IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Health) v. V.S., 2006 NSSC 8

Date: 20060110
Docket: SFH APA10636
Registry: Halifax

Between:

Minister of Health

Applicant

- and -

V. S.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Assoc. Chief Justice R. F. Ferguson

Heard: November 28, 2005, in Halifax, Nova Scotia

Written Decision: January 10, 2006

Counsel: John S. Underhill, for the Applicant
Colin Campbell, for the Respondent
Louise Walsh-Poirier, for the Attorney General (Nova Scotia)

By the Court:

[1] The Minister of Health is applying for a continuation of an order finding V. S. an adult in need of protective services. The original order was made in 1999 and has been renewed approximately every six months since that date.

[2] Ms. S. is seeking to have sections 9(5), (6), (7) and (8) of the *Adult Protection Act* struck down as contrary to sections 7 and 12 of the *Canadian Charter of Rights*. The remedy sought is a declaration of invalidity for six months to allow the Province time to either rectify the *Act*, pass or proclaim other legislation or take steps to deal with the issue of her concerns.

THE *ADULT PROTECTION ACT* APPLICATION

[3] In a decision related to the application made in June of 2004, I stated:

> Ms. S. is a compelling, pleasant woman who, between 1977 and 1999, was hospitalized on forty-four occasions prior to becoming involved in her current living arrangements. Evidence by two psychiatrists today state she did and continues to suffer from paranoid schizophrenia and that on her discharge in 1999 the diagnosis was the same as when she had entered the institution; that this illness continues today and, further, Ms. S. had and continues to have no insight as to her current illness, the limitation it places on her and the requirements it has for her medication. The psychiatrists testified that, given her history and the discussions they had with her of recent date, they believe she would not continue with such medication unless under a regime similar to the one where it is required of her or it is encouraged of her. I accept that conclusion bearing in mind this lady is, under any of those conditions, in a position to make her own decisions about taking medication. The psychiatrists' testimony is that the medication she takes is significant and that the dosage is significant and that she would quickly regress if not taking this medication as required.

[4] In a decision related to the application made in January, 2005, I stated:

> Ms. V. S., in May of 1999, was determined to be an adult in need of protection pursuant to the *Adult Protection Act* and has been subject to such an order of this court since that date. This order has provided the Minister of Health with authority to provide services, including placement in a facility approved by the Minister. Initially, Ms. S. was represented at these hearings by a litigation guardian who had legal counsel. In November of 2003, she sought the right to instruct her own counsel. At a pre-trial, a hearing was scheduled pursuant to *Civil Procedure Rule 6* pertaining to persons under disability. Prior to this hearing taking place, the Minister consented to Ms. S. representing herself but maintained their submission she remained designated as an adult in need of protective services. It is noted the

medical expert relied on by the Minister to support this conclusion also stated she could instruct counsel.

RELEVANT LEGISLATION

[5] The *Adult Protection Act*:

"**3** In this Act,

(b) "adult in need of protection" means an adult who, in the premises where he resides,

(ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention;

Order of court

9(3) Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

(a) is not mentally competent to decide whether or not to accept the assistance of the Minister; or

(b) is refusing the assistance by reason of duress,

the court shall so declare and may, where it appears to the court to be in the best interest of that person,

(c) make an order authorizing the Minister to provide the adult with services, including placement in a facility approved by the Minister, which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect;

Variation or renewal of order

(6) An application to vary, renew or terminate an order made pursuant to subsection (3) may be made by the Minister, the adult in need of protection or an interested person on his behalf, or a person named in a protective intervention order upon notice of at least ten days to the parties affected which notice may not be given in respect of a protective intervention order earlier than three months after the date of the order.

Factor considered by court

(7) An order made pursuant to subsection (3) may be varied, renewed or terminated by the court where the court is satisfied that it is in the best interests of the adult in need of protection."

[6] In *Nova Scotia (Minister of Health) v. R.G.*, 2005 NSCA 59, the Nova Scotia Court of Appeal provided direction as to the factors to be considered in an application to renew an order finding an adult to be in need of protection. Chief Justice MacDonald stated:

¶ 15 The chambers judge acknowledged the Minister's submission for the need of an initial determination as to whether R.G. remained an adult in need of protection. However, she was convinced that because this finding had already been established at the initial hearing, her only task was to determine R.G.'s best interests as mandated in the application to terminate provisions. The chambers judge reached this conclusion by applying what she felt to be the "plain meaning of the legislation." She explained:

[14] The Minister of Health submits that the court must find that R.G. is an "adult in need of protection" under the Act before I can renew the order. I disagree with that submission as the plain reading of the legislation suggests otherwise. ...

[15] I am further convinced that I do not have to find R.G. to be an adult in need of protection by the wording of the provisions dealing with variation or renewal of orders - ss. 9(6) and 9(7) of the Act. Section 9(6) provides that the application to vary, renew or terminate may be made by the adult in need of protection. This provision on its plain reading preserves the finding that the adult is in need of protection until further order of the court. ...

[Emphasis by the chambers judge]

. . .

¶ 35 While the adult who was previously found to be in need of protection is granted standing under s. 9(6) on a variation or renewal hearing, such does not negate the need to determine, at each such hearing, whether that adult continues to be in need of protection. The statute clearly contemplates that the court's jurisdiction to continue to make orders in relation to the adult's care is premised upon the adult being in need of protection. Were that not the case and as noted earlier, the finding could continue indefinitely, irrespective of the status of the adult, so long as the Minister decided to continue to seek renewals of the protection order. The finding as to status would terminate only when an order was allowed to expire.

. . .

¶ 40 The trial judge also raised the same concern in her decision:

[14] ... The definition of adult in need of protection would require me to find that R.G., in the premises in which he resides, is a victim of abuse or cruelty or is not receiving adequate care and attention. I would hope that it would be rare, if ever, that once placed in a home approved by the Minister, an adult would still be in need of protection in the premises in which he resides. Few, if any, orders would be renewed as the adult would need to be abused or neglected while under the care of the Minister.

[Emphasis by the chambers judge]

¶ 41 Respectfully, when considering the purpose of this legislation, the chambers judge is interpreting too narrowly the reference to "premises" in the definition. Again, to reflect the purpose of the legislation, this term should be interpreted broadly to include where the adult lived either before the initial APO or where he may be living, should the APO terminate. In this regard, I accept the approach of Daley, J.F.C. in Nova Scotia (Minister of Community Services) v. L.K. (1991), 107 N.S.R. (2d) 377:

[24] Counsel submitted that the reference in the definition in Section 3(b) to "... in the premises where he resides," is not applicable to this application because L.K. resides at Camp Hill Hospital and it cannot therefore be argued she is in need of protection there. This is a narrow interpretation of the definition. I do not agree with counsel for the K.'s on this issue.

. . .

[26] The purpose of the Adult Protection Act is,

2 The purpose of this Act is to provide a means whereby adults who lack the ability to care and fend adequately for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect.

[27] The Oxford English Dictionary, (2nd Ed. 1989) defines to reside as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place." Neither Glades Lodge nor Camp Hill Hospital were L.K.'s settled or usual abode. She was in both places on a temporary basis at the discretion of the family, the Minister or the court or a combination of any of these.

[28] The proper interpretation to put on the reference is a broad one and means either the premises where the adult was residing at the time he or she was removed under s. 10 of the Act, or to where the adult may be living if the application were to be dismissed. To interpret the reference otherwise would defeat the purpose of the Act.

[Emphasis added]

. . .

¶ 49 In summary, I am of the view that an application under s. 9(6) requires an initial determination that the adult is "in need of protection" as defined in s. 3(b) of the APA. As stated, by failing to address this initial issue, the chambers judge

> erred in law. Furthermore, it is not for us to make this determination. I would allow the appeal on this basis.

EVIDENCE

[7] It was agreed, after striking paragraphs related to Ms. S.'s stress in relation to the court hearings, that the affidavits of the following would be admitted as evidence without the necessity of the parties being available for cross-examination:

- Cindy Morrison, Adult Protection Worker
- Venita Murphy, employee of Community Living Centres Inc.
- Janie Campbell, employee of Community Living Centres Inc.
- Barbara Bixby, employee of Community Living Centres Inc.
- Lorenna Rose-Hines, Registered Nurse
- Dr. A. Bhattacharyya, Psychiatrist

[8] In addition, Robert Turnbull, Provincial Coordinator of Adult Protection Services testified.

[9] The Defendant did not present evidence.

FINDING AS TO WHETHER OR NOT MS. S. REMAINS AN ADULT IN NEED OF PROTECTION

[10] Dr. Bhattacharyya concludes that Ms. S. continues to suffer from paranoid schizophrenia. Further, his evidence and that of the others who currently provide assistance to Ms. S. support a conclusion she is not mentally capable to decide whether or not to accept the services of the Minister. Dr. Bhattacharyya states:

> I have had the opportunity to review my May 13, 2004 affidavit and my January 4, 2005 letter, which I understand remain on file with the court in this proceeding, as well as the transcript of my testimony of May 13, 2004, and I confirm that the

> evidence I gave in those documents and in my testimony (my 'previous evidence') remains accurate to the best of my knowledge.
>
> I see all SCOT patients on a regular basis, usually every three months, sometimes more frequently based on reports from the case manager. Throughout the time I have known V. S., since 2002, she has spoken consistently of not having a psychiatric illness, not wanting to take her medication, and referring to the medication as 'nerve junk'. These remarks have been frequent and have continued to the present day. As a result of her constant requests that her medication be reduced or stopped, I now see V. S. approximately every two months.

[11] Venita Murphy states:

> V. S. regularly requests portions of her recreation money, laundry and transportation money, and this money is usually completely spent by the tenth day of each month, and V. S. has great difficulty keeping money aside for future needs such as laundry, recreation, transportation, grocery and cigarettes.
>
> It is my understanding that V. S. has been diagnosed with paranoid schizophrenia, and that she has been prescribed 525 mg of Clozapine, which she takes around suppertime each day. Ms. Bixby, Ms. Campbell and I assist her every day with taking her medication. In particular, I open the locked container where the pill bottles are stored, remove five 100 mg tablets from one bottle and one 25 mg tablet from the other bottle, and place them in a paper cup for V. to take. I then observe her for forty-five minutes thereafter, to ensure that she has no medical or other problems as a result of taking the medication.

[12] As I stated, the evidence of Janie Campbell and Barbara Bixby is supportive of that of Venita Murphy.

[13] Cindy Morrison states:

> During my meeting with V. S. on June 2, 2005, I reminded her of previous statements she had made in the past describing her medication as 'junk' and stating that, given the choice, she would no longer take her medication. V. told me that she still believed those statements, and advised that when she saw Dr. Bhattacharyya the following week, she was intending to talk to him about these concerns.

[14] I find that V. S. is an adult in need of protection and is not mentally competent to decide whether or not to accept the assistance of the Minister.

[15] I am aware that V. S. continues to believe the Minister is not providing her with services but rather is an impediment to her living on her own and making her own decisions.

[16] As previously noted, prior to the Minister's intervention, Ms. S. was hospitalized, at the Nova Scotia Hospital, forty three times. On a review of the evidence, I agree with the submission of the Attorney General of Nova Scotia where it states:

> Since the first AP Order in 1999, continuously renewed by application of the Minister, the Applicant has been able to live on her own in the community in a supportive living environment with a broad spectrum of co-ordinated supportive services, individually designed to meet her needs, from Dr. Bhattacharyya, the SCOT Team of the Nova Scotia Hospital, and under a 'supervised apartment program' on the Department of Community Services entitled: Services for Persons with Disability, which includes support and services in daily living that enable her to live independently in the community (Morrison Affidavit, para 22).
>
> Under the 'supervised apartment program' the Applicant is provided with a 'supervised apartment' in the community in Dartmouth, and receives daily support services that assist her with grocery shopping, taking medications, managing her money, participating in leisure activities and household management). AP Orders are not coercive (*RG, infra,* NSCA).

[17] It is in V. S.'s best interest that the order finding her in need of protection be renewed at this time.

CHARTER **APPLICATION**

[18] Section 7 of the *Canadian Charter of Rights and Freedoms* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[19] Section 12 of the *Canadian Charter of Rights and Freedoms* states:

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

RELEVANT LEGISLATION

[20] The *Adult Protection Act*:

> Expiry of order
>
> 9 (5) An order made pursuant to subsection (3) expires six months after it is made.
>
> Variation or renewal of order
>
> (6) An application to vary, renew or terminate an order made pursuant to subsection (3) may be made by the Minister, the adult in need of protection or an interested person on his behalf, or a person named in a protective intervention order upon notice of at least ten days to the parties affected which notice may not be given in respect of a protective intervention order earlier than three months after the date of the order.
>
> Factor considered by court
>
> (7) An order made pursuant to subsection (3) may be varied, renewed or terminated by the court where the court is satisfied that it is in the best interests of the adult in need of protection.
>
> Expiry of renewal order
>
> (8) A renewal order expires six months after it is made.

[21] Ms. S. is a relatively young person. Her medical diagnosis has not changed since her initial appearance in 1999. It would appear this mental diagnosis will prevail indefinitely. Her belief she is capable of managing her own affairs has not wavered since 1999 and she will probably retain that belief. This combination almost guarantees that every six months the Minister will seek a renewal order finding Ms. S. in need of protection and she will oppose such application. Ms. S. contends the portions of the *Adult Protection Act* requiring her to endure such repeated application violates her *Charter of Rights*.

[22] In her submission, Ms. S. states:

> It is the position of Ms. S. s. 7 of the Charter is contravened. It is contrary to the principles of fundamental justice that Ms. S.'s right to liberty and security of

person should be limited for purposes which are not prescribed by the Act. It is further submitted that the cyclical review process is not in accordance with principles of fundamental justice as it repeatedly focuses Ms. S. on her limitations and embroils her in a contested legal process which is difficult for her to comprehend and more difficult still to justify legally or economically.

In the alternative it is argued that the repeated legal process is both cruel and unusual treatment within the meaning of s. 12 of the Charter. Individuals with fragile mental health do not deserve to be trotted in and out of court. There has to be a better way.

[23] In support of this submission, Ms. S. relies on the evidence of Dr. Bhattacharyya and Dr. Theriault given at previous hearings which she contends leads to a conclusion she would be affected by the distress of a court proceeding.

[24] Dr. Bhattacharyya in the hearing held in May of 2004 stated:

. . . it will not be in her best interests to go every six months . . . we cannot say that every six months things are going to change. When we talk about a chronic schizophrenic illness of 30 years . . . I think six months is a very brief time to go over and say she is better now to come off protection.

[25] Ms. S. also contends that the statements made by the Nova Scotia Court of Appeal in *Nova Scotia (Minister of Health) v. R.G.*, 2005 NSCA 59 is supportive of her stance. Chief Justice MacDonald stated at ¶ 46 and again at ¶ 51, ¶ 52, ¶53 and ¶ 54:

¶ 46 It is no small step to be found an adult in need of protection. It can seriously affect an individual's liberty and security as protected by s. 7 of the Charter. Courts should therefore exercise caution before making such a determination. Thus, consistent with my earlier conclusion, I prefer an interpretation that mandates a court to address this important issue each time an APO is reconsidered.

. . .

¶ 51 Before concluding, I wish to discuss my concerns about a process that in this case, as stated, has now involved the courts in 37 renewal applications for over a 17 year span.

¶ 52 The APA, I believe, was never designed for such prolonged involvement by the courts. Instead, an APO should only be issued for such duration as the Minister requires to establish a long term stability plan for the subject adult.

¶ 53 Section 9(5), for example, provides for initial orders to expire within six months unless renewed. By s. 9(8), renewal orders are also to expire after 6 months.

¶ 54 Furthermore, s. 13(2)(b) of the APA contemplates long term solutions that do not involve the continuous renewals of APOs. Instead, it anticipates the involvement of the Public Trustee or other guardians beyond the initial APO stage:

13(2) Where the Public Trustee ... is of the opinion that his intervention is appropriate, the Public Trustee may assume immediate management of the estate of that person and may take possession of the property of that person and shall safely keep, preserve and protect the same until

(a) the Public Trustee determines that it is no longer necessary to manage the estate of the person;

(b) the Supreme Court or a judge thereof has appointed the Public Trustee or another person to be guardian of the estate of the adult in need of protection;

(c) a court finds that the person is not an adult in need of protection; or

(d) the order that a person is an adult in need of protection expires, terminates or is rescinded.

[26] Ms. S. also suggests that the Province's recent passing of the *Involuntary Psychological Treatment Act* (although not yet proclaimed) recognizes the inappropriateness of the questioned sections of the *Adult Protection Act* as it applies to someone of her circumstances.

[27] Ms. S. has, for some time, contended the Minister is using the intrusive provisions of the *Adult Protection Act* for the inappropriate purposes of ensuring she takes her prescribed medication and properly allocates her financial resources.

[28] The Attorney General in his submission, in my opinion, correctly identifies the issues when he states at para. 21:

Accordingly, the issues before this Court are:

(I) whether subsections 9(5)-(8) violate s. 7 or 12 of the *Canadian Charter of Rights and Freedoms*; and

(ii) is so, are the impugned provisions, limiting the protected right(s), saved under Section 1 of the *Charter* on the basis they are reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[29] He further puts forward his position as follows:

> The Attorney General submits the Applicant has failed to discharge the burden of proof to satisfy the Court, on a balance of probabilities, that s. 7 or s. 12 has been breached.
>
> There is no evidence to satisfy the Court that s. 7 liberty or security of the person interests are engaged here. Alternatively, there is no breach of a principle of fundamental justice as argued for by the Applicant.
>
> Nor is there evidence that periodic reviews under subsections 9(5)-(8) fall within s. 12 of the Charter as delineated by the jurisprudence.
>
> Finally, if there is a s.7 or s.12 breach, it is submitted the impugned provisions constitute a reasonable limit and are saved under s.1 of the *Charter.*

CONSIDERATION - SECTION 7 OF THE *CHARTER*

[30] I agree with the submission of the Attorney General that Ms. S. has not established a breach of s. 7 protected rights. The evidence provided by the attending psychiatrists, that of Dr. Bhattacharyya that it was not in her best interest to go through these repeated court hearings or that of Dr. Theriault that she would be affected by stress by having to face such court applications every six months, does not establish a breach of her constitutional rights. To again quote from the Attorney General's submission:

> It is submitted the Applicant has failed to discharge the onus on her to prove a breach of s.7 liberty or security of the person. To find a breach of a constitutional right based on such evidence would overshoot the purpose of s.7 and trivialize the rights which have been elevated to constitutionally-protected status.
>
> . . .

What the Applicant must show on the evidence here, on a balance of probabilities, in order to fall within s.7 liberty or security of the person, is that reviews under subsections 9(5)-(8) cause her “serious psychological stress”. ie a serious interference with her psychological integrity.

[31] The Nova Scotia Court of Appeal in *R. v. Doucette*, (1987) 77 N.S.R. (2d) 279 (N.S.C.A.), dealing with a *Charter* challenge stated:

In my opinion, a person who alleges that his rights under the Charter have been breached has the burden of establishing that matter before the Court. There is no such concept as a theoretical breach of the Charter and it would appear that this was the approach that was taken by counsel in the trial court. When you allege that your life, liberty or security is being impaired by an obligation imposed upon you by a piece of legislation, you must in fact prove that impairment before any remedy can be provided under the Charter. This has been clearly pointed out by Dickson, J. when speaking for the majority of the Supreme Court of Canada in Operation Dismantle v. The Queen (1985) . . .

. . . The only way this legislation could be found to be in violation of s. 7 would be if it could be proved in evidence that it forced the appellant to do something that did in fact endanger his life or security of his person. Since this issue was not given any evidentiary basis in the court below and the trial judge was unable to rule upon it on a proper basis, the appellant has not, in my opinion, discharged the burden upon him to prove a breach of his rights under the Charter.

[32] The Supreme Court of Canada, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, speaks of interference with an individual’s psychological integrity as it relates to s. 7 of the *Charter*. Bastarache J. states:

¶ 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in Morgentaler, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (G. (J.), at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.

[33] In this instance, the evidence of the stress and anxiety suffered by Ms. S. by her continued court obligations do not constitute a violation of s. 7 of the *Charter.*

CONSIDERATION OF S. 12 OF THE *CHARTER*

[34] I agree with the submissions of the Attorney General that requiring Ms. S. to make herself available to a court process and hearing every six months does not equate to being subjected to cruel or unusual treatment contrary to s. 12 of the *Charter*.

[35] On this point the Supreme Court of Canada, in *R. v. Smith* [1987] 1 S.C.R. 1045, stated at p. 1072:

> . . . The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in Miller and Cockriell, supra, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

[36] The *Adult Protection Act* requirement that Ms. S. may be subject to reviews on a six-month basis is not so excessive as to "outrage the standards of decency."

[37] People such as Ms. S. who are found to be in need of protective services but can instruct counsel can be expected to maintain their beliefs such involvement is unnecessary and to repeatedly instruct counsel accordingly. This creates for them far more than an imposition but, in my opinion, falls short of violating their *Charter* rights. What would obviously violate their *Charter* rights was if a continued availability to test the determination that places limits on their freedom was not available to them. That being said, the Province should continue to look to approaches that could provide for people in the position of Ms. S. in the least possible intrusive manner.

J.