Children's Commission Tribunal Division Decision

Panel Decision PD#01-03

October 30, 2001

Introduction

The complainant is the mother of an autistic teenager and who brought this complaint to the Children's Commission on behalf of that child. The Children's Commission accepted this complaint on June 26, 2000. The Children's Commissioner referred the complaint to this Panel on January 31, 2001.

The parties to the hearing are the child, the mother and father of the child, and the Ministry for Children and Families (now referred to as the Ministry for Children and Family Development, "the Ministry"). The mother and father of child and the child were jointly represented by counsel, as was the Ministry. Notice of this complaint was given to the Office of the Child Youth and Family Advocate and they declined to participate in this complaint.

A Prehearing Conference (PHC) was held March 30, 2001 to deal with procedural issues. A hearing of the complaints was later held over three days May 25, May 31, and June 4, 2001.

Issues

The complaints that were accepted for review are stated in the Complaint Resolution Report to the Children's Commission as follows:

> "As defined in the CC's s. 12 Notice of Acceptance letter, June 26, 2000, the complaint under review concerns decisions by the Ministry for Children and Families (the Ministry) related to provision of designated services. The complainant, [], mother of 16 year old [child], has submitted a complaint to the Commission under s. 10 (1) (b) of the Children's Commission Act. Specifically, [the mother] disagrees with the Ministry's decision:
>
> a) to limit youth workers services to [the child] to a maximum of 10 hours per week;

b) to limit access to behavioral consulting services offered to [the child] to those provided by Laurel Group, which, the mother believes do not meet the child's specific needs;
c) to limit the amount and type of service offered to [the child] and the family, including Lovaas method behavioral treatment;
d) to wait list [the child] for the Communication Behavioral Instruction program (CBI).

It was clear from the PHC that there was a great deal of agreement concerning the factual background of this case. Indeed, the mother and the father of the child speak well of the efforts of the specific workers they have dealt with from the Ministry, although they have many complaints about some of the contractors who have delivered services to the child and the family. All parties acknowledge and have focused on the fact that this complaint falls to be evaluated against the background of the three decisions of the British Columbia Supreme Court, known as the Auton decisions:

a) *Auton (Guardian ad litem of) v. British Columbia (Ministry of Health),* (1999) B.C.D. Civ. 770.12.00.00-08; ("Auton #1);
b) *Auton (Guardian ad litem of) v. British Columbia (Ministry of Attorney General),* 2000 BCSC 1142; (Auton #2);
c) *Auton (Guardian ad litem of) v. British Columbia (Ministry of Attorney General),* 2001 BCSC 220; (Auton #3); (and referred to collectively as the "Auton case")

(All three decisions may be found at: http://www.courts.gov.bc.ca/sc/sc-main.htm)

Background

A hospital team meeting report placed into evidence, describes the child as a "highly functioning autistic child". The mother gave evidence to the same effect. The Panel was impressed with the child's ability to play music and interact with strangers when we met with the child on the morning of the first day of the hearing.

The child began his contact with the social service and the health system at one and half years of age. One early report in kindergarten showed that the child "... had extreme difficulty responding to questions during a speech/language assessment and in class, appeared to be unable to follow instructions, even when given individually." Evaluations by the family doctor and Sunny Hill hospital followed in the next year. Even then it was noted that the child had an ear for music, which this Panel saw demonstrated when they met with the child. The child continued to attend school and receive support in the way of teachers aids etc., but it was clear that there

were still problems. In March of 1999, Dr. Andrews at Children's Hospital recommended among other things, follow-up with the Gateway Program. At the end of 1999 and through 2000, it was clear that the problems the child and the family were experiencing were becoming more acute and multifaceted. There was suggestion of psychiatric problems and medication issues. The child could no longer continue in school and the coordination of services in the community was difficult.

The child was not formally diagnosed with autism until 1997 although the first such diagnosis was given much earlier. Various services have been supplied in the education system, mental health system, health care system, and social service system over the ensuing years. The child is now a seventeen year old teenager and the child's symptoms are increasing in complexity. The family is increasingly stressed and unable to cope with the child's behaviors at home. The child has some additional physical and mental health problems. The parties agreed that the statements of facts in the complaint resolution report dated January 10, 2001, were correct. We quote from that report:

> "March 3, 2000... [the mother] is not satisfied with the model of service provided by Laurel Group because the service provides 10 hours a week (sic) per client, including telephone calls, meetings, data collection, travel time and report writing. Dissatisfaction with the Laurel Group model, (specifically the lack of time actually spend with [the child] and the family, "the lack of detailed functional analysis of behavior", and that the consultant would be on leave for a month without a replacement), precipitates the first formal complaint to the Ministry....Six weeks after discharge from B.C. Children's Hospital, the Ministry has not assigned another youth worker for [the child]. This forms the basis of the second complaint to MCF. May 5, 2000 [the mother] sends [a] fax to [the social worker] and [the supervisor] stating she does not want to continue services with Laurel Group and requests Communication Behavioral Instruction (CBI). [The mother] sends [a] fax to the Honorable Gretchen M. Brewin requesting funding for Lovaas therapy for [the child]... May 19, 2000 [the supervisor] and [the social worker] write to [the mother] stating that the wait list for CBI would be "a minimum of one year". Disagreement with the Ministry's decision to wait list [the child] for CBI services prompts the third complaint by [the mother] to the Ministry. May 24th, 2000 Mike Corbeil, then Deputy Minister, MCF, writes to [the mother] stating "full funding for intensive behavioral treatment, including the Lovaas method, is not a service available from MCF at this time" [The mother's] disagreement with the Ministry's decision not to provide Lovaas therapy prompts the fourth complaint to the Ministry."

The Ministry provides services for children with autism under the "Behavioral Support for Children with Autism" program found as part three, section 2, subsection 8 in the Community Support Services Policy Manual. The objective is "to provide behavioral support services for children with autism, their families and caregivers, as a support enabling them to function as effectively as possible within their communities." Eligibility for the services requires a diagnosis by a qualified medical practitioner using the appropriate screening protocol. Families are not income tested for the services. The program described in full is as follows:

> "Behavioral support is provided by trained professionals for specific children, with involvement of their families, caregivers, and other relevant professionals or community members. This includes determining behavioral change goals, developing plans, and the systematic use of applied behavioral analysis procedures. Behavioral support services may also include; child's specific training and hands-on demonstration of child management techniques, service coordination and liaison around a specific child in partnership with families, the ministry, and other service providers; community awareness and network building about the needs and responses of children with autism, and follow-up with families and caregivers following the end of the intense service."

No issue has been raised in these proceedings as to the eligibility of this family for the service. Services of the youth worker, Laurel Group, CBI and eligibility for Lovaas method behavioural treatment, all fall to be evaluated under this program description.

The Panel notes the care the parents have provided to the child. It has involved a huge focus and effort. Particularly challenging has been the need to coordinate the diverse criteria for services from the education, health, and social service agencies in contact with the child. Not surprisingly, they have developed advocacy skills and strong beliefs about what programs and services are needed for their child. The primary belief that gives rise to this set of complaints is their belief that Lovaas therapy is what the child needs and not the Ministry contracted programs in their area called CBI and Laurel Group. Before turning to this central question, we will examine the tests utilized to establish justified complaints and then turn to the complaints concerning youth worker services and the waitlist (complaints (a) and (d)).

Whether a complaint is "justified"

The evaluation of complaints is governed by section 16 (3) of the *Children's Commission Act* (the "Act"). That section requires the Panel to determine whether complaints are "justified". Specifically, section 16 (3) provides that:

> "If the Panel determines after reviewing the complaint... that the complaint is justified, the Panel may do one or more of the following:
> (a) order the person in charge of administering the designated service to reconsider the decision that was the subject of the complaint;
> (b) make recommendations about the steps that might be taken to resolve the complaint;
> (c) request the person referred to in paragraph (a) to
> (i) notify the Children's Commissioner of any steps taken to resolve the complaint, and
> (ii) give reasons if that person decides not to take any steps or decides not to follow the Panel's recommendations."

The key determination under section 16 is whether the complaint is, in the Panel's opinion, "justified." It is clear that the Panel is not bound by the precedent of other Panel decisions, nevertheless, it may be useful to examine the standards utilized for what is "justified" in those other decisions.

1. In decision number PD 01-01 the Panel held in considering this section:

> "For the reasons noted above, it is my conclusion that the complaint is not justified under section 16. In sum, I conclude MCF has done an adequate job in attempting to address the needs of this child and this family, having regard to the child's condition, the shortage of registered nurses, and the competing demands placed upon MCF by other clients."

2. In decision number PD 00-11 the Panel held that there were a number of justified denials of services and compared them to the standard of adequate social work practice.

3. In decision number PD 00-10 the Panel addressed the standards question as:

> "...the Commission's review of Ministry practice does not entail the Commission conducting a surrogate child protection investigation. The issue will be whether the Ministry decisions were justified based on the information before the Ministry considered in light of prevailing child protection policies and standards."

4. In decision PD 00-08 the Panel stated on this determination:

> "As to the complaints pertaining to "designated services", specifically the provision of guardianship services to (the children) and the decision to move the children from one placement and the way in which the move was planned and implemented, the Panel finds that the complaints are justified. Specifically, the planning and decision-making process for (the children) did not in a meaningful way:
>
> - Consult the children.
> - Ensure the decision was in the children's best interest.
> - Consider the impact of the placement decision within the context of what had been a permanent life placement with the (complainants).
> - Consider, in the eventuality of the (complainants) being unable to care for the children, placing them within their community so that they could maintain relationships and contact with friends and school."

5. In decision PD 00-03

> "In this case, there is no dispute that the child needs the service immediately. The Ministry's justification for not providing the service is that it has inadequate resources to do so.
>
> The Panel is cognizant of the reality that funding is not unlimited and that wait lists are sometimes a fact of life. That reality must be considered in deciding whether to order the Ministry to reconsider a decision not to provide service and what, if any, recommendations to make even if a complaint is "justified". On the other hand, to accept the justification of "limited funds" as a complete and automatic defence to a complaint about access to service, would render the complaints process illusory."

6. In decision PD99-01

> "Based on our own independent review of the file and submissions in this particular case, we are satisfied that the conclusion reached by the Regional Child Protection Manager was a valid one - namely, that based on all relevant information, the decisions over time not to remove the child from her father's home were justified. In particular, we are satisfied that the information collected in those investigations justified the conclusions that the child should not be removed. We have no doubt that the Appellant reported her concerns in all good

faith. But the legislation requires that before it may act to remove a child, the Ministry must investigate a report in light of all the objective evidence available. When all of that information is considered in balance, including interviews of the child herself and contact with collaterals, we are satisfied that the Ministry acted properly.

This Panel finds that the complaint is justified to the extent that the Ministry failed to follow its own policies and procedures in undertaking its Complaints Review. However, the Panel also finds, based on its own review, that the Complaint Manager's conclusion that the child's needs have adequately been addressed by MCF was correct in the result."

7. In decision 98-01

"Interpreting the Panel's jurisdiction to be simply a checklist for conformity with existing policy, would avoid any review of Ministry policy concerned with a complaint. It is the intent of the legislation that the Panel determine whether a complaint is justified or there has been a breach of the rights of a child. Such can arise on the policy applicable to a case as well as the facts concerned in a particular case.

Concerning the question of the jurisdiction of a Panel to consider the best interest of the child in its reviews, where a complaint concerns the provision of a designated service, the Panel must determine whether the complaint is "justified". That cannot be done unless the factors and tests utilized by the Director in the decision are examined and weighed. To the extent that the Director is required to consider the child's best interests in making a decision, the Panel will also need to consider the child's best interests at the time the decision was made. Concerning complaints and decisions relating to the provision of services, the Panel's jurisdiction to consider best interests is coextensive with that of the Director. Where a complaint concerns the breach of a child's rights, these must be interpreted in accordance with the guiding principles set out in section 2 of the CFCSA. The provisions of section 2 and the interpretation of "community standards" in section 70 (1) (a) requires a consideration of many of the same factors as set out in the definition of best interests, contained in section 4 of the CFCSA. For purposes of this decision we find that the community standard regarding the provision of a foster home to a child in care at least requires a consideration of that child's best interests."

It is evident from the foregoing that the categories of standards to evaluate justification are not closed and are whatever a Panel, in its specialized expertise, believes they should be. Community standards, social work practice, Ministry policy and procedure, child protection policies standards and the child's best interests are all examples of yardsticks used to compare what has occurred to what should have occurred.

Youth Worker Services – Complaint (a)

After the child was discharged from Children's Hospital, a youth worker was assigned, but had to leave due to reasons beyond the scope of this complaint. A second youth worker was assigned in June of 2000, but resigned shortly thereafter and before commencing service to the family, citing the fact that their mileage costs were not being covered. At the time of the hearing of this matter, the position had still not been filled. Youth worker services were approved for the child at 10 hours per week. The mother stated in her testimony that she needed 12 hours. Although the subject of questioning, no particular reasons were given, nor was it clear what activities would be enabled or curtailed by the difference between 10 and 12 hours. The main problem has been the difficulty in filling the position. The father stated that he believed a youth worker could teach life skills, assist the child to control the child's emotions, and become more independent. Regarding the adequacy of hours of youth worker services, he felt that an increase in hours from 10 would assist his wife's respite needs given that he is a shift worker in the steel industry and needs to work with different shifts over the course of time. He believes that increased hours would provide a better break for his wife leading to reduced stress levels in the home and providing them more time for each other.

The team leader for the Ministry in the area gave evidence that she has been involved with the delivery of services to the family and that her role involves a final say on services and wait lists. She testified that there are only two examples of acute situations where workers are approved for as much as 10 hours of youth worker services. Everyone else has been approved for less than 10 hours. Apparently, there are 100 children waiting for youth worker services and some of them have been waiting for two years. She testified that the family has "been offered or given the full gamut of services."

The social worker, Team Leader and the Ministry supervisor all agreed that the family was in crisis and this was not disputed by any other witness. It was this criteria, of being in crisis, which was an important factor in enabling the family to receive the maximum services of 10 hours.

Returning to consideration of the justification of a limitation of 10 hours as opposed to 12 or even 15 hours per week of youth worker services for the child in this case, in these circumstances consideration should be given to:

- the inability of the parents or others to say, except in general way, what benefits would flow from the increased worker time;
- the lack of standards suggested by social work practice, policy, community standards;
- the fact that the child is already receiving service at the maximum amount of comparable situations.

The Panel finds that the complaint (a) is not justified in these circumstances.

The decision to waitlist the child for CBI services – complaint (d)

This complaint appears to arise from the letter of Byron Smith dated May 15, 2000. Mr. Smith is the Quality Assurance Manager and wrote to the complainant on May 15, 2000 saying "there is little I can do to speed up your access to CBI services. If you're not happy with the outcome of my review of this matter you can appeal to the Children's Commission for a further review." It is apparent that the mother requested referral to CBI based upon recommendations she received from the Autism Society of British Columbia and her dissatisfaction with a Laurel Group consultant.

According to the evidence of the social worker and her supervisor, in August or September 2000 the child became the number one priority on the CBI waitlist. In November 2000, the child was offered these services. The Team Leader testified to the progress of this case while on the waitlist, leading up to the child being offered these services.

The complainants submit that there should not even be a waitlist and that services should be provided as soon as they are needed.

The waitlist program was detailed in exhibit 23, a policy bulletin dated August 15, 2000. The social worker's supervisor described the steps this child's case went through compared to the procedure in exhibit 23.

The Panel is satisfied that in the circumstances of this case, that this child's entitlement to services was assessed according to this policy and that this policy provided a reasonable and transparent program in this case at the relevant time periods. The Panel accepts that some degree of waitlisting is a necessary part of the delivery of these services and therefore does not

accept the complainant's submission. In the circumstances, the Panel finds that complaint (d) is not justified.

Lovaas method behavioural treatment – complaints (b) and (c)

The Panel now returns to what was the central question in this complaint. Complaints b) and c) both relate to the desire on the part of the parents to have Lovaas therapy funded for their child. We will deal with these two complaints together.

Dr. Wand, a psychiatrist, has recommended in his letter of August 25, 2000:

> "This letter is to confirm that I have recommended that your son be treated for his symptoms of autism with the Lovaas Technique, which has proved effective for older children as well as younger children."

His general practitioner, Dr. Morris, has recommended that he be evaluated for Lovaas treatment and have it provided if suitable.

> "[The child] should be evaluated for Lovaas treatment. If considered suitable he should undergo this treatment, at least on the trial basis to see if improvement occurs."

Dr. deLevie, who also gave evidence in the Auton case, reviewed this child and stated his views in a letter dated September 27, 2000:

> "[The child] is a 16-year-old boy who has the diagnosis of autism, schizophrenia, and psychosis. He is receiving medication to ameliorate his schizophrenia and psychosis. Even though [the child] has the above diagnosis, he has never been assessed or treated by an expert in applied behavioral therapy, (ABA).
>
> [The child] is a complex person. Despite his diagnosis, he is a gentle, caring, intelligent person who is gifted in his music abilities.
>
> [The child] would greatly benefit from an assessment and therapy from an expert consultants in applied behavioral analysis."

No medical reports were put into evidence by the Ministry and the Panel expects that the above reports fairly represent the medical views on the question of appropriate autism treatment for a child such as this. The difficulty comes from the cost of this form of treatment and the availability of trained personnel.

The Community Living Services Manager for the Ministry testified at this hearing noting a shortage of people properly trained to provide Lovaas therapy. He was not aware of any training programs to deal with the shortage. He testified that there are no contracts with the Ministry to provide Lovaas therapy. He was aware of a new program (EIBI Early Intensive Behavioral Intervention), designed by the Ministry to deal with the BC Supreme Court's decision in Auton. This program will not be available until approximately December 2001 in this area and this child will be too old to be eligible for that program once it is eventually available. That program is restricted to children 6 years of age and less.

The social worker for this child, gave evidence at the hearing. She testified that 40 percent of the clients on her caseload are autistic and that this is typical of the social workers in her team. Her caseload is approximately 75 people. She described the difficulties in hiring respite workers. She knew of one or two persons who were receiving Lovaas therapy through private funding. She referred to earlier flexibility in Ministry funding, where respite monies were paid to parents who could then divert those funds to support such therapy. This past flexibility was also testified to by Sabrina Freeman PhD., a witness called by the complainants who is a leader of a society entitled Families for Early Autism Treatment (FEAT). Apparently, this funding flexibility ended in approximately August 1998, when a provincial wide memorandum prohibited such arrangements, referred to commonly as "individualized funding." Nevertheless, Sabrina Freeman testified to being aware of some families who were "being less than honest" about what they are using their funding for and as a result some monies were being used to support Lovaas therapy for autistic children.

Also in evidence is a May 24, 2000 letter of Mr. Corbeil, then Deputy Minister of the Ministry to the mother, stating that "full funding for intensive behavioral treatment, including the Lovaas method, is not a service available from MCF at this time." In summary then, Lovaas therapy is not funded by the Ministry and the only therapy available to this child now and probably up to his adulthood is that offered by CBI and Laurel group. Treatment with Laurel Group and CBI has been offered to the family. The new applied behavioural analysis program of the Ministry, EIBI, will not be available to children over 6.

The Panel wishes to emphasize that we have not heard fresh evidence concerning the current efficacy of the CBI or the Laurel Group programs. Neither party called the detailed evidence that would be required to make such a re-determination. Instead, all parties relied upon the findings of fact and the evidence called in the Auton case, as being applicable to issues in

this case, including the efficacy of these programs and treatments. In particular, Auton #2 was referred to.

In that decision, the same Dr. de Levie testified, whose opinion is in evidence here. The Court summarized his evidence as:

> "¶ 62. Dr. de Levie, who has served as a pediatrician to Laurel Group in the past, described the treatment provided by Laurel Group and CBI Consultants as much less intense and effective than the Lovaas Autism Treatment."

Further in that decision, a Dr. Davies stated that services provided by agencies like Laurel Group and CBI:

> "¶61 ...are not intensive; they are not delivered early enough in the child's development; and they are rarely of sufficient duration to maximize the child's development. Those organizations typically provide consultation services to the parents rather than direct therapy to the child. The frequency of consultation may range from less than an hour to a few hours a week. Dr. Davies describes these interventions and as "minimal treatment/minimal outcome."

In addition, the Court noted with approval the conclusions of Dr. Davies, which this Panel notes, accurately describe the experience of the child before us:

> "¶59 Dr. Davies accurately described the fate of autistic children in B.C. whose families seek government services. They face long delays before they are diagnosed. They may then be referred to agencies with long wait lists that, when accessed, generally provide services that are supportive rather than therapeutic."

These evaluations should be contrasted with the finding that there are effective programs and that there is an effective treatment.

> ¶156 "... it is beyond debate that the appropriate treatment is ABA or Early intensive behavioral intervention."

> ¶52 "...The expert witnesses agree that the most effective behavioural therapies are those based on principles of ABA. There are no effective competing treatments. As Dr. Gresham stated, "there is no question that ABA is the treatment of choice for children presenting with autistic disorder based on over 35 years of research in the field." He emphasized the fact that although replication of the

> Lovaas study was necessary, treatment should not be delayed awaiting the outcome."

> ¶66 "It is ironic that the very limited treatment services provided by the Crown not only fail to meet the gold standard of scientific methodology; they are positively discredited by one of the Crown's own expert witnesses."

That witness made a statement, which we refer to for the evidence of recovery rates. That witness, Dr. Davies, said:

> ¶67..."Providing a number of supportive services to a disorder that with treatment we know that half could recover, is tantamount to withholding treatment and continuing with support and respite services for AIDS patients after a treatment that can cure half of them has been discovered. "

The Panel notes exhibit 15, which is Behavioral Treatment of Autistic Persons: A Review of Research from 1980 to the Present [1996], by Matson, Benavidez, Compton, Paclawskyj, and Baglio, a study which supports recovery rates of that magnitude. This submission was unanswered by the Ministry.

In this case, the mother has refused the services of Laurel Group and we find, delayed the implementation of CBI services, including the parents education program, in the belief that if she got these services she would not get Lovaas therapy. We shall have more to say about how to deal with parental resistance in this circumstance and the name of this program, however, the Ministry did not even attempt to call any evidence to support the proposition that accepting the above noted services would have made any difference to this child's condition.

Jurisdiction

At the outset of the hearings counsel for the Ministry submitted than the complaints should be dismissed under section 18 of the Act as there was no reasonable prospect that the inquiry will benefit the child and that the complaints should have been refused. The argument was that the complaints primarily concerned the provision of Lovaas therapy and it was submitted that the Children's Commission has no jurisdiction to order Lovaas therapy as it was not "... a service provided by the Ministry." At that time, the Panel reserved ruling upon that application until the evidence had been heard.

Section 10 of the Act provides: "a person ... may make a complaint to the commission... about a decision concerning the provision of a designated service to a specific child." Section 2 of the *Children's Commission Regulation* (the "Regulation") states that "A **service** or **program** provided by the Ministry to a child... is designated..." [emphasis added]. The Ministry argues that as Lovaas therapy is not provided, there is no jurisdiction to even consider the complaint. The Ministry further argues that the Children's Commission may not recommend or order Lovaas therapy as this would be taking on a policy role.

The Panel dismisses this application for two reasons. The first involves an examination of the relevant legislation. The second looks to the constitutional grounds described in Auton.

Services are provided under section 93 of the *Child Family and Community Service Act*, which provides:

> 93. "A director may do one or more of the following: (a) provide preventive and supportive services for families to promote the purposes of this Act..."

Those services need to be interpreted by the guiding principles, including:

> 2. (c) "if, with the available support services, a family can provide a safe and nurturing environment for child, support services should be provided;"

The Ministry has exercised that power by instituting a policy tendered as exhibit 27 in this matter, which is:

> "Community Support Services Policy Manual,
> Part 3, Section 2, Subsection 8,
> **Services** for Children with Special Needs
> **Program** Policies [Emphasis added]
> Behavioral Support for Children with Autism
>
> Objectives
> To provide behavioural support services for children with autism, their families and caregivers, as a support enabling them to function as effectively as possible within their communities.
>
> Description
> Behavioural support is provided by trained professionals for specific children, with direct involvement for their families, caregivers, and

> other relevant professionals or community members. This includes determining behavioural change goals, developing plans, and the **systematic use of applied behavioural analysis procedures** [emphasis added]. Behavioural support services may also include; child specific training and hands-on demonstration of child management techniques; service coordination and liaison around a specific child in partnership with families, the ministry, and other service providers; community awareness and network building about the needs and responses of children with autism; and follow-up with families and caregivers following the end of intensive service."

The policy or program is clearly wide enough to encompass the provision of Lovaas and ABA therapy, especially in its use of the terms "... systematic use of applied behavioral analysis procedures." A decision about whether to provide benefits under a policy that is sufficiently broad to permit such, is also a decision concerning the provision of a service or a program provided by the Ministry. In other words, the program is broad enough to encompass ABA and Lovaas therapy and as such meets the test of designation even where there has been a clear decision not to provide the services to carry out that program.

As indicated above, the second answer to this jurisdictional challenge refers to Auton #2 and the *Charter of Rights and Freedoms*.

> "¶85 Section 15(1) of the ***Charter*** enshrines the principles of equality:
>
> > Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> ¶132 The petitioners are the victims of the government's failure to accommodate them by failing to provide treatment to ameliorate their mental disability. That failure constitutes direct discrimination.
>
> ¶139 I find that the petitioners have established that their s. 15 rights have been infringed on the basis of the test set out in **Law** and **Granovsky**. The Crown has failed to take into account and accommodate the infant petitioners' already disadvantaged position, resulting in

> differential treatment. That unequal treatment, which is based on the enumerated ground of mental disability, is discriminatory. Here the only accommodation possible is funding for effective treatment.
>
> ¶155 However, it is the government, rather than the Ministry of Health, that has failed to meet its constitutional obligations. Accordingly, it makes no difference if the Crown fulfils its obligations through another ministry as the governments of Alberta and Ontario have done.

From the Auton #3 decision of the Supreme Court:

> ¶29] ...the Government is obliged to provide effective treatment to accommodate the disadvantaged position of autistic children. It cannot deny or delay implementation of Early IBI on the basis of cost. In fact, the evidence adduced in this case clearly established that early effective treatment of autistic children would effect a huge cost saving to Government in the long run."

On the jurisdictional challenge, the failure to provide the therapy in question is a violation of this child's constitutional rights to equality before the law. It is that very same failure to provide the therapy in question, that is relied upon by the Ministry to exclude review by this Panel. The absurd situation argued for, is that a review by the Children's Commission can be avoided if the Ministry behaves unconstitutionally in the provision of programs and services. Rather than interpret the Act and Regulation in an absurd manner, this Panel interprets the words "provided by the Ministry" in section 2 of the Regulation, to include those programs and services, which "constitutionally should be provided".

As a result, the jurisdictional challenge is dismissed.

The question remains what affirmatively, is there jurisdiction to do. The Supreme Court of British Columbia in Auton #2 found they lacked jurisdiction:

> "¶50 "... however, as I have concluded that the court cannot direct the Crown to specifically provide Lovaas Autism Treatment regardless of the outcome of these proceedings, it is unnecessary to descend further into the ongoing debate..."

By contrast the jurisdiction given to this Panel by the Act is specifically laid out. The jurisdiction to make recommendations is set out in section 16 (3).

"(3) If a Panel determines after reviewing a complaint made under section 10 (1) (b) that the complaint is justified, the Panel may do one or more of the following:

(a) order the person in charge of administering the designated service to reconsider the decision that was the subject of the complaint;

(b) make recommendations about the steps that might be taken to resolve the complaint;

(c) request the person referred to in paragraph (a) to

(i) notify the Children's Commissioner of any steps taken to resolve the complaint, and

(ii) give reasons if that person decides not to take any steps or decides not to follow the Panel's recommendations."

Terminology

The controversy in this area has generated a great deal of confusion in terminology. In the document tendered by the Ministry, the services provided by CBI Consultants are described as:

"... three primary areas of service: a) 1-1 consultation to individuals and their families; 2) comprehensive training to school districts, families, and to Ministry for Children and Families Agencies; and c) research." It continues: "What can we expect once we begin with CBI's services? Once CBI services become initiated, the family will be invited to participate in a five-week parent course. You will then be assigned a CBI consultant who will complete a functional assessment, assessment report and develop an individualized support plan for your child. The behavior support plan will include 1-1 behavioral consultation and participation in additional CBI courses based on your child's behavior support plan."

It is clear from this description of the services provided that the 1-1 work is in the nature of "consultation" and not what we will call "direct care" with the child. Unfortunately, in the evidence in this matter, the distinction between consultation and direct care with the child was not always made.

Moreover, we find, this is the crucial distinction between the services presently offered by the Ministry and those described as ABA, EIBI and Lovaas. To be precise, consultation services are where the trained staff or contractor (the "skilled person") works by any means (eg. individual meetings, in classroom situations, providing reports and information in written form, etc.) with family members, youth workers, residential home staff, aids, respite workers etc. (the "front line workers") with a view to training them in the methods to change the behavior of the child. In the provision of consultation services the skilled person may work for minutes or hours with the child directly, but this is incidental to the primary purpose of training the front line worker. For example, such incidental direct care work may demonstrate techniques to front line workers, deal with a particularly problematic behavior in the child, or merely provide enough behavior change success to get things started. The front line workers are then to implement the behavior change strategies learned from the skilled persons, while working with the child ("this we refer to as direct care"). Having thus clarified the terminology, the evidence in this case is that Laurel Group and CBI provide consultation services and not direct care services. ABA, EIBI, and Lovaas provide direct care services as well as consultation services. Further, the evidence is that the greatest expense and the greatest behaviour change impact on the child, comes from the skilled persons providing direct care for significant periods of time. This is consistent with the findings of the Court in Auton case.

In the context of the present case, this child has been offered, among other things, consultation services. Lovaas and the Ministry's new EIBI program for younger children offer both consultation services and direct care and these have not been offered to this child.

We say this against the background of terminology we have been exposed to in the hearing of this complaint. The following terms have been used to describe autism treatments:

Lovaas Autism Treatment
Lovaas therapy
Lovaas method behavioral treatment
ABA: Applied Behavioural Analysis therapy
Applied Behaviour Therapy
Applied behaviour analysis
CBI: Communication Behavioral Instruction Program
CBI Behavioural Support Project
Functional analysis behaviour
Behavioral consulting services
Intensive behavioural intervention

Appropriate intensive behavior intervention services
Intensive behavioral treatment
Behavioral intervention services
Behavioral intervention resources
Behavioral Support for Children with Autism
EIBI: Early Intensive Behavioral Intervention

There are too many different terms used to describe autism treatment programs and they do not appear to be used consistently or with adequate precision in all cases. This may be somewhat related to the litigation around the Auton case, but it greatly contributes to confusion among users and makes them very dependent upon expensive professional services for explanation. It is clear that the communication and delivery of effective programs to autistic children will be enhanced by a reduction in this variety and a standardization of the terminology describing these programs.

Parental Concerns

It is clear from the evidence in this matter that the identification and separation of the distinct needs of the mother, the family, and the child are necessary to effectively meet the child's current and future treatment needs. For example, the parents have consistently identified Lovaas therapy as being "scientific" or "professional" or "the Cadillac", but have been unable to answer questions, which invite them to explain what they mean by those terms. It is clear that they mean simply the "best". The Panel carefully went over the complaint resolution report with the parties and received their agreement that the statements made in that report are accurate. The report provides at page 11:

> "MCF records indicate that case planning for [the child] has included supporting the family to collaborate in and follow a comprehensive plan of care for their son. According to the QA manager and both social workers, a consistent challenge for the ministry has been to retain a commitment from the [family] to stick with an agreed-upon plan of care that provide structure and consistency for [the child]. While the ministry acknowledges the complainants stress level in caring for [the child], the ministry also recognizes that the complainants had some difficulty following an agreed to plan of care for [the child], thus limiting the consistency and structure [the child] might otherwise have."

Both parents carefully emphasized that they were pleased with the job that their social workers were doing. Their complaints revolve around the type and extent of the services provided by or through those workers.

The parents have from time to time declined services from: the Gateway Residence, the CBI parenting component, the Laurel Group absolutely, further hospital residential stay and have from time to time declined the services of specific workers. It is clear that the child is becoming much more difficult to manage at home without intensive respite and homemaker services. The parents are naturally quite upset, having cared for the child all these years, to find that they can no longer do this. In her affidavit, the mother states "Generally, [the child's] difficulties are getting worse as [the child] is getting older." At the time of the hearing, the child is not wait listed for any service. All programs and services which the Ministry offers are being offered to the child. In some cases, the family has chosen not to accept the services offered e.g. community group home respite, or delayed in accepting them e.g. CBI and SHARE group meetings and in one case utilized program funds in a way that was not intended (home respite funding).

This Panel is of the view that the social worker should have met more promptly with the adults and discussed and met their opposition to the forms of services offered. For example, the social worker should have explained the parent's role in the CBI program where the mother and father found it insulting to be offered a "parenting course", which they interpreted as questioning their skills as parents. They needed acknowledgement of the good job as parents they had done and explanations of the different technical skills to be taught to carry out the therapy. Similarly, the social worker should have met with the parents concerning their dissatisfaction with the Laurel Group consultant.

The Panel notes that the child is exhibiting some normal teenage behaviors and will be 19 years old in less than two years. This child crucially needs life skills training to enable the child to exist as independently as possible from the child's family. The available therapies should be pursued now with the utmost diligence, even in the face of resistance from the parents.

Conclusion

Complaints (a) and (d) are dismissed. Complaints (b) and (c) are justified. The Panel declines to make an order under section 16(3) (a) that the person in charge of administering the designated service reconsider the decision. We make the following recommendations:

Recommendations

1. That this child and seven to nineteen year old autistic children be integrated into the EIBI program, recognizing that age appropriate developments and modifications may be necessary in that program.

2. That the definitions of services to autistic children be standardized throughout all regions and all Ministry sponsored programs.

3. That the information on services to autistic children be compiled into an information kit for each region, written in plain language, with clear definitions. This information kit should be provided to all clients who inquire about these services.

4. That the focus be upon supporting this child's independence as soon as possible by emphasizing life skills and pursuing every form of assistance, including any services of Laurel Group and CBI, even in the face of resistance from the parents.

5. That the Ministry communicate with the CBI program ensure that the name of the parents' skill training course be changed from "CBI parent course" to something, which identifies the new skills to be learned eg. Behavioural therapy training for parents.

The Panel specifically requests the Ministry to notify the Children's Commissioner, within 30 days of the date of this decision, of the steps taken to resolve this justified complaint in accordance with our recommendations, and give reasons if the Ministry decides not to take any steps or follow the Panel's recommendations.

Terry Harris
Panel Chair

Sandra McEwan
Panel Member

Greg Eng
Panel Member