WeirFoulds LLP

LITIGATION

— ESTATE ALERT

DECEMBER 2013

Cuthbertson v. Rasouli and its Implications for Substitute Decision-Makers

by Farah Malik

In a recent and much-anticipated judgment, the Supreme Court of Canada in *Cuthbertson v. Rasouli* confirmed that withdrawing or withholding life support constitutes treatment which, in turn, requires consent from a patient or substitute decision-maker under Ontario's *Health Care Consent Act, 1996* ("HCCA").

Hassan Rasouli, by his litigation guardian, substitute decision-maker and wife Parichehr Salasel, applied for a Court order preventing withdrawal of his life-sustaining treatment at Sunnybrook Health Sciences Centre. This treatment, which consists of the use of a mechanical ventilator and feeding tube, was implemented as a result of severe brain injury following the removal of a benign tumour in Mr. Rasouli's head. Mr. Rasouli has been on life support since October of 2010.

The respondent doctors responsible for Mr. Rasouli's care cross-applied for a declaration that consent is not required to withdraw life-sustaining treatment where such treatment is not medically indicated. More particularly, they argued that they have unilateral discretion to withdraw Mr. Rasouli's life support because his persistent vegetative state ("PVS") means that he will never again regain consciousness; all appropriate treatments have been exhausted; and the life-sustaining measures at issue are no longer medically effective, i.e. there is no realistic hope of recovery. The respondent doctors proposed, instead, to remove Mr. Rasouli's life support and provide him with palliative care until he dies.

While capable, Mr. Rasouli did not express any wishes regarding removal or continuation of life support, although the evidence did indicate that his Shiite Muslim beliefs about the end of life ought to be taken into account.

In a split 5-2 decision, the Supreme Court dismissed the respondent doctors' appeal, finding that consent is indeed required under the HCCA to withdraw life support. Because the substitute decision-maker in this case refused to provide her consent to the withdrawal of Mr. Rasouli's life support, the respondent doctors' were required to challenge her decision before the Consent and Capacity Board ("CCB").

The majority of the Supreme Court began its analysis by recognizing that the HCCA is premised on the general public policy rule that medical treatment cannot be administered without consent.

The primary legal issue before the Rasouli Court, therefore, was whether the defined term "treatment" under the HCCA could include a decision to terminate or withdraw life support where a patient is terminally ill or has little chance of survival without such support.

The term "treatment," in turn, is broadly defined as "anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose" (emphasis added). The majority found that life support serves a "health-related purpose" by preventing suffering and indignity at the end of life. Because the withdrawal of life support also involves physical interference with a patient's body, the majority rejected the respondent doctors' argument that a "health-related purpose" is limited to what an attending physician considers to medically benefit a patient.

WeirFoulds LLP
66 Wellington Street West
Suite 4100, P.O. Box 35
Toronto-Dominion Centre
Toronto, Ontario, Canada
M5K 1B7
Office 416.365.1110
Facsimile 416.365.1876
www.weirfoulds.com

The majority also found that life support arguably falls within the ambit of "therapeutic" and "preventive" purposes within the definition of "treatment", i.e. life support could have the effect of keeping a patient alive and forestalling death.

More importantly, the majority recognized that withdrawing life support from someone like Mr. Rasouli "impacts patient autonomy in the most fundamental way."

The Supreme Court agreed that because "treatment" includes the withdrawal of life support, Ontario health practitioners cannot act unilaterally in doing so, i.e. they must obtain consent to do so from patients or their substitute decision-makers. If disputes between health practitioners and next-of-kin substitute decision-makers arise over consent regarding life support, resort should be had to the CCB, an "independent, quasi-judicial body with specialized jurisdiction over matters of consent to medical treatment" for a full consideration of the incapable person's best interests.

In light of *Rasouli*, attorneys for personal care, as well as spouses, children, parents and other close relatives of capable patients over the age of 16, should keep the following in mind:

1. If capable patients are slated to undergo risky medical procedures that could result in death, serious injury, or a PVS, attempts should be made to determine the wishes of such patients respecting life support and end-of-life palliative care. While such discussions can be extremely difficult to have, they should nevertheless take place to avoid needless litigation. A capable patient's wishes should be documented in writing and witnessed wherever possible to preserve his or her dignity and autonomy. This is also because prior capable wishes, arising from different contexts, will not be applied mechanically. The question will be whether when the wish was expressed, the patient intended its application in his or her present circumstances.
2. If a patient's wishes are not discernable for capacity or other reasons, attorneys for personal care or close family members should nevertheless ascertain the patient's general values and beliefs, especially with respect to prolonged life-sustaining measures. In providing or refusing consent to life-sustaining measures, a substitute decision-maker must take into account the patient's best interests, which include his or her value and belief system, as well as the patient's overall medical state and well-being.

Estates, Trusts and Charities

Since the creation of the firm, our lawyers have been advising clients on all aspects of will preparation, family and business trusts, estate planning, business succession planning, capacity and guardianship issues, estate litigation, and estate arbitration and mediation. Our Estates, Trusts and Charities Practice is led by senior partners with a wide range of experience. Our practice members are active in the litigation, mediation and corporate and commercial areas of practice. Several of our members have been recognized as leading practitioners in their area of expertise in various legal directories. Our clients include trust companies, charities, not-for-profit corporations, independent business owners, executors, estate trustees and individuals.

AUTHOR **Farah Malik**

Farah Malik is a civil litigator with a special interest in administrative, employment, professional negligence, constitutional and human rights law. She has experience in estates and complex commercial litigation matters.

Contact Farah at 416.947.5071 or fmalik@weirfoulds.com.

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.