



Community Living
Ontario

Intégration communautaire
Ontario

Analysis of the Decision of the Divisional Court's Judicial Review into the Closure of Institutions

January 27, 2006

The decision of the Divisional Court was released on January 26, 2006. The Court unanimously affirmed the Minister's authority to order the closure of the three institutions by March 31, 2009. (Although no one joined the judicial review application on behalf of those living in Southwestern Regional Centre, the judgment states that it has "obvious application to the residents of SRC".)

On the issue of informed consent to each person's transfer to the community from the facility where they have been living, the Court took it as a given that "the option of continuing to reside there in the long-term will not be open to the remaining residents".

Having ruled out the possibility of any residents remaining in the institutions beyond the established closure date, Justice Charles Hackland wrote, on behalf of the three-judge Divisional Court panel, "I am of the opinion that the consent of a developmentally disabled adult or his or her substitute decision maker is required to any choice of community residential placement". The judgment makes it clear that the appropriate substitute decision maker is to be either a family member or, where no family members are involved, the Public Guardian and Trustee.

However, the "supported decision-making" model put forward in Community Living Ontario's intervention was specifically and positively recognized by the Court: "The incapacitated person must be encouraged to participate (in the decision) as much as possible". The consensual planning process that has been designed by the Ministry was essentially commended, with a reminder that "the consensus must include the resident or his or her next of kin or substitute decision maker". Justice Hackland wrote, "As argued by counsel for the Intervenor, Community Living Ontario, a process short of guardianship is preferable in many cases, as it best recognizes the autonomy and dignity of the individual and the inclusiveness of the decision-making process".

Rather than having to go to the Court in advance to be appointed as a resident's "guardian of the person", the Divisional Court judgment says that a family member (or the Public Guardian and Trustee when no family member is available) can

provide the necessary consent to a community placement. This authority, however, is not without limits. Justice Hackland proposed several safeguards that must be observed both by substitute decision makers and the Ministry: 1) “The objective will always be to act in the best interests of the incapable person”; 2) “This will necessarily involve participating in good faith in the Ministry’s program to identify group homes and other community placements for the residents; and 3) “In those, hopefully, few cases where the Ministry and the substitute decision makers cannot agree, the direction of the Superior Court may be sought”. The Ministry has made a commitment to the Court that it will initiate such applications when the parties have reached an impasse over the placement decision.

It seems very clear that the requirement for informed consent will not be able to be used as a pretext for preventing any individual from being transferred to an appropriate community residence. The courts will not look favourably on any substitute decision maker who has rejected a suitable placement option or otherwise acted in bad faith, nor will they overlook any shortcomings on the part of the Ministry in living up to its declared intention of providing for the well-being of all those who have lived most of their lives excluded from the company of their families and from the broader community in which they belong.

The 23-page Divisional Court judgment is available on-line at www.communitylivingontario.ca/deinstitutionalization/decision.pdf.

Or, you may obtain a copy by contacting Community Living Ontario’s Legal Counsel at orville@communitylivingontario.ca.