NOVA SCOTIA COURT OF APPEAL

Citation: *Dassonville-Trudel v. Nova Scotia (Community Services)*, 2004 NSCA 82

Date: 20040616
Docket: CA 181270
Registry: Halifax

Between:

Dominique Dassonville-Trudel, an Infant, by her Guardian Ad Litem, Joyce Lorraine Dassonville, and Joyce Lorraine Dassonville

Appellants

v.

The Department of Community Services and The Minister of Community Services

Respondents

Judges: Bateman, Freeman and Cromwell, JJ.A.

Appeal Heard: May 17, 2004, in Halifax, Nova Scotia

Held: Appeal allowed in part per reasons for judgment of Bateman, J.A.; Freeman and Cromwell, JJ.A. concurring.

Counsel: Blair Mitchell, for the appellants
Catherine Lunn, for the respondents

Reasons for judgment:

[1] This is an appeal by Joyce Lorraine Dassonville on behalf of herself and in her capacity as *guardian ad litem* for her daughter Dominique Dassonville-Trudel from an order and decision of Justice C. Richard Coughlan of the Supreme Court of Nova Scotia. The decision on appeal is reported as **Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board** at (2002), 205 N.S.R. (2d) 88; N.S.J. No. 231 (Q.L.).

BACKGROUND

[2] Dominique was born April 5, 1995. She has a severe form of autistic spectrum disorder. She is the daughter of Ms. Dassonville and Yves Trudel. Dominique, due to her autism, has extremely high needs. She borders on the unmanageable. In 2000/2001 the family had been receiving financial assistance under the Department of Community Services ("Department") "In-Home Support Program" ("Program") to assist with Dominique's care. The funding was inadequate from the perspective of the parents.

[3] Dominique presents dramatic behaviour management challenges for this family. At the time of the funding issues, she was five years old, not toilet trained, could not communicate and tended to violent behaviour. She required constant supervision, day and night. The Dassonville-Trudels have two other children at home, Chloe who was born in 1993 and 16 year old Ehern who has Asperger's Syndrome, a form of high functioning autism.

[4] In 1998 the family had applied to the Department for financial assistance for Dominique's needs. At that time their joint income exceeded the maximum allowable under the Program Guidelines. In June of 2000 Ms. Dassonville left her employment. Due to the resulting drop in income the family qualified for the Program and entered into a Special Needs Agreement with the Minister of Community Services ("Minister") which entitled them to financial assistance. The money provided by the Department was not sufficient to meet Dominique's extensive needs. Ms. Dassonville commenced an action in the Supreme Court seeking judicial review of the Department's denial of additional funding.

[5] By the summer of 2001 the Department determined that the family's income again exceeded the maximum allowable and advised the family that they were no longer eligible for assistance.

[6] Ms. Dassonville's original application to the Supreme Court, which was for orders in the nature of *certiorari* and *mandamus* in relation to the decisions to deny additional financial support, was expanded to challenge the decision to terminate funding. She sought, as well, a finding that certain decisions of the Minister of Community Services, the Department of Education and the Halifax Regional School Board were contrary to ss.7, 12 and 15 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

[7] It was Ms. Dassonville's position that, if appropriate funding could not be obtained from the Department, the family could not continue to provide for Dominique, who would then be a "child in need of protective services" within the meaning of s. 22 of the **Children and Family Services Act**, R.S.N.S. 1989, c. 5 ("**CFSA**"). It was the Department's view that Dominique was not in need of protective services under s. 22. In her action Ms. Dassonville challenged that decision as well.

[8] The judicial review application was subsequently narrowed to involve only the Department. Because extensive evidence would be required to address the **Charter** issues, the judge directed that the appropriate procedure to bring those matters forward would be by Originating Notice (Action).

[9] The hearing before Justice Coughlan was limited to the applications to quash the funding decisions of the Department (*certiorari)* and to order that the Department to take certain action (*mandamus*).

[10] Justice Coughlan dismissed all applications. He was satisfied that all of the challenged decisions met the standard of reasonableness *simpliciter*.

ISSUES

[11] The appellants say that the Supreme Court judge erred:

(i) in applying the standard of *reasonableness simpliciter*, rather than correctness to the decisions of the Department;

(ii) in finding that the Guidelines did not permit funding for the requested home security system and the intensive toilet training and that denial of funding on this basis was reasonable;

(iii) in finding that the income limits in the Guidelines excluded the appellants from participation in the Program and that such exclusion was reasonable;

(iv) in finding that the determination by the Department that Dominique was not "a child in need of protective services" was reasonable.

[12] Our role in reviewing Justice Coughlan's decision on the judicial review application is to determine whether he chose and properly applied the correct standard of review and, in the event he used the wrong standard, to assess the Department's decision(s) in light of the correct standard. (**Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226; S.C.J. No. 18 (Q.L.) at ¶ 43).

THE CHILDREN AND FAMILY SERVICES ACT

[13] At issue here is funding for the Dassonville-Trudel family under the In-Home Support Program of the **CFSA**. Section 18 of the **CFSA** provides that a "special needs agreement" may be entered into between the Minister and the parent(s) of a child requiring services:

> **18 (1)** A parent or guardian who is unable to provide the services required by a child in the parent or guardians custody because the child has special needs, as prescribed by the regulations, may enter into a written agreement with an agency or the Minister for the care and custody of the child or provision of services to meet the child's special needs.

> **(2)** A special-needs agreement made pursuant to this Section shall be made for a period not exceeding one year, but may be extended for further periods each not exceeding one year, with the approval of the Minister.

[14] Section 99 of the **CFSA** authorizes regulations including those "respecting services to promote the integrity of families" and "prescribing the procedures for temporary-care agreements, special-needs agreements, agreements with older adolescents and adoption agreements".

[15] In order to give effect to s.18 of the **CFSA**, the Department developed the "In-Home Support Program". The Program Mandate is set out in Article 1.0 of the In-Home Support Program Guidelines:

> The goal of the In-Home Support Program is to provide support to children with significant disabilities, developmental or physical, to live at home with their families. Individualized funding is provided to families to purchase the supports and services in their community to assist them in effectively caring for their children at home. (Individualized funding refers to the allocation of public funds to individuals rather than to agencies or programs.)

[16] The Guidelines provide for various types of financial assistance:

> 7.0 PROGRAM SERVICES
>
> 7.1 Core Services - Applicants are eligible for "Core Services" when they require basic support through financial assistance for respite care, for personal care expenses, for transportation to medical appointments related to the disability, and for other extraordinary expenses that may arise related to the child's care.
>
> 7.2 Enhanced Support - Applicants are eligible for "Enhanced Support" when they require additional respite care due to their child's challenging and stressful behaviour caused as a result of the underlying condition/disability, and/or when a family has extremely high medical costs associated with the child's extraordinary health care needs.

[17] A further category, "Extraordinary Expenses", is outlined in Article 8. These are "those costs that are incurred in the special care of the child which are over and above the costs that a family would incur for a typically developing child". Articles 8.1 to 8.4 provide that such expenses "may include" medications,

personal care supplies, transportation expenses, and child care for children over the age of 12 years. Article 8.5 is particularly relevant here:

> 8.5 Special Needs that relate to expenses and professional fees that are incurred, related to, and/or associated with the nature or extent of the child's disability, and which are not covered by an insurance plan or other sources. The Children's Special Support Services may make a contribution to such fees or supports. Fees not considered in this category include summer camp fees, (outside of the yearly approval as per Section 9.6) and regular costs of centre-based, family or informal childcare which a working family normally meets.

[18] Article 9 addresses respite care:

> 9.0 RESPITE CARE
>
> The main function of "respite care" is to relieve the parent/family/primary caregiver for a specific period of time while facilitating a positive and rewarding experience for the child with a disability or a chronic illness. Respite care includes: meeting the care needs of the child; offering the child opportunities to develop social, recreational and life skills; strengthening families by reducing stress and thereby improving long-term function and quality of life.
>
> . . .

[19] Articles 10.1 and 10.2 limit the amount paid annually to $3600 for Core Services and $10,000 for Enhanced amounts. Article 10.3 provides that exceptions to those amounts ". . . may be considered based on behaviours which are so severe as to make the child a risk to him/herself or others, or when the level of medical support or equipment exceeds the currently approved levels".

THE STANDARD OF REVIEW

[20] The appellants say that the judge erred in reviewing the Department's decisions on the standard of reasonableness *simpliciter* rather than that of correctness.

[21] In **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982, the Supreme Court of Canada developed the pragmatic and functional approach to determining the appropriate standard of review. The issue

before the administrative body is analysed within the framework of four contextual factors:

(1) the presence or absence of a privative clause or statutory right of appeal;
(2) the expertise of the tribunal relative to that of the reviewing court on the issue in question;
(3) the purposes of the legislation and the provision in particular; and
(4) the nature of the question — law, fact, or mixed law and fact.

[22] The administrative decisions under review here each involve a non-adjudicative exercise of discretion:

a. a denial of funding under the In-Home Support Program to

cover the costs of:

i. private therapy in the home, including toilet training; and
ii. a security system installed in the home.

b. termination of all funding under the Program in 2001 based on financial eligibility; and

c. a finding that the infant appellant, Dominique Dassonville-Trudel, is not a "child in need of protection" under s. 22 of the **CFSA**.

[23] Traditionally administrative law decisions classified as discretionary could only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose or the use of irrelevant considerations. In **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817; S.C.J. No. 39 (Q.L.), L'Heureux-Dubé, J., writing for the majority, confirmed that the standard by which such decisions would be reviewed was to be determined through the application of the pragmatic and functional approach. She said:

> 53 . . . discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but . . . considerable deference will be given to decision-makers by courts in reviewing

> the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

[24] While rejecting the association of standard of review to the categorization of decisions as discretionary or non-discretionary, L'Heureux-Dubé, J. confirmed that decisions of a highly discretionary nature may still warrant a significant level of deference. She said:

> 56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

Section 18

[25] Applying the pragmatic and functional approach to determine the standard of review of the Minister's decisions in relation to the In-Home Support Program: Section 18 affords the Minister a broad discretion. The **CFSA** does not provide for an external review of the exercise of that discretion. While there is no privative clause insulating the Minister's decision from review, "[t]he absence of a

privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard" (**Pushpanathan** at ¶30).

[26] As to relative expertise, it would be my view that, on the question of the provision of funding for special needs, the Minister possesses a greater level of expertise than does the court. The Program is administered by members of the Department who are knowledgeable about the number of families seeking assistance under the Program and their respective needs. It was the evidence of Judy Jackson, Director of Community Outreach Services within the Department, that the annual budget for the In-Home Support Program for the 2001-2002 fiscal year was 5.3 million dollars. The Program assists approximately 1100 Nova Scotia families annually and was expected to exceed budget by about 1 million dollars for that fiscal year. Funding decisions under the Program involve the allocation of limited resources (public funds) in the face of seemingly unlimited demands on this benefits scheme. This is not a matter within the particular expertise of the courts. The specific issue before the Minister here was the level of financial assistance for one of the many families in need of support under the Program. It was not a matter, for example, of legal interpretation on which the court would enjoy a greater expertise. The Department's relative expertise in this area dictates a greater level of deference to the Minister's decision.

[27] Considering the purpose of the legislation: the general scheme of the **CFSA** is to protect children from abuse and neglect and, where possible, to preserve the integrity of the family. Section 18 is directed, in part, at the provision of services to assist a child with special needs within that child's family, where the family is unable to provide the necessary services. The wording of the section is permissive. It neither requires the Minister to provide services, nor obliges the Minister to enter into an agreement with the parents of the child with special needs. The criteria for determining whether a family is unable to provide the services required by the child, the nature of the services covered by the Department and the manner of delivery of those services is not directed by statute. The provision of Program funding to families involves a balancing of limited funds as against limitless need. It is a polycentric issue - one which requires ". . . the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties", as discussed in **Pushpanathan** (¶ 36). It is my view that the very broad

grant of discretion considered in conjunction with the polycentric nature of the issue favours the most deferential approach to the Minister's decisions under s. 18.

[28] Finally, as to the nature of the question on review: the issue before the Minister - whether Program funding is provided to a family - is a pure question of fact. Once again, this militates in favour of significant deference.

Section 22

[29] Under the scheme of the **CFSA** it is the Department that makes the decision to initiate an application to the Court asking that a child be found in need of protective services. Section 22 of the **CFSA** enumerates the conditions precedent to a child being found in such need:

> **22 (1)** In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (2) A child is in need of protective services where
>
> > (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
> >
> > (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
> >
> > (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
> >
> > (d) there is a substantial risk that the child will be sexually abused as described in clause (c);
> >
> > (e) a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;

(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the childs parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

(k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

(l) the child is under twelve years of age and has killed or seriously injured another person or caused serious damage to another persons property, and services or treatment are necessary to prevent a recurrence and a parent or guardian of the child does not provide,

> or refuses or is unavailable or unable to consent to, the necessary services or treatment;
>
> (m) the child is under twelve years of age and has on more than one occasion injured another person or caused loss or damage to another persons property, with the encouragement of a parent or guardian of the child or because of the parent's or guardian's failure or inability to supervise the child adequately.

(Emphasis added)

[30] The **CFSA** does not provide for a review of the Department's decision not to make application to the Court. Where protection proceedings are initiated, however, the matter must be brought under court supervision with dispatch. In this context, I would not find the absence of a privative clause, on the question of declining to initiate proceedings, reflective of a low level of deference.

[31] Whether a child in relation to which a proceeding has been commenced is, at law, in need of protective services is ultimately one for determination by the courts. The court therefore enjoys a relative expertise on this issue. However, on the question of the initial intervention by the Department and the launching of an application that a child be found in need of protective services, which is the question in issue here, I am satisfied that the Department enjoys a greater expertise than does the courts. It is the Department, through its child protection workers, which is entrusted by statute with deciding whether it is necessary or advisable to commence an action. The child protection personnel have considerable expertise on this issue through front-line experience with families in crisis. This relative expertise warrants considerable deference by the courts on the question of initiation of a protection proceeding.

[32] As noted above, the general scheme of the **CFSA** is to protect children from abuse and neglect and, where possible, to preserve the integrity of the family. On the question of the Department's decision on the initiation of protection proceedings, the issue was whether, in the opinion of the Department, s. 22(e) or (h) of the **CFSA** were applicable to this family's circumstances. The Department has an investigatory procedure for making this determination. A multitude of factors are considered by the Department in deciding whether to initiate a proceeding as is evidenced by the detailed guidelines for intake and the investigation of allegations of abuse or neglect which form part of the record here.

Multiple workers are involved and case conferences are held. In reaching a decision on intervention a balance must be struck between respect for family autonomy and the interest of the state in protecting children from harm. This polycentricity favours a deferential standard of review.

[33] Finally, when deciding to initiate protection proceedings, at issue is the application of a legal standard "child in need of protective services" to a set of facts (Dominique's family situation). It is a question of mixed law and fact which, in the context of initiating proceedings, is heavily weighted toward the facts. As the Court said in **Canada (Director of Investigation and Research) v. Southam**, [1997] 1 S.C.R. 748 at 750:

> The problem before the Tribunal in this case was a problem of mixed law and fact. Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. The distinction between questions of law and questions of mixed law and fact will sometimes be difficult to make. In theoretical terms, the rule is that as the level of generality of the challenged proposition approaches complete particularity, the matter approaches unqualified application of law and draws away from the forging of new law, and hence draws nigh to being an unqualified question of mixed law and fact.
>
> The Tribunal did not fail to consider relevant items of evidence and so did not err in law by failing to consider them. To suggest that it erred in law by failing to accord adequate weight to certain factors is inimical to the very notion of a balancing test, which is a kind of legal rule whose application should be subtle and flexible, but not mechanical. As a matter of law, the Tribunal should consider each factor, but the according of weight to the factors should be left, at least initially, to the Tribunal. The Tribunal forged no new legal principle and so any error it might have made can only have been one of mixed law and fact. This suggests that some measure of deference accordingly is owed to the Tribunal's decision. Appellate courts should be reluctant to venture into a re-examination of the conclusions of the Tribunal on questions of mixed law and fact.
> (Emphasis added)

[34] Recognizing the primarily factual nature of the issue here, the Department's exercise of discretion under s. 22 would, arguably, attract the most deferential standard of review.

Summary

[35] In my view, a strong case could be made in favour of reviewing decisions under both ss.18 and 22 on a standard of patent unreasonableness. The Minister, however, supports the judge's application of reasonableness *simpliciter*. It suffices here to say that the standard of review is not correctness as is urged by the appellants. In view of the Minister's position I will resolve this appeal applying the reasonableness *simpliciter* standard.

ANALYSIS

[36] It is accepted that Dominique, as a child with "significant disabilities developmental or physical", qualifies for assistance under the In-Home Support Program, subject to the family income criteria. The Guidelines specify maximum income levels below which a family's income must fall to qualify for the Program. The application of a means test is generally in keeping with the statutory direction of s. 18 in that assistance is intended for those families who are "unable to provide" for their child's special needs. Appendices 2 and 3 of the Guidelines provide a method of calculating "Total Family Net Income" and set out maximum net incomes which vary with the size of the family.

[37] The appellants say the Department: (i) did not provide adequate funding, while they were operating under a "Special Needs Agreement", in particular, refused funding for certain necessary expenses; and (ii) wrongly determined that they were no longer eligible for the Program because their net family income exceeded the Guidelines maximum. In effect, it is the appellants' submission that the Guidelines are invalid because they unlawfully fetter the Minister's exercise of discretion under s.18 of the **CFSA** and, in any event, the Department incorrectly applied the Guidelines. The Chambers judge did not expressly consider whether strict application of the Guidelines improperly fettered the Minister's exercise of discretion. He found, however, that the Minister's decision not to fund the security system or intensive toilet training was reasonable because the Guidelines did not provide for funding for those items. He found, as well, that because the family's income exceeded the maximum prescribed by the Guidelines, the decision to terminate their participation in the Program was reasonable.

[38] For reasons which I will develop, it is my view that it was not reasonable to find that funding for the requested services was explicitly excluded by the Guidelines, and, in any event, it was an unreasonable exercise of statutory discretion to rigidly apply the Guidelines without consideration of the particular circumstances of this family. As for the family's financial eligibility, I am of the view that the Guidelines were applied in an irrational way and that their application without regard to the actual needs and circumstances of this family was an unreasonable exercise of the statutory discretion. While I speak of an unreasonable exercise of statutory discretion, as will be seen below, it is my view that, on both issues there was, in effect, a failure to exercise discretion.

[39] Section 18 of the **Act** affords the Minister considerable discretion in providing financial assistance to families of children with special needs. The In-Home Support Program and its Guidelines have been developed to fulfil the purpose of s.18. Contrary to the appellants' submission, it is not unlawful for the Minister to have created guidelines to aid in the administration of the Program. In **Maple Lodge Farms Ltd. v. Canada**, [1982] 2 S.C.R. 2 McIntyre, J., writing for a unanimous Court, discussed the effect of guidelines in the context of a claim of fettering discretion (at p. 6):

> ... The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:
>
> > The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his

> discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).

[40] The proper role of guidelines in the decision-making process is complex. While the adoption of guidelines and policies to assist with the exercise of delegated authority is not, *per se*, unlawful, a decision-maker who blindly follows guidelines or policies may improperly fetter his or her discretion. On the other hand, to routinely exercise discretion, *ad hoc*, unbounded by general policies or principles may open the decision-maker to a claim of arbitrariness.

[41] The dilemma is well expressed by the authors Donald J.M. Brown and The Honourable John M. Evans in *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 1998) vol. 3 at p. 12-38:

> . . . the issue in each case is not whether the rule, guideline, precedent, policy, or contract was a factor, or even the determining factor, in the making of a decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case. In the result, in each instance a tension will exist between the desirability of consistency on the one hand, and encouraging administrative decision-makers to be mindful of the particular circumstances of individual cases on the other. As one judge has observed: "The principle [that decision-makers must not fetter their judgment] is easy enough to state. But, in truth, it is a principle [that is] vague in its limits with a good deal of the chancellor's foot in its application." [**Saunders Farms Limited v. British Columbia(Liquor Control and Licensing Board)** (1995), 32 Admin. L.R. (2d) 145 (BCCA) per Southin J.A.]

[42] The In-Home Support Program Guidelines, insofar as they impose a family income cut-off, if rigidly applied, fail to take into account the individual circumstances of the families in need. A family with an income above the Guidelines maximum is denied assistance, although the child in question may have extraordinary needs which far exceed the parents' financial ability to respond. Such a family may, in fact, be more in need of assistance than is one with an income below the Guidelines amount, but whose child has more moderate special needs. I am not persuaded, however, that the Minister's reference to Guidelines, *prima facie*, results in an unreasonable decision. It is necessary to examine how the Guidelines were applied.

[43] The Dassonville-Trudel family and the Department entered into a Special Needs Agreement dated June 21, 2000 under which the Department would provide $300 monthly for respite care and diapers. In July, 2000 Ms. Dassonville requested additional funding to address Dominique's needs, including additional funding for respite care; travel and accommodation expenses and fees to permit the parents to attend various conferences about autism; the cost of a speech pathology report; modifications to their home to enhance Dominique's security and additional funds to meet Dominique's restricted dietary needs. Ms. Dassonville estimated the additional respite care cost would be about $47,000 annually and the conference-related expenses about $3600. The speech pathology report cost was $4000 and additional one-time expenses, excluding household renovations, would be about $6250. Ms. Dassonville revised the respite care estimate later that month to total approximately $71,000 annually.

[44] In response to Ms. Dassonville's request the Department, in August 2000, increased the monthly funding from $300 to $600. This obviously fell far short of the amount sought.

[45] Ms. Dassonville, in her pursuit of additional funding, wrote several explanatory letters to the Department, each time giving substantial detail about Dominique's extraordinary needs for supervision and training. When she did not receive a sufficiently favourable response she sought review of the Department's decision, as she was entitled to do under the Guidelines review process:

> 14.0 REVIEW PROCESS
>
> 14.1 A review process is available to families appealing their ineligibility for support through the Children's Special Support Services Program.
>
> 14.2 The family should request a review of their eligibility in writing to the Casework Supervisor in their geographic area indicating the basis for their dissatisfaction. If necessary, a meeting will be set up with the family member, the support coordinator and the Casework Supervisor to attempt to resolve the matter. Within 10 working days a written report on what was decided at the meeting will be forwarded to the family member.
>
> 14.3 If still dissatisfied the family member may contact the District Manager or the Regional Administrator and explain the reasons for his/her

> dissatisfaction. The family member can expect to receive a report about the problem within 15 working days after this contact.
>
> 14.4 If the family member still disagrees after each of the above steps have been taken, he/she can contact the Director of Community Outreach in writing who will then reply with a written report on the final decision within 20 working days of hearing from the family member.
>
> (Emphasis added)

[46] It is the Department's decisions under this review process that were before the Supreme Court and are the subject of this appeal. In addition the appellants challenge the Department's decision not to initiate proceedings to have Dominique found to be a child in need of protective services.

The Decision Not to Fund Intensive Toilet Training and the Security System

[47] By letter dated September 13, 2000 Ms. Dassonville sought review of the Minister's refusal to fund an intensive toilet training program and a home security system. She relied upon her earlier detailed letters to the Department setting out the family's circumstances and describing Dominique's extensive needs. The September 13 letter was followed by others containing greater detail about Dominique's situation and progress as well as a recommended treatment plan from Dr. Elizabeth Allard, speech pathologist. These letters included revised funding requests, estimated to be about $9000 monthly plus $11,000 in one-time funding.

[48] Provision of adequate resources for Dominique required the co-ordination with service providers in the Departments of Education and Health, as well as Community Services. The Department arranged a multi-disciplinary meeting to address the question of meeting Dominique's needs. Approximately fifteen representatives from the Departments of Health, Education and Community Services were invited to attend the meeting. The meeting did not produce a resolution satisfactory to the appellants.

[49] By letter dated October 31, 2000, Judy Jackson, Director of Community Outreach Services responded to Ms. Dassonville's request for a review of the denial of substantially increased funding (see Article 14.4 of the Review Process at ¶ 45 above). Ms. Jackson advised that the Department would increase the monthly in-home support to $825.00. This fell short of the family's request. Ms.

Dassonville continued to press for increases, particularly for an intensive toilet training program.

[50] Ms. Jackson wrote in her March 20, 2001 letter to Ms. Dassonville:

> In response to your appeal for additional funding for a toileting program for Dominique, this will advise you that funding in this regard will not be approved.
>
> As you know, this program is considered intensive treatment and, as such, is not covered through the In-Home Support Program.
> (Emphasis added)

[51] Ms. Dassonville asked, as well, for funding to install a home security system. Dominique was taken to leaving the house at all hours of the day and night. The family needed the security system to alert them when Dominique attempted to leave. The Department declined the funding and Ms. Dassonville asked for a review of that decision. The official departmental response came from Ms. Jackson by letter dated March 21, 2001, as follows:

> This will respond to your recent appeal regarding your request for funding for a home security system.
>
> The In-Home Support System does not provide funding for this item, however, I understand that Jennifer Marchand has provided you with a list of possible service groups that may be helpful in providing funding. I trust this is helpful.
> (Emphasis added)

[52] In her affidavit of December 6, 2001, filed in the Supreme Court, Ms. Jackson explained that the In-Home Support Program was never intended to meet all needs of families with children with severe disabilities, but to help families in need purchase supports and services in the community to assist them in caring for their children in their homes. She addressed the refusal of funding for the toilet training:

> 28. THAT the applicant, Joyce Dassonville, was dissatisfied with the amount of additional funding and demanded from the Program more funds for respite care and for therapy by a private psychologist (Dr. Paul Nau) in her home to administer the intensive toilet training program.

29. THAT on February 7, 2001, the Applicants again demanded funds to cover the cost of the intensive toilet training program in the amount of $2,400.00 over a two week period (Record, pp. 310-313). The Applicant, Joyce Dassonville, was informed, in writing, by letter dated February 13, 2001, (Record, p. 315) that funding would not be given under the Program for same. The reason for this decision is because Sections 7 and 8 of the Guidelines, attached hereto as Exhibit "A", do not permit funding for a treatment or therapy.

30. THAT the Applicants appealed the decision of no funding for the intensive toilet training program (Record, pp. 323 - 326) to the Director. On March 20, 2001, I advised the Applicant, Joyce Dassonville, that funding could not be approved for same as it is not covered under the program.

...

32. THAT on or about March 19, 2001, the Applicants requested funds under the Program to install a security system in the home. We advised the Program does not cover such an item, but referred the Applicant, Joyce Dassonville, to some organizations where financial aid might be available (Record, pp. 346 and 349).

33. THAT the Applicants appealed the decision not to provide funding for installation of a security system and on March 21, 2001, in my capacity as Director, I notified the Applicant, Joyce Dassonville, in writing that the Program does not cover such an item. This decision is based on the provisions of Sections 7 and 8 of the Guidelines, contained in Exhibit "A" attached hereto, which do not include expenses for installing security systems (Record, pp. 349 and 352).

...

(Emphasis added)

[53] Thus it was Ms. Jackson's opinion that Articles 7, 8 and 9 of the Guidelines do not permit funding for treatment or therapy or the security system. For convenience, I reproduce the applicable parts of Guidelines 7 and 8 here (Article 9 deals solely with respite care):

7.1 Core Services - Applicants are eligible for "Core Services" when they require basic support through financial assistance for respite care, for personal care expenses, for transportation to medical appointments related to the disability, and for other extraordinary expenses that may arise related to the child's care.

> 7.2 Enhanced Support - Applicants are eligible for "Enhanced Support" when they require additional respite care due to their child's challenging and stressful behaviour caused as a result of the underlying condition/disability, and/or when a family has extremely high medical costs associated with the child's extraordinary health care needs.
>
> 8.5 Special Needs that relate to expenses and professional fees that are incurred, related to, and/or associated with the nature or extent of the child's disability, and which are not covered by an insurance plan or other source. The Children's Special Support Services may make a *contribution* to such fees or supports. Fees not considered in this category include summer camp fees, (outside of the yearly approval as per Section 9.6) and regular costs of the centre-based, family or informal childcare which a working family normally meets.
> (Emphasis added)

[54] It may be the Minister's policy under the In-Home Support Program not to fund therapy or treatment or a security system. It is not, however, reasonable to say that financial assistance for the toilet training program or the home security system is not included within the broad wording of Articles 7 or 8 of the Guidelines as Ms. Jackson's response of March 21, 2001 and subsequent affidavit evidence suggests. Article 7.1 permits funding for ". . . other extraordinary expenses that may arise related to the child's care" and Article 8.5 for ". . . expenses and professional fees that are incurred, related to, and/or associated with the nature or extent of the child's disability . . .".

[55] While the Department was entitled to exercise its discretion on relevant considerations to deny funding for a toilet training program and a security system, it is a reasonable inference from Ms. Jackson's responses to Ms. Dassonville that the Department did not, in fact, exercise any discretion. Instead, it treated the Guidelines as determinative. Not only was it unreasonable to conclude that the Guidelines exclude these services, it was unreasonable to exercise the statutory discretion based solely on the Guidelines and without regard to the particular circumstances of this family.

The Decision that the Family No Longer Qualified for the Program

[56] The Dassonville-Trudel family had first applied for assistance in 1998. They were not included in the In-Home Support Program because their family

income slightly exceeded the Guidelines maximum. On May 31, 2000 Ms. Dassonville left her full time employment as an Appeals Commissioner with the Workers' Compensation Appeals Tribunal. She planned to establish a private legal practice. Her income for the calendar year 2000, up to June 1, ($27,981.99) had been disclosed to the Department. Her future income from the legal practice was obviously not known. Using Mr. Trudel's net earnings of $2062.44 monthly, which fell well below the Guidelines maximum of $3928.00, the Department determined that the family qualified for the In-Home Support Program and commenced providing financial assistance.

[57] Article 6 of the Guidelines requires an annual review of the child's and family's needs. On July 23, 2001, Ms. Dassonville was advised that the family no longer qualified for the Program because their family income for the 2000 calendar year exceeded the Guidelines maximum.

[58] In her request for review of the family's disqualification, it was Ms. Dassonville's submission that it was not rational for the Department to use, in assessing family income, Ms. Dassonville's earnings for the first six months of 2000. Her income for that period had been excluded by the Department in approving the family's original eligibility for the program.

[59] On August 16, 2001 Ms. Jackson replied by letter to Ms. Dassonville's request for a review stating in relevant part:

> . . .
>
> Family income is determined by reviewing either the most recent income tax form, or the cheque stubs, to determine the net income. There are deductions we include when determining the family's net income.
>
> Based on the financial information you provided to Jennifer Marchand, it clearly demonstrates that your family income exceeds our program's financial criteria. If you have more recent income information for our review, please provide this at your earliest convenience. In the meantime, the decision to discharge your family from the In-Home Support Program based on our program criteria remains.

[60] The Department's income calculations, as gleaned from the record, are confusing and inconsistent. It is Departmental policy to base eligibility for the Program on net income. Net income, as used by the Department, is gross income

less mandatory deductions. This was done in qualifying the family for the Program.

[61] On the annual review, Ms. MacPherson's calculations showed the Dassonville-Trudel net income for 2000 to be $60,015. This figure is taken from their income tax forms and represents the parties' gross incomes less child care expenses, but there is no allowance for income tax or other source deductions.

[62] The Department was obviously mistaken in this calculation of net income on the annual review. More importantly, however, the Dassonville-Trudel income had originally been based upon their financial position after Ms. Dassonville had left her employment. She had earned only minimal income from her law practice during the balance of the year. Ms. Jackson, in her response to Ms. Dassonville's request for a review of eligibility, did not appear to appreciate the incongruity of including Ms. Dassonville's earnings for the first six months of 2000 to disqualify the family, when they were qualified for inclusion in the program by exclusion of this same income.

[63] Ms. Jackson stated in her affidavit:

> 38. THAT on or about June 27, 2001, the Applicant, Joyce Dassonville, submitted the income tax returns for herself and her husband, Yves Trudel, for the annual review. Upon review of the tax returns, it was evident the combined net family income is $60,015.00 ($21,451.00 is the net annual income for Joyce Dassonville; $38,564.00 is the net annual income for Yves Trudel - record, pp. 424 and 425), which, based on the 2000 tax year, exceeds the In-Home Support Program's financial Guidelines (Exhibit "C").
>
> 39. THAT by letter dated July 23, 2001, (Record, p. 418) the Applicants, Joyce Dassonville and Yves Trudel, were advised that based on the recent annual review conducted by the Program, their family income exceeded the income guidelines by $12,879.00 per year. They were advised they would be discharged from the In-Home Support Program, effective September 1, 2001.
>
> 40. THAT the last cheque issued to the Dassonville family was in the amount of $1,365.00 on August 1, 2001. The total amount of funding issued to the Dassonville family under the In-Home Support Program is the sum of $16,960.00.
>
> 40.(sic) THAT on or about August 8, 2001, the Applicants appealed the termination of funding to the Director (Record, p. 457). By letter dated August

> 16, 2001, (Record, p. 462) I confirmed the decision to discharge the Applicants from the In-Home Support Program, as the income information they had provided indicated the family exceeded the Program's financial Guidelines. My letter also requests the Applicants, Joyce Dassonville and Yves Trudel, to submit any "recent income information" they wish to have considered under the Program criteria. To date, the Applicants have not provided any further income information for consideration.
>
> 41. THAT attached hereto as Exhibit "D" is a copy of e-mailed correspondence to the Applicant, Joyce Dassonville, from the In-Home Support Program worker, Jennifer Marchand, dated October 24, 2001, requesting financial income from April 1st to September 30th, 2001.
>
> 42. THAT as of the date of this, my Affidavit, the Applicant, Joyce Dassonville has not complied with this request; her reply is attached hereto as Exhibit "E".

[64] Program eligibility based upon income for a calendar year is undoubtedly administratively convenient and appropriate in the majority of cases. However, where there are dramatic changes in income within the year, it is necessary to take a flexible approach in order to derive a true picture of family income. It is my view that the income calculations here were so muddled and internally inconsistent that they were irrational.

[65] More fundamentally, however, as with the denial of funding for the specific financial requests, there was a failure to recognize that the application of the Guidelines did not exhaust the statutory discretion and a resulting failure to exercise that discretion in light of the actual needs and circumstances of this family.

[66] There is no evidence in either response to the request for a review of the denial of funding that Ms. Jackson, for the Department, turned her mind to the specific circumstances of the Dassonville-Trudel family, or gave any consideration to the extensive submissions by Ms. Dassonville which identified the family's seemingly unique circumstances. The question before this Court is not whether, had Ms. Jackson done so the result would have been the same, but whether she genuinely considered the requests on their merits in exercising the discretion permitted under the statute. The brevity and tenor of the responses from Ms. Jackson and the absence of any other evidence in the record attesting to her

consideration of the requests would suggest that she did not. I emphasize that the issue before us is not whether we agree with the decisions to deny and subsequently terminate funding or whether those decisions are supportable had the discretion been properly exercised, but whether the Department improperly fettered or failed to exercise any discretion.

[67] The issue, where there is a claim of a fettering of discretion, is neatly summarized by Finch, J.A., as he then was, for the court, in **Ministry of Forests et al. v. Halfway River First Nation et al.** (1999), 178 D.L.R. (4th) 666 (B.C.C.A.):

> [62] The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, which holds that decision-makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are *Davison v. Maple Ridge (District)* (1991), 60 B.C.L.R. (2d) 24 (C.A.) and *T.(C.) v. Board of School Trustees of School District 35* (1985), 65 B.C.L.R. 197 (C.A.). Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm, supra*, at pages 6-8 and *Clare v. Thomson* (1983), 83 B.C.L.R. (2d) 263 (C.A.). . . .

[68] I would find that the judge erred in concluding that the Department's refusal to provide funds for an intensive toilet training program and a home security system was reasonable. I would allow the appeal, quash these decisions and remit those requests to the Department for re-consideration within its statutory mandate.

[69] Similarly, I would find that the judge erred in concluding that the disqualification of this family from financial assistance on the basis of their joint income for the year 2000 was reasonable. I would allow the appeal, quash the Department's decision and remit the matter to the Department for consideration using correct annual income figures running from the date of commencement of the Special Needs Agreement, subject to the family providing appropriate income information.

The Decision Not to Commence Apprehension Proceedings

[70] In addition to the appeal of the judge's decision on funding matters, Ms. Dassonville submits that the judge erred in concluding that the Department's decision that Dominique was not a child in need of protective services was reasonable.

[71] In Ms. Dassonville's request for a review of funding matters she had advised the Department that the family would be unable to continue to care for Dominique if their financial requests were not met. Recognizing that the Department had not provided funds in the full amount sought, Ms. Jackson forwarded a request to Leonard Doiron, Acting Coordinator of Child Protection Services, asking that he consider whether a referral to the protection branch for a s. 22 review of Dominique's circumstances was in order. It was Mr. Doiron's conclusion that Ms. Jackson should refer the matter for investigation. On November 17, 2000, in response to the referral, the Dartmouth District Office advised Ms. Dassonville that the family's situation did not fit within s. 22 of the **CFSA**. It was the Department's assessment that Dominique was not a child in need of protective services.

[72] The record reveals that the Department had been actively monitoring the Dassonville-Trudel family from a child protection perspective from the late fall of 2000. It was recognized by the Department that Dominique's needs were placing considerable strain on the family and that Ms. Dassonville, in particular, was experiencing significant stress. In April 2001 the Department discussed with Ms. Dassonville the possibility of placing Dominique in a situation outside the family home. Ms. Dassonville was not, at that time, prepared to consider that option. It appears that the Department followed a comprehensive process to assess Dominique's needs, including following up on collateral information from other professionals involved with Dominique's care. In early July 2001, Ms. Dassonville made a self-referral to the Dartmouth District Office, alleging that Dominique was a child in need of protective services. The Department's file notes indicate, however, that on July 31, 2001 Ms. Dassonville advised the worker who had responded to the referral that she would not surrender Dominique into the Department's care, if asked to do so. She said she had made the referral out of desperation, hoping to obtain additional services to assist with Dominique's care. On August 8, 2001 Ms. Dassonville asked for a written statement from the

Department setting out their position on initiating protection proceedings. She was advised by letter dated September 19, 2001 that the Department would not be commencing proceedings. I am not persuaded that the judge erred in finding the Department's decision reasonable. I would dismiss the appeal on this issue.

DISPOSITION

[73] In summary, I would dismiss the appeal on the challenge to the standard of review and in relation to the s. 22 issue. On the question of the specific requests for funding and the termination of Program eligibility, I would allow the appeal and quash the Minister's decisions, remitting those issues to the Department.

[74] The appellants shall have costs of the appeal which I would fix at $2000 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Freeman, J.A.
Cromwell, J.A.