Scenario One: Discretion, Interpretation and *Charter* Values

This case deals with the Mental Health Tribunal established under the *Mental Health Act,* which has jurisdiction to issue and approve community treatment orders. People suffering from mental disorders may, subject to the provisions of the *Act*, be monitored in the community and made to comply with conditions designed to keep the person out of hospital and functioning in society.

Section 2 of the *Mental Health Act* provides that the purpose of a community treatment order is:

> Purpose
>
> 2. The purpose of a community treatment order is to provide a person who suffers from a serious mental disorder with a comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.

The Mental Health Tribunal's jurisdiction is to confirm, deny or amend a community treatment order proposed by a psychiatrist with reference to the following criteria:

> 1. Whether the treatment is likely to,
>
> i. improve the person's condition or well-being, or
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> ii. reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate.
>
> 2. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.
>
> 3. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

A person who meets those criteria may be subjected to a “comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.”

At the time of the hearing, Ms MBG was single and 34 years old. Ms MBG’s psychiatric involvement began when she was in her late adolescence or early adulthood. She had various diagnoses over the years. She has been in and out of psychiatric hospitals on seven different occasions since 2000. Dr. Cavanaugh diagnosed Ms MBG as suffering from a chronic psychotic disorder.

Ms MBG wanted to live with her boyfriend or in an apartment near him. Dr. Cavanaugh thought Ms MBG needed supportive housing, and proposed that she be subject to the following condition:

> "Ms MBG will be released from hospital only if she resides in supportive housing, where meals and support will be available to her. If she wants to move to another living environment, it can only be done with approval of her consulting psychiatrist"

From Dr. Cavanaugh's perspective, if Ms MBG lived with her boyfriend or in an apartment near him without the support Dr. Cavanaugh thought she needed, the community treatment order would not succeed and Ms MBG would end up back in hospital.

The *Mental Health Act* defines treatment as follows:

> "treatment" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment order, but does not include
>
> (e) the admission of a person to a hospital or other facility,

MBGs counsel argues that housing is not part of treatment, and the legislation did not contemplate that someone could dictate where a person subject to a community treatment order must live. She seeks to argue Charter s. 7 (liberty, dignity, autonomy), Charter s. 6 (mobility rights), and Charter ss. 15 and s. 2(d) (freedom of association with her boyfriend) as part of the statutory interpretation of treatment, and to direct that the Board not approve the community treatment order.

MBG's counsel submitted this was an attempt by Dr. Cavanaugh to define Ms MBG's relationship with her boyfriend by prohibiting Ms MBG from living with him or in an apartment near him. The result was that, not only was the state in Ms MBG's bedroom,but it now also dictated where that bedroom was.

ISSUES:

1. How should the tribunal approach:

(a) the statutory interpretation question?

(b) its decision to confirm, deny or amend the community treatment order?

2. Does the Attorney General need to be notified? If so, who should take the initiative to do so? (see Ontario *Courts of Justice Act*, s. 109, at page 5 of problem)

3. Would the Tribunal's approach be any different if the statute provided the Tribunal has no jurisdiction to determine constitutional questions? If so, how would it differ?

4. MBG's counsel calls evidence that there are no publicly funded supportive housing spots available in Toronto where MBG and her boyfriend live, and the nearest spot without a waiting list is in Kenora. Does this affect the Tribunal's approach?

Supplementary materials (Background Only)

I. *Charter* (and other Fundamental) Values

MBG's counsel has argued that the Tribunal must interpret the legislation and/or exercise its discretion accordance with *Charter* values and other fundamental values of Canadian society. She has directed the Tribunal's attention to the following:

In the Decision of the Supreme Court of Canada, *Nova Scotia (Attorney General) v. Walsh,* 2002 S.C.C. 83, Justice Bastarche wrote,

> Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of Charter values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life…Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty. (paragraph 63)

In *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.C. 497, Justice Iacobucci wrote for the Court,

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition…the equality guarantee in s. 15 (1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather

> concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? (paragraph 53)

Reference Re Public Service Employee relations Act (Alberta), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, in which Justice McIntyre wrote,

> Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association. (paragraph 146)

At paragraph 150, Justice McIntyre also quoted with approval Alexis de Tocqueville, Democracy in America, (1945), vol. 1, p. 196:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

II. *UN Convention on the Rights of Persons with Disabilities* (ratified by Canada in 2010):

Article 19 - Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

III. Notice of Constitutional Question

Courts of Justice Act, R.S.O. 1990, CHAPTER C.43

109.(1)Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2)If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1)The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2)The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3)Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4)Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5)Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6)This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).