2001 SFH DM99-51

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Nova Scotia (Health) v. J.J.*, 2001 NSSF 12

IN THE MATTER OF: The *Adult Protection Act*, R.S.N.S. 1989, C.2

- and -

IN THE MATTER OF: The Minister of Health (formerly Community Services)

- and -

IN THE MATTER OF: J.J. (also known as J.B.)

[Cite as: *APA & Min. of Health & J.J.*, 2001 NSSF 12]

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on April 2, 2008.

DECISION

HEARD: BY THE HONOURABLE JUSTICE MOIRA C. LEGERE ON FEBRUARY 8, 2001

DECISION: MARCH 13, 2001

COUNSEL: ROBERTA CLARKE, COUNSEL FOR THE MINISTER

JILL FRAM, COUNSEL FOR J.J.

LEGERE, J.

References:

Cases cited by counsel: *Nova Scotia (Minister of Community Services) v. F.R.*

(1988), 86 N.S.R.(2d) 147, Daley FCJ; *Nova Scotia (Minister of Community Services) v. L.B.* (1996), 162 N.S.R. (2d) 227 (S.C.). Gass FCJ (then); *Nova Scotia (Minister of Community Services) v. Carter* (1988), 89 N.S.R.(2d) 275; *Minister of Health v. E.F.* (2000) unreported (N.S.S.C.F.D.) Gass J.; *Nova Scotia (Minister of Community Services) v. L.K.* (1991), 107 N.S.R.(2d) 377 Daley JFC; *M.C.S .v. E.R.* (1988) 88 N.S.R. (2d) 301; *Re Eve* (1986) 31 D.L.R. (4th) 1 (S.C.C). LaForest J.; *Re Benson and the Director of Child Welfare* (1982), 142 D.L.R. (3d) 20 (S.C.C.); *S. v. Saskatchewan (Minister of Social Services)* (1983), 33 R.F.L. (2d) 1 (Sask C.A.); *Hughs (Re*)(1994), 5 E.T.R.(2d) 244 (Alta. Surr. Ct.); *R Seaman* (1997),151 D.L.R. (4th) 337 (Alta.Surr.Ct.); *C.A.S. Metro. Toronto v. Ont. (Dir. Children and Family Services Act)*(1990), 27 R.F.L.(3d) 311 (Ont.Sup.Ct.Div.Ct.); *Nova Scotia (Minister of Community Services) v. K.L.T.,(*1998) N.S.J. No292 (Fam.Ct).

Additional cases referenced by Court: *New Brunswick v. G.(J),*1999 S.C.J.47 (S.C.C.); *R.B. v .C.A.S. of Metropolitan Toronto* (1995) 1S.C.C. 315, 9 R.F.L. (4th) 157; C.(G.C.) v *New Brunswick (Minister of Health and Community Services)* (1988), 14 R.F.L.(3d) 1 S.C.C.; *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)(*1994) 2 R.F.L.(4th) 313 (S.C.C.) 336; *Nouveau Brunswick (Minister de la sante et des services communautaries c. L.(M.)* (1998) 41 R.F.L. (4th) 339 (S.C.C.); *R.(S.) v. R.(M.)* (1998) 43 R.F.L.(4th) 116 (Ont.C.A.); *B.(H.J.) v. B.(A.C.)* (May11,1999), Doc.S.H.154944/99(N.S.S.C.);-----(19186) 2 S.C.R. 573, 33 D.L.R (4th)174; (Reference 94(2) of the *Motor Vehicle Act* (1985) 2 S.C.R.486, 23 C.C.C.(3d) 289, 48 C.R.(3d) 289*);(P.(M.A.R.) v.(A)* (1998), 40 R.F.L.(4th) 411 (Ont.Gen Div); *K.L.W. v. Winnipeg Family and Children Services*, 2000 S.C.C. 48 File # 26779. *Seaman(Re)* (1997)A.J.No.908,DRS98-03000Alberta Surrogate Court. JDC September 15,1997.

Articles:

1. The *Charter of Rights* & Family Law in Canada: A New Era Nicholas Bala
2. 18 C.F.L.Q.25. Carswell, Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative D.A. Rollie Thompson; D.L.S,
3. A Status as a Haven in a Ruleless, Heartless World? A Family Law Update D.A. Rollie Thompson, D. L. S.
4. The ABC's of the *Charter*; D.A. Thompson, D.L.S.
5. The New ABC's of the *Charter*, D.A..Rollie Thompson, D.L.S.

This is an application dated September 1, 2000 for an order to review and vary the existing Adult Protection Order dated March 31, 1999 made pursuant to section 9(6) and 9(7) of the *Adult Protection Act* R.S. c.2. The adult in question is 32 years

old. The Minister of Health seeks an order removing specific placement provisions from the original order, allowing the current plan of the Minister to place the adult in a specific facility approved by the Minister.

[1] The parties have requested that this application be heard and resolved in two parts.

> 1. a decision respecting the extent of its jurisdiction to become involved in placement matters and in assessing the plans of the parties. It includes implicitly a question whether the court has jurisdiction to impose any conditions on the nature and extent of Ministerial intervention once a finding under 9(3)(a) and (c) has been made.
>
> 2. a hearing of the evidence on placement and conditions , if any, that should attach to the order.

[2] Both counsel agree that the finding that J. J. is an adult in need of protection should continue.

[3] The original order arose out of an application dated February 6, 1999 by the Minister of Community Services (the Ministry then responsible for this Act) on February 16, 1999 for a finding that:

- J. J. is an adult in need of protection pursuant to s.3(b)(ii) of the Act;
- and for a finding that she is not competent to decide whether or not to accept the assistance of the Minister pursuant to s.9(3)(a); and
- further for an order authorizing the Minister of Community Services to provide J. J. with services, including placement in a facility approved by the Minister, pursuant to s.9(3)(c).

[4] The particulars of the adult's personal history and circumstances are outlined in a decision dated March 23, 1999 and will not be repeated for the purposes of this decision, save for those facts necessary to establish a foundation for this decision.

[5] J.J. has marked cognitive impairment, is impulsive and sensation seeking. She has little to no insight. These are predictors for ongoing risk of violence and aggression. The risk management assessment which is before the Court and will be more fully before the Court in the second stage; endorses the plan of care put forward by the in-patient treatment team as a well thought-out risk management plan

which would reduce the risk to the public. This risk management plan must be viewed as a total package because the failure to provide any one of the recommendations may significantly increase J.J.'s risk, as J.J. has shown little ability to control her behavior without the carefully applied application for external support. The reports state that J.J., because of her cognitive deficits, requires management through supervision and support. Rather than expect that she will be able to incorporate behavioral changes due to insight the Team report proposes a behaviour management approach.

[6] The proposal of the Minister appears in this circumstance to be in conflict with the results of a risk management assessment and the in-patient treatment team. The Department of Community Services has classified J.J. as requiring Regional Rehabilitation Centre level of care. She has been offered a placement in the Halifax County Regional Rehabilitation Centre by the Department of Community Services. Counsel for the Minister acknowledges that this facility is scheduled to close in June 2001. Both the Adult, the SCOT team and her treating physician do not endorse this placement. The closure of the Halifax Regional Rehabilitation Centre means this placement will be a temporary placement requiring J.J. to be relocated upon obtaining a suitable placement to address her needs.

[7] The Court requested further information on this recommended placement. By memorandum dated January 9, 2001 the Applicant advised that the Halifax County Regional Rehabilitation Centre is scheduled to close on June 30, 2001. Individual planning is underway for residents who are ready for community placement. The memo indicates that 29 residents have been placed out in the community. Eight residents from the Northern region, who are not ready for community placement will be relocated to a specialized unit at the Riverview Adult Residential Centre in Riverton. Ten clients from the Metro area who will continue to require an intensive level of professional support have been assessed as requiring 24-hour professional intervention. For these individuals an alternate placement with required supports is being developed in the Metro area.

[8] J. J. continues to reside at the time in the Nova Scotia Hospital having been placed there originally by certification in December 1998. Her counsel submits she has been ready for release and placement for approximately 18 months. She has consistently opposed the application and her continued placement in a hospital setting. She sought and obtained a separate review of her status in the Nova Scotia Hospital in 1999. She appeared at each review hearing under this Act with counsel and reminded the court that she wishes to leave the hospital setting.

[9] J.J. is married and while she and her husband continue to live apart from one another, they continue to have a relationship with one another. Once in the community it is unlikely that she and her husband will be able to co-habit.

[10] In 1997, Adult Protection Services indicated that the adult was not a candidate for a development home, given her behavior in the community. She was considered to be a risk to others and to herself. The concerns surrounding her placement included the following:

- A history of eviction from apartments;
- Exposing herself;
- Threats, including threats with a knife, a bomb threat, harassment;
- Telephone calls and the removal of the telephone by MTT;
- Frequent calls to ambulance and fire departments for assistance;
- Frequently presenting in the Emergency Department;
- Setting her hair on fire to gain attention;
- Setting her coat on fire;
- Violent behavior towards others; and
- Placing herself in situations of extreme risk.

[11] The March 28th,1999 decision included a finding that J.J. could not live peaceably with people without strict conditions of supervision and could not live on her own. J.J was not a good candidate for a group home.

> Placement is a critical issue with her which requires very individual management of her needs so that she and others are not placed in jeopardy or harmed or placed in circumstances where there is an increase in the likelihood of injury to herself or others. (Page 9 Decision)

[12] The SCOT team (a supportive community outreach team) are very familiar with this adult and have continued to advocate on behalf of J.J. for services to her to keep her in her own apartment and to ensure she takes her medication daily.

[13] I found that J.J. was an adult in need of protection and that she was not competent to decide whether or not to accept the assistance of the Minister.

[14] At page 11, the decision states:

> My view is that once I have made the order under (a) and (e), I can in some way prior to making of the order under 9(3)(c) assist the parties, perhaps push the parties, and counsel the parties to address the needs itemized in evidence. That once I authorize the Minister to provide services in accordance with subsection (3), the Minister then becomes responsible

> to address the needs of the person who has been found to be an adult in need of protection. That would implicitly include the responsibility to place J.J. in suitable housing that addresses not only her needs for privacy but balances her needs with the need of the community for protection.

[15] In accordance with the facts that existed at the time, the parties consented to the placement of J.J. in her own apartment with a minimum of 8 hours supervision with provision for a standing order through the SCOT Team at the Nova Scotia Hospital for committal to the hospital in the event of a breach of the plan of care. This would include a refusal by J.J. to take her medication. The SCOT Team and the Adult Protection team devised a plan of care to which they consented which addressed the issues of risk to ensure that J.J. was adequately occupied through the day, properly supervised in her apartment through the day and night in whatever way the Minister deemed appropriate, given what they knew of her needs and risks associated with placement in her apartment. J.J. agreed to the required supervision, promised to take her medication on a regular basis, recognizing that failure could put her back in the hospital until she was reestablished on medication.

[16] Counsel drafted the order to contain the agreed upon placement provision. While the court accepted the consent of the parties in accepting the proposed placement, I had some residual concerns. My decision cautioned "that there are serious issues that have to be addressed in devising a plan to accommodate J.J.'s need for quality of life balanced with the community needs , recognizing there is a risk to others if she lives with them." The concern included the possibility that if J.J. did deteriorate, she placed herself at risk by possibly entering the criminal justice system. Having sought the declaration of incompetence and the order permitting the Minister to offer services, the Minister then became responsible for addressing her needs, and providing in this instance the agreed placement.

[17] The specific wording of this consent order includes the finding pursuant to s.9(3)(a); the authorization requested by the Minister to provide J.J. with services

> including placement in a facility approved by the Minister which will enhance the ability of J.J. to care and fend adequately for herself, *specifically supervision in her own apartment as may be required as determined by the Minister in consultation with the support of the community outreach team (SCOT) of the Nova Scotia Hospital, and including admissions of short duration in the Nova Scotia Hospital as directed by the support of community outreach team (SCOT) of the Nova Scotia Hospital, for an adult protection worker from time to time*.(emphasis added)

[18] A copy of the order was to be given to the police department, to the SCOT Team, to the Nova Scotia Hospital Admissions and to the appropriate individuals in

adult protection.

[19] The Minister admitted at that time that they did not have a facility appropriate to house J.J. and that their ability to house in other than a group setting was not necessarily acceptable. There was not currently availability, suitable small option homes. I understood there was a considerable waiting list.

[20] This order, issued on the 23rd of March, 1999, was renewed pursuant to a Court order issued the 4th of October, 1999. The renewal order of March 20, 2000 substituted the words "in her own residence" for words "in her own apartment".

[21] The Minister of Health is now the Applicant in Adult Protection matters and seeks a variation to remove the specific references to placement . This would allow the Minister to place J.J. in a facility approved by the Minister which would allow their current plan to be implemented. In essence, having consented to the form of order, the Minister is now seeking a variation of their consent order to adjust placement to the facility proposed.

[22] The affidavit from the Adult Protection worker states as follows:

> That based on my own observations of J.J., and her husband, D.J., and the information I have received from Noel Kinley, and Dr. Diane Eastwood, I do verily believe that J.J. continues to require close monitoring and supervision in order to fend for herself in the community, and that the existing Adult Protection Order should be renewed to ensure she receives support and supervision, and the continued ability of the Nova Scotia Hospital for short admissions when required, **and as it appears that placement in her own residence is unlikely to be funded by Community Supports for Adults**, I do verily believe that the Order should be varied to authorize the Minister to provide services to J.J., including placement in a facility approved by the Minister.

[23] While J.J. has been assessed as requiring the level of care offered in the Regional Rehabilitation Centre level of program, it is unclear whether she will continue to require this type of setting following the closure of the Halifax County Regional Rehabilitation Centre or possibly be deemed ready for community placement, depending on her assessed needs.

[24] The recommendations of the SCOT team include a community based option (small option program) with her own bedroom, a residence layout that allows sufficient privacy to support private or conjugal visits with her husband in a low density neighborhood in a situation in which her phone calls can be monitored as

specified in the behavioral management plan. There has to be twenty-four hour staff in the residence, seven days a week. Supervision of this adult is required in the community when she is not attending a structured activity or not accompanied by an adult capable of providing necessary supervision (her parents, program staff and for short periods of time, her husband).

[25] In the affidavit of Mr. Boyd, submitted by the Applicant he refers to the observations of Dr. Eastwood who recommends that the appropriate plan of care for J.J. requires a small (ie., few residents) community setting where intensive, one to one, 24 hour a day supports and supervision are provided. It should be noted that her husband is unable to provide adequate supervision and therefore, unsupervised contact is recommended to be limited to one three-hour community outing per week.

[26] Proposals have been sought from residential service providers to accommodate J.J. in her own residence. Funding has not been approved for any of the residential service providers who have submitted proposals, including the Metro Community Housing Association, Community Living Centres Incorporated and the Regional Residential Services Society. The Court currently has no information as to why these were rejected and may well hear evidence on that at a further proceeding.

[27] There **has been improvement** in J.J.;s condition as noted by the SCOT team who believe that with appropriate supervision and support, her problematic behaviors can be managed in the community without a significant risk to staff or the public. **Her doctor is concerned** about the closure of the Halifax County Regional Rehabilitation Centre and concerned about the movement of J.J. from one institution to another. ***Dr. Eastwood has advised that she is not prepared to discharge J.J. to the Halifax County Regional Rehabilitation Centre because she anticipates her behavior will deteriorate and all of the gains made during the admission to the Nova Scotia Hospital will be lost.*** If, once she is sent to Halifax County Regional Rehabilitation Centre, she will be discharged from the SCOT team she will lose access to this specialized team who know her needs and provide support for her in the community. J.J. herself refuses placement at the Halifax County Regional Rehabilitation Centre.

[28] This leaves in limbo any possible appropriate assessment of placement ***. It has been 18 months during which time the Minister of Health has not been able to address a community placement.*** One could reasonably presume that there is no

certainty respecting any alternate placement with the required supports developed for clients of this nature or it would have been made available by this time. Alternate appropriate placement details have yet to be confirmed, its location, its potential to address the needs of J.J., its proximity to her family who have continued to support her and enhance her quality of life.

[29] The first issue to be decided is whether the Court, pursuant to s.9(3)(c) of the Adult Protection Act, has jurisdiction to specify the placement of an adult. The Minister of Health takes a restrictive interpretation of the word "authorize to allow" to constrain the courts authority. The Minister of Health indicates that the Court's powers with respect to the *Adult Protection Act* and specifically, s.9(3) relate to an authorization to allow the Minister to provide services, including placement in a facility approved by the Minister. In other words, the Court can authorize the Minister to become involved in providing services which may include placement but cannot direct the actual placement. The Court, it argues, has no authority to order an individual to attend at any specific facility (Nova Scotia (Minister of Community Services) v. F.R. (1988), 86 N.S.R. (2d) 147,at p. 154, decision of Daley, JFC.).

[30] The Applicant argues that the Court is restricted in that it has jurisdiction to do what the statute authorizes and no more. Counsel for the Minister of Health seeks to restrict the meaning of authorize to empower the Minister without a corresponding duty to enquire, to weigh the options to impose conditions and specify the provision of certain services, etc. The court cannot direct the Minister to provide certain services, including placement in a particular facility.

[31] The Minister argues now and intends at the second stage to argue that the Court must recognize the inherent resource limitations and the restraints on the Minister of Health and the placement of individuals with the current resources available.

[32] The Minister also refers to *Nova Scotia (Minister of Community Services) v. L.B.* (1996), 162 N.S.R. (2d) 227 (S.C.). Gass J. In her decision, Justice Gass indicates that the *Act does not specify* that the Court can become involved in the actual placement of an adult.

[33] The parties agree that if the Court accepts the Ministers position, there is still a requirement that the Court weigh the plans put forward to determine which plan best suits the adult's needs. The Minister, however, suggests that the jurisdiction of the

court to review the plans is limited. This implies that the court retains some jurisdiction to review the evidence, to weight the plans, with the express requirement to determine *what is in the best interests of the adult* in accordance with the court's mandate as set out in section 12 of the *Adult Protection Act*. This mandates that the Court apply the principle in these proceedings that the welfare of the adult in need of protection is the paramount consideration.

[34] **The question remains what is the authority/duty of the court after the findings are made.** If the duty is to apply the best interests principle, in what context, to what degree, respecting what questions? What meaningful purpose exists that calls a court to review the evidence of possible placements and for what end if the court has limited jurisdiction? How limited is this jurisdiction?

[35] What makes placement so critical in this case is the difficulty in assessing and managing this particular individual and the lack of available placement. The Minister has had difficulty finding an appropriate placement with appropriate supports. The Court cannot **at this stage** conclude that this is simply a resource problem. If this is the position, that the Minister cannot provide a suitable placement that enhances the individual, the evidence ought to be clear that the position adopted is reasonable and accords with the proper weighing and balancing of the best interests test.

[36] The conflict between the Minister of Health and the caretakers placement is a very real and live issue for J.J. who simply wants to be released on her own into the community. The Minister seeks to reaffirm the limited jurisdiction of the court to become involved in placement issues in light of the conflicting placement plans and the limitation of resources. This matter continues to need resolution.

What sources exist that define the Court's authority?

- Legislation,
- Best Interests Test,
- *Charter* Values,
- *Parens Patriae* Jurisdiction

The Legislation

[37] The *Adult Protection Act* R.S., C. 2, is but 19 short sections in length. The purpose of the Act is set out in sec.2:

…to provide 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.

[38] Section 9 (3) states as follows:

Where the Court finds upon the hearing of the application, the 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,

Court shall so declare *and may, where it appears to the Court to be in the best interests 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 in care and fend adequately for himself which will protect the adult from abuse or neglect;

[39] Section 12 is particularly relevant to this inquiry. It states:

In any proceeding taken pursuant to this Act, a Court or Judge *shall* apply the principle that *the welfare of the adult in need of protection is the paramount consideration.* R.S., c.2, S. 12.(my emphasis added)

[40] The results of intervention may result in more intrusive intervention.

13 (1) Where an adult is removed from the premises where he resides to another place pursuant to this Act, and it appears to the Minister that there is an immediate danger of loss of, or damage to, any property of his by reason of his temporary or permanent inability to deal with the property, and that no other suitable arrangements have been made or are being made for that purpose, the Minister shall inform the public trustee.

14(1) Nothing in this Act limits the remedy available or affects an action that may be taken pursuant to another enactment.

[41] An order made pursuant to subsection (3) expires six months after it is made; an application to vary, renew or terminate an order made pursuant to subsection (3) may be made by the Minister under the adult need of protection where 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 effected which notice may not be given in respect to the protective intervention order earlier than three months after the date of

the order. (7) An order made pursuant to subsection (3) may be varied, renewed or terminated by the Court in *where the Court is satisfied that it is in the best interests of the adult in need of protection.* (8) A renewal order expires six months after it is made.

1. ***The legislation*** directs the court to enter into a review of the service and placement plans of the Minister.(Ref.s.12, the best interests test) and (sec. 2 & 7; the express aim to enhance the individual's ability to care for themselves)

2. **The Best Interests test** :

[42] Using the best interests test to allow the court to expand into an area it was traditionally reluctant to review requires caution to ensure that the bending or expansion of the rule does not create individual solutions to the detriment of the "children" (or adults) within the system.

[43] The "best interests" test is a test that can be said to fall under the substantive principles of fundamental justice. The test was extended in the **child protection context** in *C.(G.C.) v. New Brunswick (Minister of Health and Community Services)* (1988), 14 R.F.L. (3d) 1 (S.C.C.). And again in *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.) (*1994) 2 R.F.L. (4th) 313 (S.C.C.). At pg. 336 the court said:

> Notwithstanding the specific provisions of the Act, however, traditional discussions with respect the best interests remain highly relevant.

[44] The court has extended the philosophy and purview of the Ontario Act to include the interests of foster parents when weighing "best interests test". The Supreme Court of Canada moved further to extend the best interests test to permit the making of orders for access after permanent wardship. *Nouveau- Brunswick (Minister de la sante & et des services communautaries) v. L.(M.)* (1998) 41 R.F.L. (4^{th}) 339(S.C.C.). Further, the court in the New Brunswick case created rules governing access. The "best interests" test has included a consideration about contact with siblings. (*P.(M.A.R.) v. V.(A.)* (1998), 40 R.F.L. (4^{th}) 411 (Ont. Gen Div).

[45] The Supreme Court read into the *Family Service Act* of New Brunswick a positive duty to consider whether access was in the best interests of the child.

[46] Courts have ordered access after adoption, expanding the jurisdiction of the court in considering the best interests test. The "interpretive approach" allowed the Supreme Court of Canada in the New Brunswick case *(L.(M)* to preserve access after adoption in the face of the legislative directive that severs all parental rights including access not preserved by the court in the adoption proceeding. The Ontario Court of Appeal *R.(S.) v. R.(M.)* (1998), 43 R.F.L.(4th)116 (Ont. C.A.) adopted this finding that in exceptional cases access survives adoption. Associate Chief Justice MacDonald in *B.(H.J.) v. B. (A.C.)* (May 11,1999), Doc S.H. 154944/99 (N.S.S.C.) ordered post adoption access to a natural parent using the notion of its equitable jurisdiction, denying the access on the merits to the step-parent.

[47] The paramountcy of the best interests test (a test present in the *Adult Protection Act*) creates an assumption that the legislature must have intended to give the court jurisdiction to do what is best for the child. If access after wardship is a valid consideration for the court , *other considerations are relevant if they pertain to the best interests of the child. Thus the jurisdiction exists, unless closed off specifically and clearly by statute.*

[48] In Professor Thompson's analysis of the case law he identifies two prerequisites necessary to bend or expand the statutory rules; each of which exist in the case at hand:

1. The statute states that "best interests" is the paramount or guiding principal; and
2. Nothing in the statute clearly prohibits or denies the specific power or remedy sought.

[49] If we apply this reasoning to the *Adult Protection Act* it flows inevitably to the conclusion that the intervention of the court in determining what is in the best interests of an adult incapable of providing for themselves is *inclusive* rather than *restricted* unless specifically prohibited or restricted by statute.

***Parens Patriae* Jurisdiction**

[50] The Respondent asks the court to exercise its *parens patriae* jurisdiction. Section 32A(1)(t) of the *Judicature Act* R.S.,c.240 states as follows:

> The Supreme Court (Family Division) has and may exercise in such judicial districts or parts of a district, as are designated by the Governor in Council pursuant to Section 32H the powers and duties possessed by the Supreme Court in relation to, and has and may exercise jurisdiction in relation to proceedings in the following matters;

(t) *parens patriae* jurisdiction;

(x) those other matters that are provided by or under an enactment to be within the jurisdiction of the Family Division

[51] The Respondent references the comments of LaForest J. in *Re Eve* (1986), 31 D.L.R.(4th) 1(S.C.C.):

> ...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...the situation in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been and indeed cannot, be defined.(p.17)
>
> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interests" of the protected person, or again, for his or her "benefit" or "welfare".
>
> The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense....In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X* (1975) 1 AllE.R.697) at p.699 that the jurisdiction is of a very broad nature, and that it can be involved in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive....a court may act(when) injury has occurred ...and injury is apprehended.

[52] *Parens Patriae* can be used if there is a gap in the legislation. *Re. Beson* (1982), 142 D.L.R. (3d)20(S.C.C.); *S.v. Minister of Social Services*(1983), 33R.F.L.(2d)1 at 11(Sask.C.A.) . While courts must clearly enforce the will of the legislature they have a duty to exercise their inherent powers for the protection of children and mentally incompetent adults.(*R.G.J.S. and G.M.S. v.B.L.P*. (1987),75 A.R. 287(Q.B.).

[53] It is within the context of this argument that the court must at least refer to the standards clearly enunciated in the recent Supreme Court cases applying *Charter* values (particularly section 7) in Family Law matters.

***Charter* Considerations/Values**:

[54] There was no notice given to the Government respecting a *Charter* challenge. This limits the power of the court in this review. (*Constitutional Questions Act*, s.10(2)). However, 52(1) of the *Charter* states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force and effect.

[55] The court cannot ignore the principles enunciated in the *Charter* as fundamental to our understanding of judicial process and substantive law. Section 7 of the *Charter* states:

> Every person 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.

[56] The closest analogy to the broad invasion of state power in the lives of vulnerable individuals is in the arena of Child Protection where state intervention is necessary to protect children and to provide for them in the absence of appropriate family supports. Professor D.A. Thompson (*The New ABC's of the Charter*) discusses the evolution of child protection legislative development whose purpose is clearly defined to uphold the rights of children to protection and to restrict, define and hold accountable agents of the state who must of necessity intervene in the lives of citizens to carry out the purpose of providing protection to children in need. The process of redefining, creating standards and managing intervention subjects the agents of the state to judicial review. This provides further a safeguard restricting the degree of intervention which compromises the right of the individual to choose. Notable, he indicates jurisdictions have moved in the direction of less intervention and more legalistic statutes.

[57] The *Children and Family Services Act*, 1990, c.5, confirms in principle that children have basic rights and fundamental freedoms no less than those of adults. By analogy one can presume that adults have no lesser rights and indeed adults who by reason of age and infirmity of mind or body find themselves before the court under this or by other Acts are equally entitled to basic rights and fundamental freedoms.

[58] The recent case authorities cited apply to the child protection legislation where the state is authorized to intervene and protect children who are by reason of their age and stage of development unable to make decisions or care for themselves. There is a striking similarity of purpose in the *Adult Protection Act.*

What guidance ought the court to take from these recent authorities?

[59] In *New Brunswick v. G.(J.)*, 1999 S.C.J. 47, the Supreme Court recognized that child protection proceedings pose a fundamental threat to the "security of the person" of parenting their children and hence must be conducted in accordance *"with the principles of fundamental justice"* In that case in particular, parents may be entitled to a lawyer paid by the state if this is necessary to ensure a fair trial.

[60] This decision, as noted by Nicholas Bala in *"The Charter of Rights and Family Law in Canada: A New Era"* recognized and will have implications not only for child protection and adoption proceedings but for other types of family law proceedings.

[61] Professor Bala noted :

> The courts (historically) seem most prepared to use the *Charter* in this area (family law) to promote human dignity or social justice or to protect the interests of children.

[62] By inference the interests of vulnerable adults declared to be incompetent by purpose of the legislation is clearly within the purview of the instructions of the Supreme Court.

[63] Academics have analyzed the historic reluctance of the courts to invoke the *Charter* in Family Law and in respect to legislation whose purpose is designed to effect social policy in family relationships Thompson and Bala analyze and confirm the fairly recent change of philosophy coming from the Supreme Court of Canada, a philosophy that marks the intent of the court to comment on, intervene, read in or define the expectations of the law to limit or prescribe the power and scope of state intervention.

[64] Bala, in his article, reviews the history of the court's overall reluctance to become involved in a *Charter* analysis in Child Protection matters beginning with *R.B. v. C.A.S. of Metropolitan Toronto* (1995) 1 S.C.C. 315, 9 R.F.L. (4^{th}) 157. This case did signal a recognition that while the state can intervene when it considers it necessary to safeguard the child's autonomy or health ... parental decision making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.(para.85)

[65] This was further developed as Bala notes when:

> The Supreme Court of Canada in its 1999 decision in the *New Brunswick (Minister of Health) v. G.(J.)* clearly accepted that child protection proceedings affect vitally important aspects of "security of the person" and under s.7 of the *Charter* must be conducted "in accordance with the principles of fundamental justice."

[66] In the New Brunswick case this resulted in a right to be represented by counsel paid for by the government where the parent is unable to retain counsel; in order to ensure the proceedings are conducted in accordance with the principles of fundamental justice. Justice Lamer states at para. 70 and 76 in *G.(J.):*

> ...The interests of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided there is a fair procedure for making this determination.

[67] It is clear that since the *F.R.* and the *Carte*r case, indeed many of the cases referred to by both counsel before me, the Supreme Court of Canada has ventured into the Family Law arena to give some direction on the application of the *Charter* in Child Protection proceedings. These authorities are helpful in beginning to define the duties and responsibilities of the Court when state intervention removes the authority of the individual over their self determination and the autonomy of their family and their children. It identifies the court's role in protecting the rights of the family and the rights of the child. There is no reason to believe in this context that a vulnerable adult in need of protection merits any less consideration.

[68] Notably child protection legislation is now a complex detailed definition of power and duty that authorizes and constrains the intervention to preserve where possible the integrity of the family. Even the *Hospitals Act* provides more extensive direction when an adult is to be committed to a hospital or required to accept medical treatment.

[69] The Adult Protection legislation in contrast is a most invasive broad seeping authorization with little direction, guidance or restraint. It is but 19 short sections in length with little to no guidance either in the making of the finding of incompetence, the provision of services or the scope of review.

[70] Bala, in his article, anticipated correctly that the highly discretionary Manitoba regime would be invalidated by the Supreme Court of Canada. What

then are we to conclude about this open-ended statute permitting such wide discretion in the Adult Protection Act? Is it sufficient to assume that the best interests test allows the court to assess those considerations relevant to the best interests of the adult? Is there a positive duty to act in the absence of a statutory prohibition?

[71] While the development of a comprehensive and coordinated approach to adult protection across Canada appears to be lacking there are examples of *attempts* to proscribe procedural and substantive safeguards in accordance with the principles of fundamental justice.

[72] The *Adult Guardianship Act*, (R.S.B.C.) 1996, c.6,sec.2 stresses the need to approach the intervention in the least intrusive manner. While many of these sections in this Act remain to be proclaimed, the powers of the court are defined.

[73] The appointment of a guardian includes a reference to a committee under the *Patients Property Act*. There appears to be a global approach to management of the adults needs. In our Provincial legislation the appointment of a guardian under our *Adult Protection Act* is limited to the role of guardian *ad litem*. The involvement of the public trustee or other interested adults is required to address, assist and manage the personal property of an adult who may be found in need of protection.

[74] The process of bringing an application under this legislation in B.C. requires lengthy disclosure and includes a requirement on the agency to provide a plan of care and support for the adult. This plan must include the specific services and placements sought, in addition to which, in developing the plan of care the agency is required to involve the adult insofar as that adult is able to be involved. The Act defines specifically that the burden is on the agency to prove to the court that the proposed plan of care, complete with a recommendation with respect to services and placement is needed by the adult and *will benefit the adult*. Section 56 sets out the powers of the court. Section 56(4) provides:

> …the court must specify the kinds of supports and assistance that are to be provided for the adult including any of the following:
>
> (a) an admission to an available care facility, hospital or other facility for a specified period of up to six months;
>
> (b) the provision of available health care;

(c) the provision of social, recreational, educational, vocational or other similar services;

(d) supervised resident's in a care home, the adult's home or some other person's home for a specified period of up to six months; and,

(e) the provision, for a specified period of up to six months, of available services to ensure that the adult's financial affairs, business or assets are properly managed and protected including any services that may be offered by the public guardian or trustee.

[75] Section 56(5) provides:

> In an order made under this section the court must choose the most effective, but the least restrictive and intrusive way of providing support and assistance.

[76] Likewise, the *Dependent Adults Act* of Alberta, RSA 1980, c.D-32 has extensive regulations with respect to the forms and procedure for bringing a matter of this nature to the court. It is notable that in seeking a certificate of incompetency two physicians are necessary and the guardian form specifies in particular detail the requests that will be made from the court including a request that the court decide where the adult is to live, with whom, on whom should the adult be present, dependent, etc.

[77] A brief review of the *Dependent Adults Act* of Alberta shows the extensive and specific philosophy as outlined and gives directives on the appointment of the guardian, the duties of the guardian, the requirement of notice to interested persons including the public trustee and the ability of the court to order an assessment to determine whether a guardian needs to be appointed.

[78] Section 6(2) of the Act states as follows:

> (2) The Court shall not make an order under subsection (1) unless it is satisfied that the order would
>
> (a) be in the best interests of, and
> (b) result in substantial benefit to (emphasis mine)
>
> the person in respect of whom the application is made.

[79] According to the Alberta scheme when the court makes the order appointing the guardian the court specifies the powers and authority of the guardian in accordance with section 10 (20); giving only those powers that are necessary to allow the guardian to make reasonable judgments in respect of the matters relating to the dependent adult.

> (2) In making an order appointing a guardian, the Court shall specify whether all or any one or more of the following matters relating to the person of the dependent adult are to be subject to the power and authority of the guardian:
>
> (a) to decide where the dependent adult is to live, whether permanently or temporarily;
>
> (b) to decide with whom the dependent adult is to live and with whom the dependent adult is to consort;
>
> (c) to decide whether the dependent adult should engage in social activities and, if so, the nature and extent thereof and related matters;
>
> (d) to decide whether the dependent adult should work and, if so, the nature or type of work, for whom he is to work and related matters;
>
> (e) to decide whether the dependent adult should participate in any educational, vocational or other training and, if so, the nature and extent thereof and related matters;
>
> (f) to decide whether the dependent adult should apply for any license, permit, approval or other consent or authorization required by law;
>
> (g) to commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceeding taken against the dependent adult that does not relate to his estate;
>
> (h) to consent to any health care that is in the best interests of the dependent adult;
>
> (i) to make normal day to day decisions on behalf of the dependent adult including the diet and dress of the dependent adult;
>
> (j) any other matters <u>specified by the court and required by the guardian to protect the best interests of the dependent adult</u>.

[80] And further, at (3):

> In making an order appointing a guardian the court may
>
> (a) make its order subject to any conditions or restrictions it considers necessary, or
>
> (b) restrict, modify, change or add to any of the matters referred to in subsection (2).

[81] Notably the Alberta Act goes further to set out specific requirements on the place of care to ensure that there is an on-going review process with respect to treatment, management and status. The *Dependent Adults Act,* SS 1989 - 1990, c.D-25 deals with both personal guardianship and property guardianship. The Act states a preference in terms of the appointment of guardian to include first relatives, second relatives of the whole blood to relatives of the half blood and, third the eldest or eldest of two or more relatives of the same category to the young relatives. In section 5(1), it gives the court authority to inquire when an application is made for the appointment of a guardian to inquire into

> (a) the extent to which the person with respect to whom the application is made is in need of a personal guardian and for that purpose may consider the physical, psychological, emotional, social, health, residential, vocational, economic and other needs of that person; and
>
> (b) the wishes of the person to the extent that the court considers appropriate, having regard to the capacity of the person.

[82] The best interests test is applied before making an order. Section 7(1) of the Act describes in some detail the extent of personal guardian's authority.

[83] The case of *Seaman (R.E.)* [1997] A.J. No. 908, DRS 98-03000, Action Nos. D.A. 7810 and 7807, Alberta Surrogate Court, Clark J. illustrates the application of the best interests test in the exercise of the court's *parens patriae* jurisdiction. It illustrates a courts response to legislation that contains a gap in substance and procedure. In this case, an application was made to review the discretion exercised by the guardian. In reviewing the circumstances surrounding the particular decision the guardian made, the court indicated as follows:

> This was an appropriate case in which to invoke the court's *parens patriae* jurisdiction and dispense with service. The court was of the view that the Pubic Guardian had failed to give

> proper consideration to the relevant medical evidence and the assessment reports which clearly suggested that personal service would be inappropriate or injurious to the health of the proposed dependent adults.
>
> The courts maintained a *parens patriae* jurisdiction over mentally incompetent persons. The court was required to act in the best interests of the incompetent person when there was a gap in the legislation. In the court's opinion, there was a legislative gap in the *Dependent Adults Act*, authorizing the court to use its *parens patriae* jurisdiction to dispense with service. The gap existed because the statute did not contemplate a situation in which the Public Guardian failed properly to consider relevant evidence, and thus failed to act reasonably, raising a risk of harm to the proposed dependent adult.

[84] Notable the legislation referred offers far more substantive and procedural definition than the Act before me.

[85] Finally the *Adult Protection Act* P.E.I. c. A-5 is another example of a legislative scheme designed to offer more procedural and substantive safeguards prior to issuing an order regarding the dependent person. Notably in this and other jurisdictions the language of protective intervention borrows from the process followed in child protection matters. For example, the guiding principle states society's responsibility, the right to a quality of treatment and care, to personal autonomy and to the least intervention possible to address the adult's needs. The Act requires a plan of care (Section8) including the proposed services and proposed intervention, and input, as is possible, from the adult (Section.8(2)(b). The court is empowered to issue an order with conditions in accordance with the best interests of the adult to ensure "the least intrusive and restrictive option practical is being sought."

[86] There is no doubt that the authority of the final court order which authorizes a compulsory care order conveys sweeping authority on the guardian to make decisions about the adult. The benefit of precise detailed legislation is the presence of direction and the statement of powers and authorities that guide both the court and the guardian to ensure procedural and substantive safeguards prior to such an expansive order being made.

[87] Absent direction and specific prohibition it is reasonable to conclude that the court must interpret and confine state intervention to accord with the fundamental principals of law paying due respect to the rights proscribed in section 7 of the *Charter*.

The Principles of Fundamental Justice (What are they? How should we be assessing the evidence?)

[88] It is clear that the *Charte*r applies to government action. Recent case authority takes a more expansive view of the court's authority in adult protection matters to sanction court scrutiny . The real task comes is defining , in this context, the principles of fundamental justice . (The distinction offered by Bala relates to *how decisions about adults are to be made rather than what rights arise out of the individual's rights under section 7.*)

[89] To avoid assuming authority without restraint the court can look at the kinds of criteria found in the Child Protection Act, the kinds of issues addressed by the *Charter* and the case law, which has cautiously moved courts forward in their analysis of the scope and limits of judicial intervention or review. In applying a standard used by the Supreme Court in a formal *Charter* challenge, it is helpful to come to some understanding of what constitutes the principles of fundamental justice.

[90] The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process, but also of the other components of the legal system. (The annotations to *Martins Criminal Code*, the *Charter*, sec.7.) While many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees.

> Whether any given principle might be said to be a principle of fundamental justice within the meaning of the section will rest upon an analysis of the nature, sources, rationale and essential roles of that principle within the judicial process and in the legal system as it evolves.(Reference 94(2) of the *Motor Vehicle Act*, (1985) 2 S.C.R. 486,23 C.C.C. (3d) 289,48 C.R.(3d) 289.)

[91] The "principles of fundamental justice" are both substantive and procedural *(G. J.)*

[92] Professor Thompson ,(*"The ABC's of the Charter"(p.22*)), outlines the procedural and substantive notions of fundamental justice gleaned from the case law. They are not an exhaustive list but are helpful in creating some definition to this enquiry. Procedural principles of fundamental justice may include:

- reasonable notice with particulars (K.L.W.); (G.(J.); (B(R);
- an adversarial hearing (K.L.W.);(B.(R));

- a neutral arbiter (B.(R)), (G.(J.));
- advance disclosure by the state, (B.(R.));
- rights to legal representation (G.(J.));
- an opportunity to present one's case effectively, K.W.L.; G.(J.);B.(R.);
- a burden of proof on the Protective Agency;(B.(R.));
- a heightened standard of proof(B.(R.));
- an opportunity for timely status review (B.(R.));
- a fair and prompt post-apprehension hearing (K.L.W.);
- a right to a protection hearing within a reasonable period of time, (K.W.L.).

[93] Substantive may include:

- apprehension only as a last resort (K.L.W.),
- relieving a parent of custody only when it is necessary to protect the best interests of the child; G.(J.);
- limits on the use of permanent wardship orders G.(J.)

[94] This involves consideration of the standard of proof, timing and length of intervention the nature of the evidence, *the protection of the individual against unfettered discretion of the Minister.* It may mean a consideration of the limits on Ministerial intervention. It may mean a consideration of which plan properly considers the quality of life of the individual, their connection to family members and community. Clearly there are currently few rules to adult protection proceedings.

[95] Courts have also been cautioned when applying *Charter* values to be aware of the social ill that comes from a challenge which would strike down an essential legislative piece that empowers and creates a duty on the government to intervene to ensure adults in need of protection are cared for in accordance with social policy.

[96] The apparent intent of this legislation as it is played out in our courts is to intervene in the lives of elders, senior citizens who by reason of their infirmity have deteriorated, without benefit of family or with family unable or unwilling to act to keep them safe from harm. (I have been provided no evidence or information about the context of the legislation and will refrain from drawing any conclusions about whether it is appropriately or effectively accomplished with this *Adult Protection Act*).

[97] The *Adult Protection Act* is notable for its lack of definition and safeguards, for its sweeping power to take complete authority over the person without meaningful judicial review and absent the more complex directions and procedure outlined in both the *Children's and Family Services Act* and the *Hospitals Act.*

[98] The Act is broadly worded legislation requiring less supporting medical documentation and longer periods of intervention, resulting from less stringent tests and procedures than authorized by the *Hospitals Act* . It is long on informality, short on detail. It allows the government to intervene, to assess and to remove adults from their living situations forever. It permanently affects their life circumstances, provides for a minimum standard of health care in their lives, often lacking; a minimum standard of supervision, again often lacking. It may and almost always does result in a permanent relocation of an adult in a community or in surroundings that may or may not be familiar, that may extract the adult from their known geographical setting with or without available family connections. It effects far reaching permanent changes in an adult=s life, both necessary (beneficial) and negative. It results in intervention in the personal and property matters to assist to fund an adult even in a place of care to which an adult may be firmly opposed. This is possibly one of the most invasive authorizations of government intervention know to our courts.

[99] The Act usually applies to situations for senior citizens. It is used here to permit authorization and intervention into the lives of adults like J.J., a 32 year old adult, and other adults who are found lacking in the competence required to make beneficial choices about their well being and have no place to live or cannot live unattended due to their personal and medical circumstances and in J.J.=s case due to a lack of community resources or funding. Whatever the intent of the legislators, this Act is used on a revolving repetitive basis as in this case to permit the Minister to take and maintain control of the personal lives of adults in need of protection without significant safeguards and meaningful accountability. The Act places very few limits on the nature and extent of state intervention. It lacks express procedural and substantive definition. The only obvious impairment that dictates the choices available to the Minister in the provision of services is the lack of resources.

[100] At the same time the provision of protective services has prevented a vulnerable adult from neglect and abuse and from the possibility of being processed in the criminal justice system due to the efforts of those charged with the task of intervention.

[101] Under child protection legislation, the court refrains from directing the Minister to place a certain child in a certain foster home. However, there are stringent conditions attached to the Minister's intervention, a legislated "least intervention policy" and a heavy civil burden on the Minister throughout the proceedings to justify the nature and extent of their involvement before a final order is made and the court is extracted from the evidentiary review. In the context of this legislation if the court accepts that it must not force a particular placement or facility on the Minister, what does that leave for consideration?

What is the duty and extent of the Court's authority?

[102] The Minister of Health adopts the position that the Court has no jurisdiction to specify placement of an adult. Once the court has made a determination that the adult is in need of protection, should the court further conclude that the adult is not mentally competent to decide whether or not to accept the assistance of the Minister, the court shall "so declare."

[103] They argue that "where it appears to be in the best interests of the adult", the court may make an order authorizing the Minister to provide 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 form abuse or neglect.

[104] *Is placement entirely the Minister's choice?* The Minister references *N.S. (Minister of Community Services v. F.R.*(1988), 86 N.S.R. (2d) 147 at p.154 to support the limiting of the court=s authority. Judge Daley, JFC said this:

> There is not, in my view , any authority resting in the court to order F.R. to attend at any specific facility.

however Judge Daley went on to say:

> there is some value in the argument that when one is considering the best interests of F.R. the court should not assume that the Minister will necessarily provide the type of services or facility designed to meet the individual needs of F.R. and in considering what is in the best interests of F.R. the court should consider the alternatives facing F.R. which include his own plans as well as what the Minister intends to provide by way of services and facilities.

[105] In this case, the Respondent asks the court to move into an area of assessment of the options; but for what meaningful purpose?

[106] The Applicant admits that courts have commented on specific types of placement or specific placements or services referring to section 12 which states:

[107] In any proceeding taken pursuant to this Act the court or judge shall apply the principle that the welfare of the adult in need of protection is the paramount consideration.

[108] The Applicant argues however that, even though the Minister has sometimes consented to such placements or accepted the concerns expressed by the Court when devising a placement option; this acquiescence ought not to be taken to confer jurisdiction in the court where there is none.

[109] The court, it argues, cannot order a facility to take an individual. The Applicant argues that the Minister has no power to order a given facility to take a person. In the *Hospitals Act*, there is specific legislative authority requiring facilities to accept referrals of person made under the Act. The government here argues that it does not control the admission policies of facilities such as the Halifax Regional Rehabilitation Centre. I have neither the funding information or the evidence to allow me to conclude at this point what power the Minister of Health or the Provincial Government have with respect to the admission policies of the institutions or placements that would house an adult placed under this Act.

[110] The Respondent argues that the Minister has consented to a specific type of placement and cannot now withdraw that consent and arbitrarily place the adult in a facility which is about to close. This placement bears with it the potential that the adult will regress. The adult seeks to have the court direct the Minister to provide services to the adult which it has failed to do as directed in the court order.

[111] The adult asks the court to weigh the plans put forward and decide on that plan that will best address "the best interests of the adult". In this instance, the adult argues that the consent order already specifies a placement and the burden is now on the Minister to provide evidence in accordance with the civil burden of proof that this change is in the best interests of the adult. In support of this proposition the adult cites L.K., Daley, JFC at p.391:

> The logical extension of the paramount principle is that if a court accepts one plan over another, the court has the authority to impose conditions, as a necessary means of ensuring the plan is accepted, perhaps with modification, is carried out. This is specifically so in relation to s.9(3) as that is the only section which authorizes one party at least, to provide services for the adult.

[112] As a consequence, s.12 of the Act has an impact on s.9(3)(c) not only to decide what services are in the best interests of the adult in need of protection, but also in that it enables the court to impose service conditions where necessary and appropriate to ensure the welfare of the adult in need of protection is met. **Does it go further? Does it allow the court to prohibit the Minister from adopting a certain plan?**

CURRENT SAFEGUARDS

[113] The Act is not without minimal safeguards including notice to the person, and by custom in the event the Minister of Health intends to ask the court for a finding that the person is incompetent, the appointment of a guardian ad litem. In addition, by custom, the guardian ad litem is generally provided counsel through Legal Aid. Is this sufficient? Do these safeguards provide a meaningful hearing?

[114] There is a relaxed evidentiary standard for committal or a declaration of incompetence in the Adult Protection Act. Only one doctor is required to make an assessment that the person is or is not competent. Contrast this with the *Hospitals Act* that generally requires two physicians in most circumstances and very timely reviews. In this instance, the order lasts six months. The review of the Adult Protection Order may be reviewed earlier by the parties on 10 days' notice.

[115] Traditionally these hearings are short, with minimum evidence. Indeed, it is not unusual to have only the affidavit of the protection worker and no written or oral evidence from the guardian ad litem or the family members. The absence of definition and statutory direction has tended to cause courts to refrain from intervention or review unless there is a specific request by the guardian. Contested hearings and evidence from other than the Minister's agent are the exception rather than the rule. The Adult Protection application has become a perfunctory approval of the invasive power of the Ministry of Community Services and Health with little evidence of procedural and substantive safeguards.

[116] Adults under the purview of this Act are generally unable to protect themselves. The definition in the *Child Protection Act* is expansive in comparison to the sparse sections authorizing intervention (to protect the vulnerable, who are by virtue of their age or capacity unable to protect themselves). The *Adult Protection Act* authorizes an unabridged intervention in a person's life. Once an order is made, the state can place the adult in any facility without any legislative mandate to consider the family connections, in any available geographical area where placement is as much a condition of resources and availability having little to no regard over the historical connection of the adult to their own community. The intervention may go further to authorize a referral to the Public Trustee which opens the door to the sale of any and all assets of the individual to pay for the care provided without regard to standards of care, the facility, its suitability or location.

[117] To be an adult in this situation requires absolute surrender to the protection and intervention sanctioned without regard to any legislated notion of meaningful input into placement circumstances, surroundings, peer group, religious or cultural context. However well intentioned, **could the government have meant to create such unabridged authority?** Is this not the very circumstance where the *Charte*r must be invoked and/or the safeguards offered by judicial review and the *parens patriae* jurisdiction of the court comes into play to ensure the process in form and in substance complies with fundamental principles of Justice.

[118] While the courts have been cautioned to avoid requiring too much definition and precision in statutes enacted to pursue socially desirable state intervention, an absence of any definition of authority, an absence of any limits on Ministerial intervention is not desirable either.

[119] There is a **gap** in the legislative design between the authorization of significant intervention in an adult's life and the full removal of a person's right to choose for themselves where and with whom they live. For the court to become involved in the second stage of this hearing and both counsel appear to acknowledge the need for this review to move beyond this first stage, the process must fulfill a meaningful legitimate legislative and jurisdictional purpose.

[120] Before a court authorizes what is a significant if not total removal of an individual's right to freedom to choose where and with whom to live and the associated consequences of the removal of their power for self determination placing it in the hands of government and social agencies, the court must be certain that the

adult has been afforded the necessary procedural and substantive safeguards.

[121] If in Child Protection proceedings children of a certain age are accorded the right to be present and to be a part of the proceedings in a meaningful way the adult in need of protection must have a "meaningful" opportunity to be heard. Meaningful ought to include the possibility that the adult has some influence over the proceedings with a possibility of input into the result.

[122] In weighing the plans for placement and services offered the obvious concern of the Minister is the issue of resources. To what extent is the court=s enquiry legitimate? In child protection matters, the courts have not traditionally involved themselves in a judicial review of foster placements. They have involved themselves in an assessment of necessary services. The difference is that the provision of services is intended to be a corrective and not necessarily a long term proposition. The opposite is often true in adult protection. The authorization of services is likely to be for the remainder of the adult's life. It is a significant invasion of personal autonomy.

[123] In light of recent authorities is it not only the court's authority but duty to require evidence of competence and evidence of the plan of care proposed by the Minister, to place the court in a position to weigh the plans and ultimately endorse one that best reflects the best interests test? This process of reviewing placements and establishing conditions, rules to intervention would be meaningless if the court has no power to order or impose limitations on the intervention, much like the imposition of access after wardship, like the notion of keeping the person connected to family member and more particularly of ensuring that the plan of the Minister does indeed **enhance** the person's ability to be cared for or to fend for themselves. This interpretation is in keeping with the stated purpose of the statute.

[124] Further, the Minister argues that the court must take notice of the limited resources available *Ref. Nova Scotia (Minister of Community Services) v. Carter* (1988) N.S.R. (2d) 275 at page 280: wherein White, JFC articulated this reality:

> Furthermore a reasonable man would recognize that there are always limitations or restraints impacting upon our desires or wishes and that those restraints or limitations apply equally to everyone.

[125] The issue of costs of services and availability of resources is particularly relevant here. The placement being proposed is being opposed by the health care

team very familiar with the adult, the adult herself and the attending psychiatrist. The proposed move concerns the professionals because it may cause a deterioration in the level of functioning of the adult and sabotage progress made over the last two years in hospital. Chief Justice Lamer spoke to this issue in G.(J.).

> **First, the rights protected by s.7 – life, liberty and security of the person – are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing , be upheld as a reasonable limit demonstrably justified in a free and democratic society.**
>
> *Re B.C. Motor Vehicle Reference* (*Martins Criminal Code* annotations to the *Charter*.)

Conclusion

[126] It is my conclusion the court has not only the authority but the duty to conduct itself in the second stage of this review in a manner which accords with the principles of fundamental justice.

[127] It is also my conclusion that the legislature could not have intended to endorse a legislative scheme inconsistent with the fundamental principles of justice.

[128] In this instance, this includes placing the burden on the Minister to prove the change in the original court order satisfies the best interests of the adult. To weigh the evidence in a meaningful way the court must have evidence of the competing plans. If the Minister wishes to argue solely on the basis of resources, surely they must produce convincing evidence that their proposal is reasonable and justifiable as the court balances the rights of the individual to reasonable intervention in their lives. The proposed intervention must accord with the best interests of the Adult and be said to enhance their ability to care for themselves or be protected from harm.

[129] While it may be that a court ought not to order a particular placement, surely a court can prevent the placement of an adult in circumstances where their best interests are not served and the position cannot be said to enhance their life circumstances.

[130] There may be in fact and in law reasonable limits on the implementation of the Minister's plans. What they are or might be remains to be seen in the second stage of this review. In the absence of a formal *Charter* challenge that specifically

addresses the validity of the legislative scheme, the Court will proceed to the second stage of this review having full regard to the intent and stated purpose of the Court and the proper application of procedural and substantive safeguards that conform with the principles fundamental of justice.

[131] At the same time the Respondent seeks enforcement of the consent order. The burden is on the Minister to show why they are unable to comply with this order. The evidentiary foundation may be provided in the review hearing.

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Legere, J.