PSYCHIATRIC TREATMENT AND THE *CHARTER*

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Following closely on the heels of the Supreme Court's decision in *Swain*[1] comes another decision of major importance in the context of mental health legislation and the *Charter*. In *Fleming v. Reid*[2] the Ontario Court of Appeal held that certain provisions of Ontario's *Mental Health Act*[3] dealing with consent to psychiatric treatment are contrary to section 7 of the *Charter* and thus are of no force and effect. In particular, the Court held that to require a mentally incompetent patient to undergo psychiatric treatment, where previously the patient (while competent) has indicated that he or she does not wish to have that treatment, infringes the patient's right to life, liberty and security of the person in a manner which is neither in accordance with the principles of fundamental justice nor justifiable under section 1 of the *Charter*.

Like most Canadian provinces, Ontario's *Mental Health Act* provides for substitute decisionmaking on behalf of psychiatric patients who are not mentally competent to make treatment decisions themselves. The substitute is normally the patient's nearest relative or, in the absence of a relative, the Official Guardian. The *Act* provides that, when making a treatment decision on behalf of a mentally incompetent patient, the substitute must follow any wishes expressed by the patient when apparently mentally competent. However, the *Act* also provides that, in the case of an involuntary patient (that is, a person who has been committed to a psychiatric facility), if the substitute refuses consent to proposed treatment the Review Board can override this decision and authorize the treatment if it considers it to be in the patient's best interests.

The *Fleming* case involved two involuntary patients at a psychiatric facility in Ontario. Both were diagnosed as suffering from schizophrenia and their attending psychiatrist proposed treating them with neuroleptic (anti-psychotic) medication. Both patients were certified as being mentally incompetent to make treatment decisions, and so the substitute decisionmaker (the Official Guardian) was called upon to consent to the neuroleptic medication. However, as both patients had previously indicated (while mentally competent) that they did not wish to receive neuroleptics, the Official Guardian refused to give consent. Accordingly, the attending psychiatrist applied to the Review Board for an order authorizing the treatment. The Board granted the order, and this was upheld on appeal to the Ontario District Court.[4] However, the order was set aside on appeal to the Court of Appeal, on the basis that the governing provisions of the *Mental Health Act* offended section 7 of the *Charter*.

Central to the Ontario Court of Appeal's conclusion was its reiteration of the principle which it had enunciated a few months earlier in a case involving a Jehovah's Witness who refused consent to a blood transfusion, namely, that a mentally competent person has the right to refuse medical treatment even if that treatment would be in the person's best interests.[5]

In the present case the Court did not question the constitutional validity of providing a system of substitute decisionmaking for mentally incompetent persons, nor indeed was its validity challenged by counsel. The challenge was aimed at the fact that, notwithstanding that a person prior to becoming incompetent has expressed a desire not to have certain psychiatric treatment, the Ontario legislation permits (and indeed, requires) the Review Board to ignore those competent wishes and authorize the treatment if it considers the treatment to be in the patient's best interests. It was this aspect of the legislation which the Ontario Court of Appeal found to be contrary to section 7 of the *Charter*.

The Court held that it was no answer to say that a patient had been afforded procedural protections with respect to the Board's hearing when, at the hearing, the substitute's decision based on the patient's own wishes is considered irrelevant. The Court concluded that "it is plainly contrary to the principles of fundamental justice to force a patient to take anti-psychotic drugs in his or her best interests without providing the patient, or the patient's substitute, any opportunity to argue that it is not the patient's best interests but rather his or her competent wishes which should govern the course of the patient's psychiatric treatment."[6]

Having found a violation of section 7 of the *Charter*, the Court went on to conclude that this infringement could not be saved by section 1. The Court held that the State had failed to demonstrate any compelling reason for eliminating the fundamental right of a competent person to refuse psychiatric treatment in order to further that person's best interests.

Clearly this decision has significant implications for mental health legislation and the treatment of psychiatric patients across Canada. Legislation in a number of other provinces provides for psychiatric treatment without consent. For example, in Newfoundland the *Mental Health Act* expressly provides for treatment to be given to involuntary patients without their consent.[7] Similar provisions exist in several other provinces.[8] Likewise, the *Mental Health Act* of Alberta empowers a Review Panel to authorize psychiatric treatment for an involuntary patient, where the patient is mentally competent and has refused consent to the treatment, if the Panel is satisfied that the proposed treatment is in the patient's best interests.[9] In light of the decision in *Fleming v. Reid*, and of the publicity surrounding the decision,[10] it is likely that provisions such as these will themselves be the subject of challenge under the *Charter*.

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1. *R. v. Swain*, unreported, 2 May 1991, [1991] S.C.J. No. 32.
2. Unreported, 28 June 1991, [1991] O.J. No. 1083 (C.A.).
3. R.S.O. 1980, c. 262, ss. 35(2)(b)(ii), 35a.
4. *Fleming v. Reid* (1990), 73 O.R. (2d) 169 (Dist. Ct.).
5. *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.).
6. [1991] O.J. No. 1083, at p. 46.
7. *Mental Health Act*, S.N. 1971, c. 80, ss. 6(1), 7(3).
8. See generally G.B. Robertson, *Mental Disability and the Law in Canada* (Toronto: Carswell, 1987).
9. *Mental Health Act*, S.A. 1988, c. M-13.1, s. 29 [proclaimed in force January 1, 1990].
10. See for example *The Globe and Mail* (4 July 1991) A3.