CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 324

NOVEMBER 26, 2013

EDITOR: TERRANCE S. CARTER

TOP COURT UPHOLDS ROLE OF FAMILY IN WITHDRAWING LIFE SUPPORT

By Jennifer M. Leddy*

A. INTRODUCTION

On October 18th, 2013,[1] the Supreme Court of Canada upheld the Ontario Court of Appeal's[2] decision that under Ontario's *Health Care Consent Act, 1996* ("*HCCA*") physicians cannot withdraw life support from an incapable patient without the consent of the substitute decision maker or an order from the Consent and Capacity Board ("Board") established by the *HCCA.* The decision was a five to two split with the Chief Justice writing the "majority opinion", which is hereinafter referred to as "the Court." This *Charity Law Bulletin* reviews only the majority opinion, which will be of interest to the charitable and health care sectors, particularly those in Ontario.

B. FACTS

The patient, Hasan Rasouli, has been unconscious since October 16, 2010, due to an infection following surgery to remove a benign brain tumour. Mr. Rasouli's physicians proposed to withdraw his mechanical ventilator and artificial nutrition and hydration because, in their medical opinion, he was in a "persistent vegetative state", there was no reasonable prospect for recovery, and continued life support was medically futile. Ms. Parichehr Salasel, Mr. Rasouli's wife and substitute decision maker, refused to consent to this plan and applied to the Ontario Superior Court of Justice to prevent the physicians from withdrawing life

* Jennifer M. Leddy, B.A. LL.B., practices charity and not-for-profit law with the Ottawa office of Carters Professional Corporation and would like to thank Dianne T. Hajdasz, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this Bulletin.

[1] *Cuthbertson v Rasouli*, 2013 SCC 53, available online at http://canlii.ca/t/g10hr

[2] *Rasouli v Sunnybrook Health Sciences Centre*, 2011 ONCA 482. For a discussion of the Court of Appeal decision, see Jennifer M. Leddy's *Charity Law Bulletin* No.256, available online at http://www.carters.ca/pub/bulletin/charity/2011/chylb256.htm

support without her consent or a decision by the Board. Both the Superior Court of Justice and Ontario Court of Appeal concurred that challenges to Ms. Salasel's consent must be brought to the Board for resolution.

C. THE LEGISLATION

The *HCCA* provides a detailed statutory scheme regulating consent to treatment for patients who lack the capacity to consent. The purposes of the *HCCA* include providing consistent rules for consent to treatment, facilitating treatment for persons lacking capacity to make decisions, enhancing autonomy, ensuring a significant role for supportive family members and promoting communication between health practitioners and their patients. A "treatment" can't be administered to an incapable person without the consent of his or her substitute decision maker (often a family member or close personal friend) who must decide on the basis of the patient's known wishes when capable or in the best interests of the patient according to factors set out in the *HCCA*. Disputes between physicians and the substitute decision maker about the treatment of incapable patients are to be resolved by the Board. The *HCCA* defines "treatment" as "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 plan…" The interpretation of "treatment" and "health-related" purpose were, therefore, key to the outcome of this case (see sections 1, 2, and 10).

D. POSITION OF THE DOCTORS

The physicians brought forward three arguments. Firstly, while conceding that in general life support is "treatment", they argued that it is not "treatment" when it is of no "medical benefit" or not "medically indicated." Secondly, they asserted that the withdrawal of life support is not "treatment." Thirdly, they claimed that if consent is required for withdrawal of treatment, they will be in an "untenable ethical position." All three arguments were rejected.

With respect to the first argument, the physicians claimed that the life support provided to Mr. Rasouli is not "treatment" under the *HCCA* because it does not provide a medical benefit to him. The Court disagreed with the argument that "treatment" and "health-related purpose" under the *HCCA* are restricted to procedures that provide a medical benefit. A distinction was drawn between "medical benefit", which is a clinical term used by physicians to decide whether to offer a procedure to a patient, and "health-related purpose" which is the legal term used in the *HCCA* to identify the procedures that require consent. The Court determined that life support is included in "treatment" because it has a "therapeutic" and "preventative" purpose, as listed in the

definition of "treatment" under s.2(1). Furthermore, the objects of *HCCA* with their emphasis on consent, autonomy and family involvement contemplate the inclusion of life support in the word "treatment." The Chief Justice said "*..I cannot accept the physicians' argument that "treatment" and "health-related purpose" are confined to procedures that are of medical benefit in the view of the patient's medical caregivers"*(para.44).

With respect to the second argument, the physicians argued that the withdrawal of treatment is not actually "treatment" under the *HCCA*, and therefore, consent is not required for the withdrawal. The Court disagreed, finding that the definition of "treatment" was broad enough to include withdrawal of treatment which may be done for a "therapeutic, preventative, palliative or other health related purpose" such as preventing suffering and respecting dignity. Rather than viewing withdrawal of treatment as one act, the Court viewed it as a series of acts or medical interventions, each having an impact on the patient's body and a health-related purpose, and therefore requiring consent. Seen from this perspective, and in light of the objects of the *HCCA*, the withdrawal of life support "impacts patient autonomy in the most fundamental way" (para.68).

Thirdly, the physicians argued that they would be put in an "untenable ethical position" if compelled to maintain life support even though, in their view, it is not medically indicated or could even harm the patient, thus putting them in violation of their professional duty to act in the best interests of their patient. The Court once again disagreed with the physicians and stated that any tension a physician experiences with professional or personal ethics is an inherent part of practicing medicine, noting that the law of consent evolved in cases where physicians, for ethical reasons, insisted on treating patients against their wishes. The Court noted that if a physician is placed in an ethical dilemma regarding the patient's best interests, he or she may refer the matter to the Board in accordance with the *HCCA* and no physician could be criticized for complying with a decision of the Board. In addition, the Board's procedure for resolving disputes between physicians and patients provides opportunities for the physician to give information about the patient's medical condition, and the medical benefit of maintaining or withdrawing life support. Although the withdrawal of life support may pose an ethical dilemma for the physician, it did not change the legal conclusion that the withdrawal of life support in the circumstances of this case is a treatment that requires the consent of Mr. Rasouli's wife.

E. PROCEDURE UNDER *HCCA* FOR RESOLVING DISPUTES ABOUT CONSENT

The court confirmed that the *HCCA* provides the steps that a physician must follow with respect to treatment of patients who are incapable of giving consent. The physician must first seek the consent of the substitute decision maker who must act in accordance with the patient's previously expressed wishes if known, and failing that, in accordance with the patient's best interests having regard to his or her medical condition, the patient's well being, the patient's values and any prior expressed wishes that are not binding on the substitute decision maker. The decision of the Court provides a very helpful summary of the law related to prior expressed wishes and the best interests of the patient. If the substitute decision maker refuses to consent to the treatment, the physician may challenge the refusal by application to the Board and provide evidence about the patient's medical condition and best interests. The Board may override the decision of the substitute decision maker and substitute its own decision if it finds that the substitute decision maker did not comply with the criteria of the *HCCA.* This means that "...even in life-ending situations, the Board may require that consent to withdrawal of life support be granted" (para.78).

The Court noted that, while the substitute decision maker probably better understands the wishes and values of the patient and the physician probably better understands the medical condition, the Board, composed of experts, is well placed as a neutral body to resolve disputes between them, subject to judicial review.

F. APPLICATION OF THE *HCCA* TO THE RASOULI CASE

The physicians, having determined that continuing life support was not medically indicated for Mr. Rasouli, were obligated to obtain the consent of Ms. Salasel to withdrawal of the treatment. Since she did not consent, the physicians can apply to the Board for a decision that Ms. Salasel's refusal to consent was not in his best interests. The Court, therefore, did not decide whether Mr. Rasouli's life support could be withdrawn, leaving that decision to the Board if an application is made.

G. COMMENTARY

While the decision of the Supreme Court of Canada dealt with tremendously important concepts, such as definitions of "treatment" and "withdrawal of treatment", concerning physicians not having the last word in end of life care and the role of family and other substitute decision makers in end of life care decisions, the limits of the Court's decision must be kept in mind. First and foremost, this decision was based on the

interpretation of an Ontario statute. As the Chief Justice said in paragraph 4, it was not a case *"....about who, in the absence of a statute, should have the ultimate say in whether to withhold or withdraw life-sustaining treatment. Nor does the case require us to resolve the philosophical debate over whether a next-of-kin's decision should trump the physicians' interest in not being forced to provide non-beneficial treatment and the public interest in not funding treatment deemed of little or no value."* It should also be noted that the Court's findings on "withdrawal" of treatment were limited to withdrawing life support in end of life situations. As the Chief Justice stated in paragraph 70, *"This case does not stand for the proposition that consent is required under the HCCA for withdrawals of other medical services or in other medical contexts."*

The court interpreted the Ontario legislation based on the specific words in the statute. Other provinces have adopted similar legislation to govern consent to treatment of incapable patients. However, if the wording for "treatment" is not similar to that of the Ontario legislation, the other province's legislation would have to be interpreted, and the Rasouli decision may or may not be of assistance in this regard. Regardless of the limitations of this case for other provinces, it is very significant for the healthcare and charitable sectors in Ontario and for the residents in Ontario. In addition, the Court's language around important decisions concerning end of life care which affirms the autonomy of the patient, respect for the patient and involvement of substitute decision makers is bound to resonate in decisions made under different statutory schemes and the common law.