005] O.J. No. 4221. Subsequent orders of the Court directed that the application on behalf of Frances Ventola et al. be heard by the Divisional Court at the same time. The Public Guardian and Trustee was appointed, and made a party to these proceedings, to represent residents of RRC and HRC who are incapable with respect to the issues in this litigation and who have no other substitute decision maker. Community Living Ontario was granted leave to intervene as a friend of the court.

[3] The two applications for judicial review (the Gray application and the Ventola application) seek judicial review of the decision of the Minister to close the three institutions. The Applicants' submission is that the *Developmental Services Act* does not, as a matter of statutory interpretation, give the Minister this power. The Applicants concede that if the Minister does have the power to close all three institutions, the exercise of her discretion to do so is not open to challenge. The Applicants also seek a declaration of the court recognizing that the consent of a resident, or his or her substitute decision maker, is necessary for the relocation of the resident from an institutional to a community setting.

Issues

[4] The issues to be decided in these two related judicial review applications are the following:

(1) Did the Minister exceed her jurisdiction under the *Developmental Services Act* by directing the closure of the remaining Schedule I facilities (the RRC, HRC and SRC)?

(2) If the Minister acted within her jurisdiction in closing the institutions, is the Minister required to obtain the consent of the resident or his or her next of kin or substitute decision maker to the community placement selected for the resident? If so, how are disputes to be resolved concerning community placement?

Issue (1) Did the Minister exceed her jurisdiction under the *Developmental Services Act* by directing the closure of the remaining Schedule I facilities (the RRC, HRC and SRC)?

Background

[5] The Applicants are concerned that their family members, who have resided for many years in these institutions, will not be able to tolerate a move to a community setting. As well, they question whether there exists a commitment and an ability to deliver the quality of care equivalent to the institutional care residents presently receive. The Applicants recognize that the Province of Ontario's program of de-institutionalization has benefited many disabled individuals.

However, they believe that this limited group of severely disabled adults, who continue to be very well looked after in these institutional settings, are best not subjected to what, for most, will be a traumatic change in their lives.

[6] The demographics of the population in RRC, which are similar to those of the residents of the other two institutions, are helpfully set out in paragraphs 32-41 of the Applicant Ann Gray's factum, as follows:

> 32. The residents have an average age of 54. There are at least two residents in their 80's. The average period of residence at RRC is 39 years, with a range of from 30 years to 54. Sixty per cent of the residents have resided at RRC for more than 35 years.
>
> 33. Over 300 residents are profoundly retarded, while about 90 are severely retarded. These diagnoses are defined by the American Psychiatric Association's DSM – IV-TR and were used, at least until 1993, by the Ministry. Residents have an IQ of less than 40. Most residents exhibit a mental age of less than 4.
>
> 34. A significant number of residents suffer in various stages of Alzheimer's disease and other forms of dementia.
>
> 35. Many residents have a dual diagnosis of an emotional disability in addition to their mental disability. Residents of RRC, in addition to their mental and emotional disabilities, are susceptible to numerous physical disabilities too.
>
> 36. Few of the residents of RRC have significant verbal skills. Eighty percent of the residents rely entirely upon the non-verbal communication skills of their caregivers. Non-verbal communication is individual-specific. For non-verbal residents, the ability to communicate requires skill and substantial time.
>
> 37. Many residents have limited self-help ability or personal hygiene skills and most lack toilet training. Many of the residents are susceptible to frustration and react poorly to it, with a variety of self destructive or anti-social behaviours. Seventy per cent of the residents suffer from chronic long-term physical disabilities and are confined to wheel chairs or otherwise. Many of the residents suffer from one or more degenerative conditions.
>
> 38. Many residents require specialized diets and adaptive devices. Some residents are not able to feed themselves.
>
> 39. Almost half of the residents are what are referred to as total care residents, who require assistance with most if not all of their requirements for daily living.
>
> 40. Many residents are at risk of serious injury if not properly taken care of due to:

a) Fragile bones and risk of fracture;
b) Being bedridden and at risk of bedsores and infection;
c) Accelerated aging due to the effects of their developmental disability;
d) Alzheimer's Disease;
e) Dementia due to the effects of Downs Syndrome and otherwise;
f) The eating disorder Pica (Sufferers of Pica will compulsively eat all manner of non-food items, leading to gastric insult. The death of the individual has been found to be the end result of this insult in several group home environments where this has occurred.);
g) Deafness; and
h) Blindness.

41. More than 170 of the residents are destructive of property. More than 200 of the residents are prone to self abuse and injury. More than 240 of the residents are physically aggressive and a risk to others. An unknown number of the residents are sexually aggressive and a risk to others.

[7] I accept that these residents are severely developmentally delayed and are no doubt very vulnerable individuals. However, it does not follow and the evidence does not establish that their needs cannot be met in community placements. On the contrary, the evidence establishes that individuals with this level of developmental disability have been placed successfully in community settings since the mid-1980's. There have been no new admissions to the three remaining institutions for nearly 20 years.

[8] The move to de-institutionalize handicapped individuals can be traced to an influential report prepared by the late Walter Williston entitled "Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario" (1971). The author detailed the many problems associated with the overcrowded, isolated and understaffed institutions of the day. In particular he viewed the practice of locking away handicapped people as an affront to their human dignity and an obstacle to achieving their individual potential. Mr. Williston saw this problem as both a quality of care and a human rights issue. His principal recommendation was the "phasing down of large institutions for the mentally retarded", in favour of placing these individuals in community settings. As Sopinka J. stated in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 58:

> A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario (1971). With it came a recognition of the desirability of integration and de-institutionalization.

[9] Following Mr. Williston's recommendations, there were 19 such institutions. Today there are three and as noted, they are to be closed by March 31, 2009. RRC, which housed as many as 2650 residents since its opening in 1951, saw its population reduce significantly. Today it is home to 412 individuals. HRC has operated continuously since 1876 and has housed as many as 2948 residents. Today it accommodates 311 individuals.

[10] It was the evidence of the Respondents' witness Mr. Lafranier, that:

> De-institutionalization in Ontario has been implemented progressively through a series of five multi-year plans. During the course of the first two multi-year plans from 1977 to 1981 and from 1982 to 1986, a total of five facilities closed and the number of residents in others decreased. The third multi-year plan, from 1987 to 1994, included the closure of five more facilities and a commitment to close all remaining provincially operated facilities within 25 years. The fourth multi-year plan, referred to as the Community Living Initiative, from 1996 to 2000, involved the closure of three more facilities and the facility population was reduced by 978 residents. The multi-year plan, from 2001 to 2004, focused on enhancing services and supports in the community and included a commitment to plan for the closure of all the remaining facilities in Ontario.

[11] The *Developmental Services Act* was passed in 1974 in response to or at least in the wake of Mr. Williston's recommendations. Under this legislation, management of the institutions for the developmentally disabled passed from the Minister of Health to the Minister of Community and Social Services.

Analysis

Issue 1: Does the Minister have the power under the *Developmental Services Act* to close the remaining Schedule I institutions?

[12] The relevant sections of the *Developmental Services Act* are the following:

> **Facilities established**
> 2. (1) The Minister may establish, operate and maintain one or more facilities and may furnish such services and assistance as he or she considers necessary upon such terms and conditions as the Minister sees fit. R.S.O. 1990, c. D.11, s. 2 (1).
>
> **Purchase of assistance and services**
> (2) The Minister may by written agreement or otherwise purchase from any person, services and assistance for or on behalf of persons with a developmental disability or

> believed to have a developmental disability and may direct payment of expenditures as are necessary for these purposes. R.S.O. 1990, c. D.11, s. 2 (2); 2001, c. 13, s. 2 (6).
>
> **Regulations**
> 36. The Lieutenant Governor in Council may make regulations,
> (a) designating facilities or classes of facilities to which this Act and the regulations apply and limiting, restricting or exempting any such facility or class of facility from the application of any part of the regulations;
>
> …
>
> (t) respecting the examination of persons and the admission, transfer, discharge and placement of residents.
>
> 2. (1) The facilities in Schedule 1 are designated as facilities to which the Act and this Regulation apply. R.R.O. 1990, Reg. 272, s. 2 (1); O. Reg. 124/00, s. 2 (1).
>
> (2) Group homes are designated as a class of facility to which the Act and this Regulation apply. O. Reg. 434/01, s. 2.

[13] I would observe that the plain wording of section 2 of the Act vests a broad discretion in the Minister. The Minister "may" establish, operate and maintain one or more facilities. A further discretion is obviously contemplated by the words "… and may furnish such services or assistance as he or she considers necessary…" and again "… upon such terms and conditions as the Minister sees fit." Subsection 2(2) gives the Minister a further broad discretion to contract with third parties for the delivery of services to persons with a developmental disability.

[14] I can see nothing in section 2 of the Act that would require the Minister to continue to operate the remaining Schedule I facilities. On the contrary, the use of the permissive "may" in both subsections 2(1) and 2(2) of the *Developmental Services Act* leaves the determination of how assistance and services are to be provided to the Minister's discretion.

[15] Subsection 29(2) of the *Interpretation Act*, R.S.O. 1990, c. I.11 provides that "in the English version of an Act, the word 'shall' shall be construed as imperative and the word 'may' as permissive."

[16] As stated in Sullivan and Driedger on the *Construction of Statutes* (4th ed., 1999, pp. 57-58), the extent or scope of a discretionary power conferred by a statute depends on a contextual interpretation of the provision and statute conferring the discretion:

> When a statutory power is conferred using the word “may”, the implication is that the power is discretionary and that its recipient can lawfully decide whether or not to exercise it. After all, if the legislature wished to impose an obligation, it could easily have used “shall” instead of “may”.
>
> …
>
> In other words, the use of “may” implies discretion, but it does not preclude obligation. The interpreter must determine whether there is anything in the statute or in the circumstances that expressly or impliedly obliges the exercise of the power.

[17] As a general matter of statutory interpretation, the power to do a certain act includes powers that are necessarily incidental to the performance of that act and includes the power to cease performing that act, or to change the place or manner in which it is performed, see section 28, *Interpretation Act*, R.S.O. 1990, ch. I 11.

[18] In *Crawford et al. v. Ottawa Board of Education*, [1971] 2 O.R. 179 at 189, the Ontario Court of Appeal has held that the powers to “establish” and “maintain” do not include a connotation of permanence, and necessarily include a power to close:

> The Board is not under any obligation to maintain, in the sense of "to perpetuate" any particular school it establishes. "Maintain" in the Ontario Acts is not a direction to keep forever. It encompasses only authority and obligation to expend money upon the school and keep it in operation so long as the Board feels that it is desirable to do so for the provision of the educational needs of the pupils for whom it is responsible. "Maintain" in my view means the duty from year to year to keep up the operation of the school so long as the Board is of the opinion that such school should be operated as an appropriate means of discharging its duty to provide accommodation for its pupils. The direction to maintain is not inconsistent to discontinue the operation of any particular school or class when it deems it can otherwise discharge the obligation imposed upon it to provide educational facilities for its pupils.
>
> To require the perpetuation of a school entity as originally established would be destructive of the primary aim of the educational system to provide at all times the best possible form of education according to the ever-changing standards of succeeding generations. If this concept of maintenance were carried to its ridiculous conclusion, some schools would be required still to be heated by wood stoves and lighted by lamps and would have the pupils writing upon slates.

[19] The *Crawford* decision was recently followed by this Court in *Gigliotti v. Conseil d’Administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561. In *Gigliotti* it was argued that the Minister lacked the power to close a community college under Section 5 of the *Ministry of Training, Colleges and Universities Act*, which stated:

> Subject to the approval of the Lieutenant Governor in Council, the Minister may establish, name, maintain, conduct and govern colleges of applied arts and technology that offer programs of instruction in one or more fields of vocational, technological, general and recreational education and training in day and evening courses and for full-time or part-time students.

[20] The Divisional Court held that the decision was made within the Minister's discretionary power and should therefore receive the highest standard of deference, namely patent unreasonableness. Moreover, it was held that the Minister's power to establish and maintain colleges of applied arts and technology included the power to disestablish or close such institutions. The Court stated at p. 579:

> [58] We reject the submission it is necessary for a statute to specifically grant the Minister power to close a particular institution for the sole reason that other statutes do provide for such a power. Our Supreme Court has held that the mere fact other statutes explicitly provide for a certain power cannot be interpreted to mean that a Minister requires the explicit grant of that particular power.

[21] The Applicants would distinguish the *Crawford* and *Gigliotti* decisions on the basis that they deal with the closure of a single institution, whereas in the instant case the Minister's decision deals with the closure of all remaining Schedule I facilities. The Applicants say this amounts to the closure of a "complete delivery system". I do not accept this argument. The *Developmental Services Act* provides the Minister with a broad discretion in the manner of delivery of services to the developmentally disabled. Based on the established authorities, the discretion to establish, operate and maintain one or more facilities includes the right to close such facilities subject only to substantive review for patent unreasonableness. As stated previously, the Applicants have based their challenge to the Minister's decision on the alleged absence of any power in the *Developmental Services Act* to close all Schedule I institutions, not on a substantive challenge to the reasonableness of the Minister's decision.

[22] The Applicants rely on the decision in *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.) to argue that Cabinet does not have legislative authority to close the three remaining institutions. The legislative scheme in *Doctors Hospital* is distinguishable from the discretionary powers given to the Minister under the *Developmental Services Act*. In particular, in *Doctors Hospital* the Divisional Court found that the Lieutenant-Governor in Council was not authorized to revoke the hospitals' approval as a public hospital for

fiscal reasons, because such reasons were beyond the policy objective of the *Public Hospitals Act*, which was in fact a regulatory statute. In this case, the *Developmental Services Act* is far more than a regulatory statute. The Act sets out different mechanisms through which the Minister can arrange to provide assistance and services to people with developmental disabilities, including directly at province-run facilities or indirectly through the purchase of assistance and services from third parties. The Minister's decision to use one mechanism rather than another cannot be said to fall outside of the legislative intent or purpose of the *Developmental Services Act*.

[23] The decision in *Payne v. Ontario (Minister or Energy, Science and Technology),* [2002] O.J. No. 2566, relied on by the Applicants, is also distinguishable from this case. In *Payne*, the Court concluded that the Crown was not entitled to transfer the shares of Hydro One. While the *Electricity Act* did give Ontario the authority to "acquire and hold shares", it did not contemplate privatization and could therefore not be interpreted as allowing the transfer of those shares. In contrast, the *Developmental Services Act* specifically provides that assistance and services can be provided in a number of different ways, including in group homes. Accordingly, I see no basis for the Applicants' argument that the announced closures, resulting in the transfer of residents to community residential settings, fall outside of the Minister's authority.

[24] The Applicants argue that the *Developmental Services Act* was enacted in the aftermath of the Williston Report. Therefore, a contextual interpretation of that statute would recognize Mr. Williston's belief that institutional care had a continuing, if limited role, in the care of the developmentally disabled. The point is made that the Act should not be interpreted to allow the complete discontinuance of institutional care thereby doing away with the "safety net" that these institutions may provide. With respect, my interpretation of Mr. Williston's position is that institutional care should be retained for only so long as it is strictly required, i.e. until community based resources can be developed to meet the resident's needs. Mr. Williston stated at p. 68-69 of his report:

> 16. Lastly, I suggest that a century of failure and inhumanity in the large multi-purpose residential hospitals for the retarded should, in itself, be enough to warn of the inherent weakness in the system and inspire us to look for some better solution.

> While I recommend that the use of large institutions for the mentally retarded in the province be phased down I do not say that they should be abolished in their entirety. In the first place, the large hospital school must not be dismantled, without anything being put in its place. We cannot abolish the present facilities until the resources of the community have been mobilized to care for the mentally retarded in a better way. An increase in the load placed upon local health and social services without a great increase in their resources would inevitably worsen the plight of the handicapped. It would not be possible to empty a large number of the residents from the institutions and expect the public to instantaneously absorb them. Many parents who have become accustomed to having their problems stowed a long way away would now be shocked at the prospect of the return of their child. By now, many of the residents themselves have come to regard the institutions as their homes. Having been isolated for many years with little socialization with other members of the community, a mentally retarded person dramatically introduced to a world of few restraints would encounter almost insurmountable problems. These institutions have over the years acquired staff with special skills trained to deal with the mentally retarded. They should not now be entirely disbanded.
>
> If, by severe restrictions on admissions and an intensive drive to rehabilitate those who could be absorbed into the community, the present institutions, after demolishing the more decrepit buildings, were cut down to, say, 40% of their present capacity, they might well play an important part in the whole system for some years to come …

[25] In my opinion, the Minister's powers under section 2 of the *Developmental Services Act* should be interpreted broadly. This is necessary to give her the flexibility to provide services to the Applicants, and other residents of the remaining institutions, in accordance with developing knowledge, up to date practices, and the existence of community resources and expertise for the care of developmentally disabled adults. This approach would reflect the broad and permissive wording of section 2 of the Act and the recommendations of the Williston Report, to the extent such recommendations can be said to be reflected in the Act. I also am guided by the words of McLachlin C.J.C., as to the need for a dynamic interpretation of statutes to meet current realities, see *R. v. 974649 Ont. Inc.*, [2001] 3 S.C.R. 575 at 594-595:

> [38] This argument, however, rests on an overly narrow view of legislative intention. The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted: Tataryn v. Tataryn Estate, [1994] 2 S.C.R. 807, at p. 814; see also Interpretation Act, R.S.O. 1990, c. I.11, s. 4. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. While

> the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances: see, for example, Symes v. Canada, [1993] 4 S.C.R. 695, at pp. 727-29 (per Iacobucci J.), and pp. 793-94 (per L'Heureux-Dubé J., dissenting); Tataryn, supra, at pp. 814-15.

[26] In summary, I conclude that the Minister was acting within the authority given to her by section 2 of the *Developmental Services Act* when she exercised her discretion to close the three remaining Schedule I facilities, by March 31, 2009. In view of this conclusion and the fact that the Applicants have not challenged the reasonableness of the exercise of the Minister's discretion, it is unnecessary to embark on a discussion of the standard of review applicable to the exercise of her discretion.

Issue (2) If the Minister acted within her jurisdiction in closing the institutions, is the Minister required to obtain the consent of the resident or his or her next of kin or substitute decision maker to the community placement selected for the resident? If so, how are disputes to be resolved concerning community placements?

[27] The Applicants submit that the consent of the current residents of the three institutions, or where required of their substitute decision makers, is necessary with respect to any relocation from their current institutional placements. They argue that in some cases, community placements and the pre-planning involved, is being carried out without regard to the wishes of the residents' next of kin. The Respondents do not concede that consent of the residents is required. The Respondents state that the active involvement of family members is encouraged whenever possible and as a matter of fact, no community placement has occurred without the consent, expressed or implied, of the next of kin or the office of the Official Guardian and Trustee.

[28] It is therefore necessary to consider the question of whether consent is required of the incapacitated residents or their substitute decision maker for changes to their current institutional placements. If so, does the Ministry's process accommodate the requirement? Lastly, what procedure should be followed in the event of a disagreement between a substitute decision maker and the Ministry as to the appropriate residential placement of any current resident of the three institutions?

[29] I observe that the evidentiary record before the court does not allow me to determine whether and to what extent the involvement of the next of kin has occurred in the community placements that have occurred to date. The Applicants, and many other next of kin, have chosen not to participate further in the community placement planning process, at least until the basic question is decided as to whether the Minister acted lawfully in directing the closure of the Schedule I facilities. However, as this is an ongoing process involving the fundamental interests of this large group of developmentally disabled adults, these issues have an important practical application and are neither academic nor moot.

[30] I am of the opinion that the consent of the residents of these institutions is required with reference to their respective residential placements in the community. In nearly all cases, due to the severe level of intellectual disability of this group, this consent will come from the appropriate substitute decision maker, as recognized by law.

[31] Consent to a particular residential placement is required due to the fundamental importance of this issue to the developmentally disabled person. The typical demographic of this group has previously been described in paragraph 6 of these reasons. Due to their vulnerability, inappropriate residential placements have the likelihood of being harmful and may be life threatening to many of these profoundly affected adults. The provision of consent by a substitute decision maker may be seen in some cases as a circumstantial guarantee of suitable placement. Perhaps more importantly, the refusal of consent by a substitute decision maker will serve to require further consideration or an adjudication of the issue, so as to operate as a safeguard against erroneous decisions. In any event, the requirement for consent accords respect to the disabled person.

[32] Adults of normal capacity make their own decisions about where they choose to live. It cannot be right that an intellectually incapable adult has no such right, simply because of his or her incapacity. It is significant that the health and safety of disabled persons can be dependent upon obtaining a suitable residential placement where their needs can be properly met. The Supreme Court of Canada has recently held that while the *Charter* does not confer a free-standing constitutional right to health care, any statutory scheme in place must comply with the

Charter and an aspect of any such scheme that impinges on the life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice, violates the *Charter*, see *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791 at para. 104. It may be that an administrative program that places vulnerable individuals in community settings without their consent, and if their well-being is thereby endangered, may violate their *Charter* protected interests. While the requirement for consent to the placement of a developmentally disabled adult is at first instance a common law issue, the common law must be interpreted in a manner consistent with *Charter* values, see *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 and *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* [2002] 1 S.C.R. 156.

[33] In summary, I am of the opinion that the consent of a developmentally disabled adult or his or her substitute decision maker is required to any choice of community residential placement. This is because of the direct and substantial affect this choice will have on the individual's health, safety and personal welfare and is in accordance with the principles of fundamental justice. It is well within the recognized jurisdiction of the Superior Court of Justice in the exercise of its *parens patriae* jurisdiction to declare this right and to see that it is respected.

[34] The foregoing discussion is not to imply that the Respondents' approach to placing the current institutional residents into community settings has been inappropriate**.** Indeed, the affidavit materials filed by Mr. Lafranier and Mr. Ock describing the entire undertaking, known as "The Facilities Initiative", reflect a well considered process. It focuses on assessing the often complex needs of the individual, finding an appropriate placement among the labyrinth of some 370 community based care providers and it provides a mechanism for addressing post-placement follow up issues. Apart from the Respondents' alleged failure to recognize the residents' rights with respect to the issue of consent, neither the Applicants nor the Official Guardian and Trustee were critical of the Ministry's process for identifying and implementing appropriate community placement for these residents.

[35] There are of course some important nuances to the substitute decision maker's role in this process. The issues can be complex from both a medical and legal perspective. As a result, the

family member or next of kin's role may be primarily consultative, apart from the ultimate decision of whether or not to consent to the recommended placement. In some cases, relatives have had little or no ongoing contact with the resident for many years. The Williston Report points out that for some years it was institutional policy to discourage family contacts with the resident.

[36] Where the family member is not well-known, identifying and understanding the medical and social needs of an individual with complex medical and psychiatric issues, might be beyond the capabilities of many relatives who are invited to participate in the process. The incapacitated person must be encouraged to participate as much as possible; however, many are non-verbal and their input will be limited. Even more complex is the task of understanding, locating and assessing the community based residence placements and support organizations who will assume the resident's care. The Respondents involve experts, as required, and family consultation wherever possible, as part of that process. The Ministry's approach to obtaining consent from the resident or his or her next of kin is reflected in the "Guiding Principles" of the Ministry's Planning Framework, which I quote:

> **Individual Planning**
>
> - There will be a comprehensive plan tailored to each individual.
>
> **Flexiblity and Choice**
>
> - Individuals will have the opportunity and support to make informed decisions about their lives.
> - An individual's decision in relation to location and type of living arrangements, maintenance of friendship and family ties and other supports and services should be given primary consideration.
> - Planning for supports and services for individuals will be flexible and respectful of cultural, language, religious beliefs and lifestyle choices.
> - Wherever possible, individuals will have the opportunity to live close to their families or friends.
> - Wishes of the individual and those of their families will be balanced with the available resources and community capacity to respond to their needs.

Fairness

- In those situations where an individual does not have family or friends independent of the service system to effectively assist, a neutral third party will be identified to participate in the process.

- Planning for all individuals will involve existing community processes, including access mechanisms, service planning, and service resolution.

Inclusion

- An individual should have the opportunity to live, work and participate with other members of the community.

- Supports for individuals should include existing community services as required.

Health and Independence

- Supports and services will promote the physical and emotional well being of individuals in settings that foster healthy and independent living. Individuals will not leave facilities until arrangements and supports are in place.

- Specialized supports and services as required will be provided or developed.

[37] The Respondents placed in the record a document entitled, "The Facilities Initiative Planning Framework". It outlines how the Ministry will plan for a person leaving a facility to a setting that can support the individual's needs. This process provides that where an individual does not have family or friends independent of the service system to effectively assist, a neutral third party will be identified to participate in the process. The neutral third party is identified and appointed by the Ministry's regional office. He or she is expected to participate in all aspects of the planning – from the development of the resident's Personal Plan through to the review and follow up of the individual Transition Support Plan.

[38] Of the residents in the three closing facilities, approximately 80 individuals have been identified as having no family to assist them with planning or to give their perspective on planning. The absence of family involvement in the life of a resident can result from the family's wish not to be involved or could arise where family members cannot be located. The Ministry uses the term "citizens of the world" to reference this group. These individuals are assisted and represented by the office of the Public Guardian and Trustee for health treatment and financial purposes under the respective *Health Care Consent Act,* 1996, S.O. 1996, c.2 and

Substitute Decisions Act, 1992, S.O. 1992, c.30. These individuals are assisted in other decisions by a neutral third party identified at the onset of planning, as discussed previously.

[39] The placement process involves the preparation of a Personal Plan for the individual, prepared by the regional placement facilitator and staff. A non-identifying profile of the resident is presented to the appropriate community based planning agencies. The regional project manager, community planning table and regional placement facilitator identify the most appropriate agency. The community planning table and the Ministry, who contracts to fund the agency, make the decision about the choice of the new residence of the individual. However, the perspectives and input of family or significant persons to the resident are taken into account.

[40] The commendable aim of this group decision-making process is to reach a consensus on the often complex issue of what community placement best meets the resident's needs. However, it must be remembered that the consensus must include the resident or his or her next of kin or substitute decision maker. The consent of the next of kin or substitute decision maker must be obtained. Disagreements may be resolved through the existing legal avenues, as discussed below.

[41] I turn now to the current legal framework governing the provision of consent, as it relates to the proposed community residential placements of the current residents of the closing institutions. The evidence establishes that many, if not all, of the residents of the three institutions lack capacity to make an informed decision about a transfer to a group home. In my opinion, the issues likely to arise in implementing the community placements may, in whole or in part, be covered by the provisions of the *Health Care Consent Act,* 1996 or the *Substitute Decisions Act*, 1992. To the extent they are not, this Court will exercise its inherent *parens patriae* jurisdiction for the protection of the welfare of these mentally incapable adults.

[42] Because the remedial provisions of the *Substitute Decisions Act*, 1992 and the *Health Care Consent Act*, 1996 and the common law *parens patriae* jurisdiction are available in the circumstances herein, it is unnecessary to embark on a discussion of the *Charter* issues that would otherwise arise.

[43] The *Health Care Consent Act,* 1996 sets out a process by which a temporary substitute decision maker can give or refuse consent on behalf of an incapable person for decisions relating to the admission to a care facility, relating to treatment or relating to the provision of personal assistance services. A "care facility" is defined in section 2(1) of the Act. It includes specified nursing homes but does not include group homes or other community settings for developmentally challenged adults. Accordingly, this Act will govern the limited number of residents who may be considered for admission to certain nursing homes. In those cases, the Act will apply to require a substitute decision maker to give or refuse consent to admission to the facility. For incapable residents whose location will be to a group home, the provisions of this Act have no application.

[44] The *Substitute Decisions Act,* 1992 does not directly address the issue of consent in relation to the admission of an incapable person to a group home or other community setting. In some cases it will apply, depending on the incapable person's abilities and the terms of any order of the Court. This Act came into force in April 1995, replacing the former *Mental Incompetency Act* and some provisions of the *Powers of Attorney Act*. This Act sets out the law and procedure by which guardians of property and the guardians for personal care are appointed by the Superior Court of Justice.

[45] The test for incapacity for personal care is set out in section 45 of the Act:

> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[46] For the purpose of appointment of a guardian for personal care, assessments of mental capacity are conducted by capacity assessors who are members of one of the regulated health professions. Sections 55, 58, 59 and 60 of the *Substitute Decisions Act* govern the appointment of guardians. These sections are set out below:

> **Court appointment of guardian of the person**
>
> 55. (1) The court may, on any person's application, appoint a guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so. 1992, c. 30, s. 55 (1).

Prohibition

(2) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,

(a) does not require the court to find the person to be incapable of personal care; and

(b) is less restrictive of the person's decision-making rights than the appointment of a guardian. 1992, c. 30, s. 55 (2).

Finding of incapacity

58. (1) An order appointing a guardian of the person shall include a finding that the person is incapable in respect of the functions referred to in section 45, or in respect of some of them, and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so. 1992, c. 30, s. 58 (1).

Contents of order

(2) An order appointing a guardian may,

(a) make the appointment for a limited period as the court considers appropriate;

(b) impose such other conditions on the appointment as the court considers appropriate. 1992, c. 30, s. 58 (2).

Full or partial guardianship

(3) The order shall specify whether the guardianship is full or partial. 1992, c. 30, s. 58 (3).

Full guardianship

59. (1) The court may make an order for full guardianship of the person only if the court finds that the person is incapable in respect of all the functions referred to in section 45. 1992, c. 30, s. 59 (1).

Powers of guardian

(2) Under an order for full guardianship, the guardian may,

(a) exercise custodial power over the person under guardianship, determine his or her living arrangements and provide for his or her shelter and safety;

(b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;

(c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;

(d) have access to personal information, including health information and records, to which the person could have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;

(e) on behalf of the person, make any decision to which the *Health Care Consent Act, 1996* applies;

(e.1) make decisions about the person's health care, nutrition and hygiene;

(f) make decisions about the person's employment, education, training, clothing and recreation and about any social services provided to the person; and

(g) exercise the other powers and perform the other duties that are specified in the order. 1992, c. 30, s. 59 (2); 1996, c. 2, s. 37 (1).

> **Partial guardianship**
> 60. (1) The court may make an order for partial guardianship of the person for an incapable person if it finds that he or she is incapable in respect of some but not all of the functions referred to in section 45. 1992, c. 30, s. 60 (1).
>
> **Same**
> (2) The order shall specify in respect of which functions the person is found to be incapable. 1992, c. 30, s. 60 (2).
>
> **Powers of guardian**
> (3) Under an order for partial guardianship, the guardian may exercise those of the powers set out in subsections 59 (2), (3), (4) and (5) that are specified in the order. 1996, c. 2, s. 38.

[47] Section 55(2) of the Act is of particular significance. It contemplates that where alternatives to the appointment of a guardian will allow for decisions to be made concerning an individual's personal care, this is to be preferred to a guardianship order, which requires a finding that the person is incapable of personal care. The Ministry's current process has not required the appointment of a guardian in support of the "supported decision making" process, which in many cases will be consistent with the words and the intention of section 55(2) of the Act. As argued by counsel for the Intervenor**,** Community Living Ontario, a process short of full or partial guardianship is preferable in many cases, as it best recognizes the autonomy and dignity of the individual and the inclusiveness of the decision-making process. There are approximately 1000 individuals who will be transferred from these three institutions; their capacities and their needs in reference to the decision-making process will differ significantly. It is not possible to dictate a process for obtaining consent to community placements that will apply in every case. However, the objective will always be the same, which is to act in the best interests of the incapable person.

[48] Section 68 of the *Substitute Decisions Act*, 1992, provides a mechanism for a guardian, an attorney under a Power of Attorney for personal care, the Public Guardian and Trustee, or any other person with leave of the Court, to obtain the Court's direction "on any question" arising in the guardianship. Section 68 states:

Directions from court

68. (1) If an incapable person has a guardian of the person or an attorney under a power of attorney for personal care, the court may give directions on any question arising in the guardianship or under the power of attorney. 1996, c. 2, s. 44.

Form of request

(2) A request for directions shall be made,

(a) on application, if no guardian of the person has been appointed under section 55 or 62; or

(b) on motion in the proceeding in which the guardian was appointed, if a guardian of the person has been appointed under section 55 or 62. 1996, c. 2, s. 44.

Applicant; moving party

(3) An application or motion under this section may be made by the incapable person's guardian of the person, attorney under a power of attorney for personal care, dependant, guardian of property or attorney under a continuing power of attorney, by the Public Guardian and Trustee, or by any other person with leave of the court. 1996, c. 2, s. 44.

Order

(4) The court may by order give such directions as it considers to be for the benefit of the person and consistent with this Act. 1996, c. 2, s. 44.

Variation of order

(5) The court may, on motion by a person referred to in subsection (3), vary the order. 1996, c. 2, s. 44.

A disagreement between a guardian or attorney for personal care and the Ministry concerning the appropriateness, timing or any other aspect of a proposed community placement, would properly be brought before the Court under this section by any appropriate person.

[49] Section 68 of the *Substitute Decisions Act*, 1992 is limited by its own terms to matters arising in a guardianship or Power of Attorney for personal care. In many cases, the Act will not apply because the incapacitated resident has neither a guardian nor attorney to represent his or her interests. In that event, directions should be sought from the Superior Court of Justice under its inherent *parens patriae* jurisdiction.

[50] The *Substitute Decisions Act*, 1992 operates to codify certain matters that would otherwise fall within the Court's common law *parens patriae* jurisdiction. However, the Act does not otherwise limit this important historical power to protect the interests of children and incapacitated adults. It has been recognized that the *parens patriae* jurisdiction can be exercised where there is no applicable statutory scheme in place or where there is a "gap" in the existing

legislative framework, see *Dumas v. Dumas*, [1992] 10 O.R. (3d) 20 at 24 (Gen. Div.). In *E. (Mrs.) v. Eve*, Justice La Forest stated that the *parens patriae* jurisdiction "continues to this day, and even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit." See *E. (Mrs.) v. Eve*, [1986] 23 S.C.R. 388 at 410-11.

[51] I observe that in view of my conclusion that the Minister has statutory authority under the *Developmental Services Act* to close the remaining Schedule I facilities, the option of continuing to reside there in the long-term will not be open to the remaining residents. Substitute decision makers must act, as indeed the court will act, "… to do what is necessary for the benefit and protection of persons under disability", per La Forest J. in *E. (Mrs.) v. Eve*, *supra*, at 430. This will necessarily involve participating in good faith in the Ministry's current program to identify suitable group homes and other community placements for the residents. The Minister will be expected to honour the government's public commitment, repeated in argument before this Court, not to move any of the current residents of the three institutions until suitable community placements are available. In those, hopefully, few cases where the Ministry and the substitute decision makers cannot agree on the best interests of the incapable individual, in regard to his or her community placement or in regard to related issues, the direction of the Superior Court of Justice may be sought under its statutory or its *parens patriae* jurisdiction. Counsel for the Ministry stated in argument that the Ministry would initiate such an application where the court's direction was required. I regard this as appropriate.

[52] As none of the Applicants represented residents of the Southwestern Regional Centre, the order of this Court will not technically include residents of that institution. However, the matters decided herein are of obvious application to the residents of SRC.

Disposition

[53] A declaration will issue in the following terms:

(a) No incapable resident of the Rideau Regional Centre or the Huronia Regional Centre shall be transferred to any other residence without the consent of a substitute decision maker on behalf of that resident, who shall be a family member or in the absence of a family member, the Public Guardian and Trustee.

(b) Decisions to give or refuse consent to the transfer of an incapable resident from Rideau Regional Centre or Huronia Regional Centre shall be made in the incapable person's best interests.

(c) Any disagreement between the substitute decision maker and the Ministry of Community and Social Services may be resolved by application to the Superior Court of Justice.

The two applications for judicial review herein are otherwise dismissed.

[54] If the Applicants wish to make submissions as to costs they may do so within 14 days of the release of this decision and the Respondents may reply within 14 days from the receipt of the Applicants' submissions.

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The Honourable Mr. Justice Charles T. Hackland

_____

I AGREE CUNNINGHAM A.C.J.

_____

I AGREE LANE J.

Released: January 26, 2006

COURT FILE NO.: 05-DV-1152
05-DV-1200
DATE: 2006/01/26

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

ANN GRAY by her litigation guardian JAMES GRAY (Applicant) - and - HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO et al. (Respondents)

- and -

FRANCES VENTOLA by her litigation guardian ANTONIETTA JEFFREY et al.(Applicants) - and - SANDRA PUPATELLO et al. (Respondents)

REASONS FOR JUDGMENT

HACKLAND J.

Released: January 26, 2006