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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Drago Barbulov v. Dr. R. Cirone

BEFORE: Justice D. M. Brown

COUNSEL: C. McGoogan, for the Appellant, Drago Barbulov

M. Tucker, for the patient, Stadoje Barbulov

K. Byrick, for the Respondent, Dr. R. Cirone

DATE HEARD: April 2, 2009; with subsequent written submissions.

E N D O R S E M E N T

I. Introduction

[1] Death, for some, is an end; death, for others, is a beginning; death, for all, is the unavoidable outcome of birth, the natural completion of life. Medical treatment and technology can remedy some illnesses one encounters along life's path, but medical treatment cannot alter the inevitability of death. The past half century has seen, however, significant developments in the ability of medical technology to prolong existence, delay death, and create conditions where the final phases of life risk becoming overly medicalized. Consequently, as a person advances closer towards death, issues arise about what medical assistance should be administered. The Ontario *Health Care Consent Act, 1996*, S.O. 1996, c. 2, represents an effort by the Legislature to create a framework for addressing these issues.

[2] Mr. Stadoje Barbulov currently receives treatment in the intensive care unit of St. Joseph's Health Centre where he was admitted seven months ago. Mr. Barbulov suffers from severe neurologic impairment. A dispute about treatment arose between Mr. Barbulov's substitute decision-maker, his son, the appellant, Drago Barbulov, and his attending physicians, one of whom is the respondent, Dr. Robert Cirone. As a result the physicians applied in December, 2008, to the Consent and Capacity Board for a determination whether Drago Barbulov was complying with the principles for giving or refusing consent under the *HCCA*.

[3] In a decision made January 22, 2009, the CCB determined that Drago Barbulov had not complied with those principles, and it directed him to comply with requests contained in Mr.

Barbulov's 1995 Power of Attorney for Personal Care, and with a treatment withdrawal process proposed by Mr. Barbulov's physicians. Drago Barbulov appeals to this Court from that decision under section 80 of the *HCCA*.

II. Mr. Stadoje Barbulov

A. His personal and family information

[4] Mr. Barbulov is 75 years old. He immigrated to Canada from Serbia in 1970 when he was 37 years old. In Serbia he attended school until grade 10, but had no formal education beyond that. While there Mr. Barbulov worked as a wheelwright. After coming to Canada, he worked as a laborer and custodian until he was no longer physically capable of doing so.

[5] In recent years Mr. Barbulov's wife, Bosiljka Barbulov, had been blind, and she depended on her husband for care and assistance. Unfortunately, Bosiljka Barbulov passed away a few weeks ago. Mr. Barbulov has two children – his son, the appellant, Drago Barbulov, and a daughter, Jasmina Agius. Drgao Barbulov has always lived with his parents.

B. Stadoje Barbulov's medical condition

[6] On August 18, 2008, Mr. Barbulov was admitted to St. Joseph's suffering from brain damage from lack of oxygen, perhaps associated with an accidental overdose of opiate medication. Prior to his admission to hospital Mr. Barbulov had been capable of making his own decisions with respect to treatment; following admission he has been incapable of so doing.

[7] In the first few days after Mr. Barbulov's admission to hospital it was not clear whether his condition was irreversible. As time passed, there was no meaningful neurological recovery, and it became clear that Mr. Barbulov had suffered a neurologic impairment that would not allow him to process complex cognitive thoughts.

III. The proceeding before the Consent and Capacity Board

A. The "Form G Application"

[8] When Stadoje Barbulov was admitted to St. Joseph's in August, 2008, the family informed the team of treating physicians that Stadoje Barbulov did not have a power of attorney for personal care. That turned out not to be the case, but the existence of a power of attorney was not discovered until the start of the hearing before the CCB. At the direction of the family, in the first months of Mr. Barbulov's treatment he received full care, including ventilation.

[9] Following further assessment, however, Mr. Barbulov's treating physicians proposed to the family that his treatment plan be changed to one of full care, but not including cardio resuscitation ("CPR"), pressure support, or dialysis. They also proposed that if Stadoje Barbulov could be safely removed from the ventilator, there would be no re-ventilation if he deteriorated. Stadoje Barbulov's son, whom the family held out as the substitute decision-maker, did not consent to the proposed treatment.

[10] As a result, on December 1, 2008, Dr. Arthur Vanek, one of Stadoje Barbulov's treating physicians, brought a "Form G application" under section 37(1) *HCCA* to the Board. By way of explanation, section 37 of the *HCCA* establishes a framework for determining disputes about treatment that arise between a person's substitute decision-maker and his attending physicians. If consent to a treatment is refused on an incapable person's behalf by his substitute decision-maker, and if the health practitioner who proposed the treatment is of the opinion that the substitute decision-maker did not comply with the principles for giving or refusing consent set out in section 21 of the *HCCA*, the health practitioner may apply to the Board for a determination as to whether the substitute decision-maker complied with section 21: *HCCA*, s. 37(1). If the CCB determines that the substitute decision-maker did not comply with section 21 of the Act, it may substitute its opinion for that of the substitute decision-maker, give him directions and, in so doing, the CCB must apply section 21 of the Act: *HCCA*, ss. 37(3) and (4). In its decision the CCB must specify the time within which the substitute decision-maker must comply with its directions and, if he does not do so, the substitute decision-maker is deemed not to meet the requirements for the giving of consent set out in section 20(2) the Act: *HCCA*, ss. 37(5) and (6). In that event, any subsequent substitute decision-maker must comply with the directions given by the CCB on the application within the time specified by the Board: *HCCA*, s. 37(6.1).

[11] A clinical summary of Stadoje Barbulov's condition accompanied the physician's Form G Application. The summary indicated that Stadoje Barbulov had been suffering from hypoxic encephalopathy since August, 2008, depression, incident dependent diabetes, high blood pressure and high lipids. The prognosis was "essentially zero for meaningful neurological recovery."

[12] The summary noted that there were no previously expressed capable wishes directly applicable to Stadoje Barbulov's current condition, however Drago Barbulov and family had "expressed that Stadoje Barbulov would want to 'endure suffering' and do 'what is best for his family'".

[13] The current plan of treatment was recorded on the summary as "full care including ventilation, peg feeds, regular investigations, everything". The clinical summary recorded the plan of treatment proposed by the treatment team as: "(1) full care short of cardio resuscitation (CPR), pressure support, and dialysis; (2) if patient can be safely removed from ventilator, no reventilation if he deteriorates". The clinical summary stated that the "clinical team's proposal would reduce non-beneficial interventions without affecting the ultimate outcome compared with the proposed treatment plan from the wife and family." It stated that the plan of treatment proposed by the substitute decision-maker did not comply with the principles for giving or refusing consent because the plan would "(1) not improve the incapable person's condition or well-being, (2) not prevent the person's well-being from deteriorating, (3) not reduce the rate of deterioration, (4) benefits are outweighed by the risk of harm."

B. Notice and the Pre-Hearing Conference

[14] The CCB issued an order on December 15, 2008, that the Public Guardian and Trustee arrange for legal representation for Stadoje Barbulov. The PGT arranged for Ms. Tucker to represent Stadoje Barbulov at the hearing.

[15] On December 17, 2008, the CCB gave notice of a pre-hearing for the application. The pre-hearing was held on December 19, at which time the CCB decided that if Stadoje Barbulov's wife or daughter indicated in writing that they did not wish to make treatment decisions for Stadoje Barbulov and consented to Drago Barbulov making them, then he would be named as his father's substitute decision-maker. This is in fact what happened. The CCB further found that if Drago Barbulov wanted to obtain a videotape of his father in the hospital, he would have to obtain a court order to do so. In the result, he did not. The Board set January 21, 2009, as the date for the hearing, and specifically recommended that Drago Barbulov "consult with a lawyer who specializes in Health Law prior to the hearing."

[16] On January 12, 2009, the CCB issued two notices of hearing: the first, to determine the capacity of Stadoje Barbulov to consent to treatment, and the second to determine whether or not Drago Barbulov, as substitute decision-maker, had complied with the principles for substitute decision-making contained in the HCCA.

C. The Hearing and the disclosure of a Power of Attorney for Personal Care

[17] A three-person panel of the CCB conducted the hearing over two days, on January 21 and 22, 2009. Ms. Tucker acted for Stadoje Barbulov, Dr. Cirone participated as the attending physician, and Drago Barbulov participated without counsel. During the hearing the Board visited Stadoje Barbulov at St. Joseph's Health Centre.

[18] At the start of the hearing Drago Barbulov revealed, for the first time, that his father had signed a Power of Attorney for Personal Care in 1995. As a result of this disclosure, Dr. Cirone advised the CCB that the treating team would change its proposed plan of treatment so that it would conform to the wishes expressed in the 1995 POA. Specifically, Dr. Cirone testified that the new treatment plan would see the withdrawal of life-support therapy and the institution of treatment that would focus on the patient's comfort, rather than on trying to cure him of conditions the physicians did not think were curable.

[19] Given the central role the 1995 POA played in the CCB's decision, it is worth reviewing its contents now. There is no dispute that Mr. Babulov signed the 1995 POA; there is a very live dispute as to whether he understood what he was signing. In the 1995 POA Mr. Barbulov appointed his wife and son as his attorneys for personal care. Sections 4 and 5 of the 1995 POA contained the following "Specific Instructions" and "Consent to Treatment":

SPECIFIC INSTRUCTIONS

> 4. I, direct my family, my physician, my executor and all concerned others as follows:
>
> > (a) If I am not (sic) longer able to make decisions for my own future, if I am no longer able to communicate, if I am unable to care for myself, if there is no reasonable expectation of my recovery from extreme physical or mental disability of incapacity, if circumstances exist that render me incapable of rational

existence, if I am afflicted with (irreversible) injury, disease, illness or condition, then I want my attorney to respect my wishes listed below.

Where the application of measures of artificial life support would primarily serve to prolong the moment of my death, then let this document stand as an expression of my thoughts, intentions, wishes and directions - that I do not wish to endure any prolonged period of pain and suffering. I sign this document from my own free will while I am of sound mind and emotionally competent to make decisions.

(b) If any of these situations specified in paragraph 1 should arise, I direct that I be allowed to die and not be kept alive by medications, artificial means, or invasive measures of any kind.

(c) Measures of extending life, that I particularly do not wish, and which are to be withheld, withdrawn or discontinued include:

(i) electrical or mechanical resuscitation of my heart;

(ii) nutritional feedings;

(iii) artificial mechanical respiration where my brain can no longer sustain breathing;

(iv) radiation, chemotherapy and similar forms of treatment;

(v) treatment for an illness or disease which I contracted when I was already afflicted with a terminal illness.

(d) I do ask that medication be administered to alleviate pain, suffering or distress even though this may hasten the moment of my death.

(e) I want the wishes and directions expressed in this power of attorney and the spirit of this document carried out to the fullest extent permitted by law. In so far as these are not legally enforceable, I nevertheless request that those responsible for me at such time will regard themselves as morally bound by these provisions, so that they will carry out these wishes to the fullest extent possible.

(f) I would like to die at home rather than in an institution, if that does not impose an undue burden on those around me.

(g) If any of the situations specified in this document should occur, I appoint the attorney named herein as my attorney to carry out my thoughts and wishes, including obtaining a court order, if necessary, to discontinue or forbid artificial life-support measures that would primarily serve to prolong the moment of my death.

> (h) If I should happen to be under the care of a physician whose moral, ethical or religious beliefs are not in sympathy with my wishes, as expressed in this document, I direct my attorney to ask that physician to withdraw from my care and to recommend another physician, who agrees with my views.
>
> (i) No participant in the making or carrying out of this power of attorney, whether it be a healthcare provider, hospital administrator, friend, relative or any other person, shall be held responsible in any way, legally, professionally or morally, for any consequences arising from the implementation of my wishes.
>
> **CONSENT TO TREATMENT**
>
> 5. I authorize my attorney, on my behalf, to give or refuse to consent to treatment to which the *Consent to Treatment Act* applies. (or, as follows:)
>
> To carry out the provisions of "Specific Instructions" as set out in paragraph 4 hereof.

D. The CCB's Decision and Reasons for Decision

[20] On January 21, 2009, the CCB issued a decision that Stadoje Barbulov was not capable of giving or refusing life-support treatments. No issue is taken with that decision.

[21] On January 22, 2009, the CCB issued the Decision in which it determined that the substitute decision-maker, Drago Barbulov, had not complied with the principles for substitute decision-making set out in the Act, and it directed the substitute decision-maker to:

> comply with the requests contained within Mr. Stadoje Barbulov's personal care power of attorney in the first paragraph of paragraph 4(a) and paragraphs 4(b), (c) and (d), and to specifically consent to the treatment withdrawal process, beginning with and not limited to withdrawal of and no re-institution of ventilative support.

The CCB gave Drago Barbulov until 11 a.m., on January 26, 2009, to comply with its directions, failing which he would be deemed not to meet the requirements for substitute decision-making set out in section 20(2) of the *HCCA*.

[22] Following the hearing, Drago Barbulov must have retained counsel, for on January 26, 2009, his current counsel requested written reasons for decision from the Board. The CCB released its 16-page Reasons for Decision on January 28, 2009. Drago Barbulov filed a notice of appeal to this Court the following day.

E. The CCB's Reasons for Decision

[23] In its Reasons the Board set out the applicable provisions of the *HCCA*, concluded that Stadoje Barbulov was incapable of making decisions with respect to treatments, and then went on to review, at some length, the evidence about Mr. Barbulov's condition presented by Dr. Cirone and the members of the patient's family. The Board then turned to the issue of the 1995 POA. The CCB held that:

> The P of A clearly set out the wishes of B as described in paragraphs 4(b), 4(c), and 4(d), in the event that anyone of the potential precipitating events described in paragraph 4(a) should arise.

[24] The CCB then turned to consider the criteria in section 21 of the *HCCA* regarding Mr. Barbulov's best interests. It found that Dr. Cirone's evidence about Mr. Barbulov's condition and prognosis was "clear, cogent and compelling" – the patient's future would be deterioration; his brain function would not improve; his respiratory capacity would diminish because of recurrent pneumonia; there would be continued renal failure; the medical team could not determine adequate cognitive functioning; and, there was no evidence of likely improvement in any of those areas. "The predictive likelihood" was that Mr. Barbulov would not recover from his illnesses. In light of that evidence, the CCB concluded that Drago Barbulov was not acting in accordance with the best interests of his father as set out in the section 21 criteria.

IV. Appellate review of the CCB

A. The standard of review

[25] It is well-settled that the appropriate standard for reviewing findings of the CCB about whether a person had expressed an applicable prior capable wish and whether the person's best interests required particular treatment is one of reasonableness: *T. (I.) v. L. (L.)* (1999), 46 O.R. (3d) 284 (C.A.), at para. 21; *Conway v. Jacques* (2002), 59 O.R. (3d) 737 (C.A.), at para. 34. Where the CCB applies the law to the facts, a court should review the Board's decision for reasonableness: *Starson v. Swayze*, [2003] 1 S.C.R. 722, at para. 5.

[26] In its decision in *T. (I.)* the Court of Appeal explained, at para. 21 of it reasons, why reasonableness is the appropriate standard:

> The reasonableness standard is appropriate for reviewing the Board's findings for the following reasons:
>
> > (a) Whether T.C. expressed an applicable prior capable wish is a question of fact. The Board, which heard the evidence on this question, is in the best position to assess credibility and make a finding on whether there was a prior capable wish. Thus, deference is called for.
> >
> > (b) The best interests test in part requires a factual finding, in part requires medical expertise because medical outcomes are included in the test, and in part requires a weighing of relevant factors. All of these considerations argue for deference, and we observe in particular that the SDM has no medical expertise, an

> expertise that is needed to weigh the factors under s. 21(2)(c). Although an SDM may have greater knowledge of an incapable person's values and beliefs under s. 21(2)(a) of the Act, that consideration alone does not undermine the need for deference to the Board's determination of an incapable person's best interests.
>
> (c) The importance of expeditious decision-making under the Act is another reason for according deference to the Board's findings. Delay resulting from an appeal is not ordinarily likely to be in an incapable person's best interests. Only where a Board's finding can be shown to be unreasonable should it be set aside on appeal.
>
> (d) Moreover, the Board itself must hear and decide applications promptly. Under s. 75, the Board must begin a hearing within seven days of receiving an application and must decide the application by the day after the hearing ends. If reasons are requested, they must be provided within two business days. In the light of this short time frame, the Board is entitled to some leeway, and indeed it is hard to think that the legislature could have intended otherwise. A correctness standard would put an unfair burden on the Board. In our view, provided the Board's findings are reasonable, an appellate court should not interfere…

B. The meaning of "reasonableness"

[27] The content of the reasonableness standard received examination in two recent decisions of the Supreme Court of Canada, *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12. In *Dunsmuir* the Court described the reasonableness standard in the following terms:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (para. 47)

Deference in the context of the reasonableness standard implies that courts will give due consideration to the determinations of decision makers, recognizing that some tribunals implement complex administrative schemes and others determine some matters by drawing on particular expertise and experiences: *Dunsmuir*, para. 49. Nevertheless, a reasoning process of a tribunal that is deeply flawed may result in a decision that falls outside the range of acceptable outcomes: *Dunsmuir*, para. 72.

[28] In *Khosa* the Court clarified that the reconstituted category of reasonableness is a nuanced, context-specific one:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. (para. 59)

[29] Although the standard of reasonableness requires courts to give a respectful attention to the reasons of a tribunal, it does not dilute the importance of giving proper reasons for an administrative decision: *Khosa*, para. 63. Indeed, reasonableness requires transparency, justification and intelligibility within the decision-making process: *Dunsmuir*, para. 47.

V. Issues on appeal

[30] The appellant advanced three grounds of appeal; counsel for Stadoje Barbulov put forward a fourth. The issues on appeal are:

(i) Did the Board fail to afford the substitute decision-maker a meaningful right to counsel?

(ii) Did the Board err by permitting Dr. Cirone to amend his proposed plan of treatment during the hearing?

(iii) Did the CCB err in treating the 1995 POA as the expression of a prior capable wish of Mr. Barbulov under section 21(1) of the *HCCA*?

(iv) Did the CCB err in concluding that Drago Barbulov, as his father's substitute decision-maker, had failed to give or refuse consent to treatment in accordance with the principles in section 21 of the *HCCA*?

VI. First Ground of Appeal: Did the Board fail to afford the substitute decision-maker a meaningful right to counsel?

[31] As his first ground of appeal the appellant submits that the CCB denied him natural justice by failing to provide an opportunity to retain and instruct counsel prior to the hearing. I see no merit in this argument. In its December 19, 2008, pre-hearing endorsement the CCB specifically recommended that the appellant "consult with a lawyer who specializes in Health Law prior to the hearing."

[32] The appellant also points to the following exchange at the start of the hearing as evidence of the Board's failure to enable him to exercise his right to counsel:

> The Chairperson: Mr. Barbulov, you're entitled to have a lawyer present, you know, to assist you in this matter. Did you want one?
>
> Drago Barbulov: What for? You guys are on my side. You want what's best for everybody. Why would I need a lawyer?
>
> The Chairperson: It's entirely up to you, sir. I'm just telling you that you do have the right to have one and if you...
>
> Drago Barbulov: I have a lawyer...
>
> The Chairperson: So Mr. Barbulov, here's my question for you, sir, is not about the attorney, or the lawyer who drew that power of attorney, but for you to have a lawyer present in this room while this hearing takes place. Did you want to get one?
>
> Drago Barbulov: No

[33] The appellant submits that the CCB erred by failing to tell him that his understanding of the process was incorrect, and that the Board was not "on his side", but an impartial tribunal. There is no basis for this submission. The duty of the CCB was to advise the appellant of his right to have counsel present at the hearing, and the Board fully discharged that duty. I give no effect to this first ground of appeal.

VII. Second Ground of Appeal: Did the Board err by permitting the physician to amend his proposed plan of treatment during the hearing?

[34] Counsel for the patient submitted that the CCB failed to apply the principles of natural justice during the hearing by not providing the substitute decision-maker with a proper opportunity to consider the revised treatment plan put forward by Dr. Cirone during the hearing.

[35] At the start of the hearing Drago Barbulov revealed, for the first time, the existence of the 1995 POA. He acknowledged that he had found the document a couple of weeks after his father had been admitted to the hospital, but he explained that he dragged his feet on producing it until he could find the lawyer who had prepared it. When asked why he did not produce the 1995 POA at the pre-hearing conference, the appellant replied, "They would've killed me with it", referring to the medical staff.

[36] The treatment plan accompanying the Form G Application had been prepared by the treating physicians without any knowledge of the existence of the 1995 POA. When that document surfaced at the hearing one of the Board members asked Dr. Cirone what treatment plan he would propose in light of the 1995 POA. Dr. Cirone testified that he would propose a treatment plan which included the withdrawal of life support therapy, and the institution of

therapy that would concentrate on the patient's comfort, rather than on trying to cure him of the condition that the doctors felt was not curable: Transcript, Vol. 1, pp. 72 – 73.

[37] Counsel for the patient was present at the hearing. She did not request an adjournment in order to consider Dr. Cirone's new proposal. Nor did the appellant. In fact the hearing continued for a second day following the disclosure of the 1995 POA and Dr. Cirone's testimony about a new treatment proposal. Although the appellant called further witnesses on the second day, he gave no indication that he wanted to call evidence specifically dealing with the new treatment plan. In any event, it was clear from the appellant's evidence at the hearing that he would not have consented to the new treatment plan since he adamantly opposed the withdrawal of any treatment from his father at that time.

[38] Accordingly, in the absence of any requests at the hearing for an adjournment to consider the new treatment plan, and in light of the sudden way in which the existence of the 1995 POA was revealed, I conclude that the CCB provided the parties with a fair opportunity to deal with the new treatment plan. I therefore give no effect to this ground of appeal.

VIII. Third Ground of Appeal: Did the CCB err in treating the 1995 Power of Attorney for Personal Care as the expression of a prior capable wish under section 21(1) of the *HCCA*?

[39] The appellant submits that the Board erred in concluding that the 1995 POA expressed a prior capable wish of his father applicable to the circumstances for the purposes of section 21(1)1 of the *HCCA*. He also submitted that the Board ignored material evidence before it in arriving at its Decision, specifically evidence that Mr. Barbulov did not understand the meaning of the document he admittedly signed in 1995.

A. Prior capable wishes, powers of attorney for personal care, and the duties of the CCB

[40] Where the CCB is asked, on an application under section 37 of the HCCA, to determine whether a substitute decision-maker has complied with the principles for giving or refusing consent under section 21 of that Act, the Board must first inquire whether the substitute decision-maker knows of a prior capable wish expressed by the now incapable person.

[41] Section 21(1)1 of the *HCCA* requires a person who gives or refuses consent to a treatment on an incapable person's behalf to do so in accordance with a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, if the substitute decision-maker knows of such a wish. A power of attorney for personal care may express a person's wish regarding the treatment to which he would or would not consent in certain circumstances. Section 5(2) of the Act provides that wishes may be expressed in a power of attorney, in a form prescribed by the regulations, and any other written form, orally or in any other manner. Later wishes expressed while capable prevail over earlier wishes: *HCCA*, s. 5(3).

[42] The *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, contains the requirements for a valid power of attorney for personal care. Section 46 (1) provides that a person may give a written power of attorney for personal care, authorizing the person, or persons, named as attorneys to make, on the grantor's behalf, decisions concerning the grantor's personal care. The power of attorney may contain instructions with respect to the decisions the attorney is authorized to make: *SDA*, s. 46(7).

[43] Such a power of attorney need not be in any particular form: *SDA*, s. 46(8). The Act provides that a power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it, even if the grantor was incapable of personal care: *SDA*, 47(2).[1] The Act also imposes a requirement that the power of attorney for personal care be executed in the presence of, and signed by, two witnesses, although a court may declare effective a power of attorney that has not met this formality, if the court is satisfied that it is in the grantor's interest to do so: *SDA*, s. 48(1) and (4).

[44] In the present case there is no doubt that the 1995 POA met the requirements of the *SDA*, with respect to the capacity of Mr. Barbulov to give a power of attorney for personal care and the formalities of the creation of the document. However, the inquiry into whether a power of attorney expresses a person's wishes with respect to treatment, within the meaning of s. 5 of the *HCCA*, is not limited to questions of capacity and formalities. The intended effect or scope of a wish must be determined: *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.), at p. 94; *Conway v. Jacques* (2002), 59 O.R. (3d) 737 (C.A.), at para. 31. To do so the CCB must determine whether the contents of a power of attorney for personal care express the wishes of the incapable person. Fundamental to this inquiry is the need for the Board to satisfy itself, on all the evidence, that the person who made the power of attorney for personal care understood and approved of the contents of the document he or she was signing so that it can be said the document expresses the wishes of that person with respect to treatment.

[45] Counsel for the respondent referred me to the decision of the CCB in *Re G.A.*, 2007 CanLII 32891 (ON C.C.B.) in which the Board held that if a party wanted to assert that the person who signed a power of attorney for personal care did not know its contents, that party would have to adduce evidence to establish that point. I would not put the matter quite that way. I think the proper approach should draw upon principles applicable to the proof of wills: *Feeney's Canadian Law of Wills, Fourth Edition*, at §3.1. Where a person seeks to rely upon a power of attorney for personal care as the expression of a prior capable wish of an incapable person, that person must demonstrate that the grantor not only possessed the requisite capacity to make the power of attorney, but also knew and approved of the contents of the document. As in the case of wills, a presumption operates that the contents of a power of attorney were known and approved if the document had been read over to the grantor, or if the contents were otherwise brought to his or her attention. This presumption, of course, can be overborne by evidence of circumstances that the grantor did not know or approve of the contents, with the result that the

[1] The Act specifies that a person is capable of giving a power of attorney for personal care if the person has the ability to understand whether the proposed attorney has a genuine concern for the persons welfare, and appreciates that the person may need to have the proposed attorney make decisions for the person: *SDA*, s. 47(1).

person advancing the power of attorney would need to satisfy the tribunal or court of the grantor's knowledge and approval of contents.

[46] In *Re G.A.* the Board went on to state, at page 14 of its reasons:

> While, in law, it is occasionally possible for a person to escape contractual responsibility on the basis that he or she did not know what they were signing, courts have always been cautious about letting that happen. People are presumed to be responsible for their actions and know to what they've agreed.

In my respectful view, that puts the matter too high, and conflates powers of attorney for personal care with commercial contracts when, in fact, they are different types of documents. By signing a commercial contract one person makes promises to another, which the latter can call the other to perform. Courts, indeed, are reluctant to release a person from such written promises simply on the person's assertion that he did not really understand the bargain he was making.

[47] Powers of attorney for personal care are a different creature. The grantor is not making a bargain with the grantee. Rather, the grantor is selecting a person to act in his stead and is expressing, through the document, the nature of the care he wishes to receive in the event that certain circumstances arise. Under a power of attorney for personal care the grantee does not receive any benefit enforceable against the grantor, as does the promisee under a commercial contract. Instead, the grantee is requested to perform a duty for the grantor and, if he accepts the grant, the grantee must comply with the expressed wishes of the grantor.

[48] So, where the CCB is faced with a power of attorney for personal care, it should not approach the inquiry under section 21(1)1 of the *HCCA* on the basis of whether the grantor is trying to "escape contractual responsibility"; to do so would be an error. Instead, the inquiry must always remain focused on the task mandated by the statute – does this document express the capable wishes of the person with respect to treatment in particular circumstances? To conclude that the document does, the CCB must be satisfied on the evidence that the grantor understood what he was doing through the document – i.e. he knew and approved of its contents and effects. If he or she did not, then I do not see how one could say that the power of attorney for personal care expressed the wishes of the person with respect to treatment, as required by section 5 of the *HCCA*.

B. The evidence before the Board

[49] Three family members testified at the hearing: Drago Barbulov, Mrs. Bosiljka Barbulov, and Jasmina Agius, the daughter. Although Ms. Agius was not present when the 1995 POA was signed, she did testify about her father's facility in English.

B.1 Drago Barbulov

[50] Drago Barbulov testified that his father, his mother, and himself went to the office of Paul Huston, a lawyer, for Stadoje Barbulov to sign his will. When they were there Mr. Huston

brought out the POA. Drago Barbulov said that it had been "printed out of a database". Drago Barbulov testified that his father did not read the POA, nor did he discuss it with the lawyer. The appellant did not translate the POA into Serbian for his father, but they discussed who the persons would be who decided "these things": Transcript, Vol. I, p. 143. After Drago Barbulov read the document he commented to the lawyer that the POA contained a lot of things his father had not asked for, and he, Drago, objected to some of the details. He asked the lawyer that in the event any of the circumstances came about, who would decide the things set out in the POA? According to the appellant, Mr. Huston said that Drago Barbulov and Mrs. Barbulov would decide what was to be done.

[51] The appellant maintained that the only issue discussed with the lawyer was that he and his mother would have the authority to decide what was in Stadoje Barbulov's best interests. Drago Barbulov testified that his father "was comfortable with that because – well, that's the way he wanted it": Transcript, Vol. I, p. 145.

[52] Regarding his father's ability to understand the 1995 POA, the appellant had this exchange with counsel for his father:

> Ms. Tucker: Would [your father] understand the legal import of the phrases in the power of attorney?
>
> Drago Barbulov: No.
>
> Ms. Tucker: Were they explained to him by the lawyer?
>
> Drago Barbulov: From – from what I gather, the understanding was if he has no rational existence then he doesn't want to be on life support, but the issue is the rational existence. I still think he has it. (Transcript, Vol. I, pp. 152 - 153)

[53] Drago Barbulov testified that before the hearing he was able to locate Mr. Huston and talk with him. He said Mr. Huston recalled Drago Barbulov asking the question about who would decide matters under the POA, and he remembered telling them that he and his mother would.

[54] Stadoje Barbulov was educated in Serbia, where he completed Grade 10. He did not study English in school. He came to Canada when he was 37 years old. He did not take any English courses after he arrived. When asked whether his father understood English, Drago Barbulov testified:

> "How well does he understand English? Basically this well, if I try tell him something in English he'd look at me like I had three heads. He didn't prefer to communicate in the English language and he maintained that we speak Serbian at home and when he had dealings – like when he was going into retirement, when anything came up, he would ask me to go with him and translate. So his proficiency in English is such that in any momentous occasion he would need assistance." (T, I, 142-3)

Drago Barbulov also stated that his father was not able to read the POA "because I know that instrumentally he's incapable of putting these sentences together" and he would not understand the legal meaning of the phrases in the POA (Transcript, Vol. I, p. 152); "he couldn't frame the sentences or the clauses": Transcript, Vol. I, p. 164. The appellant stated that when working as a custodian at Bell, his father spoke some English, but:

> His English was very incidental. The guys that he worked with were other guys that were immigrants here that didn't have much education that had to pick up a shovel, a broom, a hammer, or whatever…They all had their baseball English going on amongst themselves as they were working. (T, I, 168)

B.2 Mrs. Barbulov

[55] Mrs. Barbulov acknowledged that she went to Mr. Huston's office with her husband and son. They only went once. She recalled Mr. Huston saying that she and her son would decide things under the POA: Transcript, Vol. II, p. 8. She did not talk with her husband about the POA. When asked whether Mr. Huston read the POA to her husband, she replied that "he read something", but it was so long ago she had forgotten and did not know whether "he read it one paper or three": Transcript, Vol. II, p. 20.

B.3 Jasmina Agius

[56] Ms. Agius had not been aware of the existence of the 1995 POA. In her testimony she offered two observations about her father's understanding of English. First, she testified: "I know for a fact that my father, first of all, couldn't even read that document and didn't write the document": Transcript, Vol. II, p. 46. Then later, this exchange took place:

> Board Member Beales: Can your father read English?
>
> Ms. Agius: To a degree.
>
> Board Member Beales: Somewhat?
>
> Ms. Agius: Well, yeah, somewhat. I mean, if the flyers came in, or – you know, but basic things. But any like full document or full paper he would've had myself read if I went over or my brother would take care of that for him…He could tell you where the sales were. (Transcript, Vol. II, pp. 55-56)

C. The Board's treatment of the evidence in its Decision

[57] How did the Board deal with this evidence regarding the circumstances surrounding the execution of the 1995 POA and Mr. Barbulov's ability to understand its contents? The CCB's treatment of the issue was contained in the following passages on pages 12 and 13 of its Reasons:

> There was a Power of Attorney for Personal Care (P of A) that was signed by B on February 28, 1995 with the knowledge and participation of Mrs. B and D, the attorneys named by B. The evidence was that Mrs. B and D recalled the setting and Mr. Huston, the lawyer who drew the document. D gave evidence that he contacted Mr. Huston after a pre-hearing in this matter on December 19, 2008 and Mr. Huston verbally confirmed his recollection of that document being delivered and signed.
>
> …
>
> In his evidence, D said that he was present for the signing of the power of attorney. He said that his father did not read it. He said that he read it and explained it to his father. He said that he instructed his father not to sign it but his father signed it anyhow. Ms. Tucker asked Mrs. B if she recalled whether the lawyer read the power of attorney to her husband before he signed it. Mrs. B recalled that the lawyer read something to her husband but she could not remember whether it was one page or three pages. B's daughter J, in her evidence, said that Mr. Huston was also her lawyer. She said that her father trusted him.

[58] These reasons pose three difficulties. First, I see no evidence in the record to support the Board's conclusion that Drago Barbulov explained the 1995 POA to his father and instructed his father not to sign it, but his father did so anyhow. In response to a question from Board Member Max the appellant specifically denied discussing the 1995 POA with his father: Transcript, Vol. I, p. 159. The appellant testified that he read the POA and offered his father advice about signing it only after he had understood from Mr. Huston that his mother and himself would decide all matters on behalf of his father: Transcript, Vol. I, p. 133. I see no evidence in the record that would support the Board's finding that Drago Barbulov explained the POA to his father; that critical finding of fact was unreasonable.

[59] Second, the Board recited Drago Barbulov's evidence as being that he had contacted Mr. Huston who had verbally confirmed his recollection of the document being delivered and signed. In fact the appellant's evidence was that he had contacted Mr. Huston who recalled telling them that the wife and son would have the power to decide what would happen. In any event, it was not in dispute that the patient had signed the 1995 POA, so the Board's misdescription of the evidence is not of great significance.

[60] Finally, in its Reasons the CCB did not indicate what consideration it had given to the evidence from Jasmina Agius and the appellant about their father's limited ability to read English, especially English of the sophistication and complexity contained in the 1995 POA. That omission is a most significant one. As I stated above, when it engages in an analysis under section 21(1)1 of the *HCCA*, the Board must be satisfied that a POA presented to it in fact

expresses the prior capable wishes of the person who is now incapable. In this case Mr. Barbulov's son and daughter both testified that their father could not comprehend language of the complexity found in the 1995 POA. The failure of the Board to consider that evidence, as indicated by its omission from its Reasons, constitutes a material flaw in its reasoning process, and a failure to ensure that its Reasons meet the requirements of transparency and intelligibility under the reasonableness standard of review.

D. Conclusion

[61] In my view, it was unreasonable for the CCB to conclude, from the whole of the evidence before it, that the 1995 POA signed by Stadoje Barbulov expressed his prior capable wishes applicable to the circumstances. The evidence showed that Mr. Barbulov went to his lawyer's office to sign a will; had given no prior instructions about a POA; did not read the POA; had limited command of written English; did not have the POA translated to him; his son read the POA, but not to his father; the son had a discussion with the lawyer and formed the understanding that decisions would be left to his mother and himself; and the patient then signed the document. On that evidence, in the specific circumstances of this case, I conclude that it was unreasonable for the CCB to conclude that the 1995 POA expressed the wishes of the patient for the purposes of section 21(1)1 of the *HCCA.* Such a conclusion, in my view, did not fall within the range of possible, acceptable outcomes which were defensible in respect of the facts of this case.

[62] In reaching this conclusion I fully appreciate the frustration felt by the Board about the late disclosure of the 1995 POA by Drago Barbulov. That said, the issue before the CCB was not whether the appellant had complied with his obligations to produce any known prior wish, but whether the 1995 POA expressed a prior capable wish of Stadoje Barbulov applicable in the circumstances.

IX. Fourth Ground of Appeal: Did the CCB err in concluding that Drago Barbulov, as substitute decision-maker, had failed to give or refuse consent to treatment in accordance with the principles contained in section 21 of the *HCCA*?

A. Appellant's position

[63] The appellant's counsel submitted that in the event I found that the Board erred in concluding that the 1995 POA expressed Mr. Barbulov's prior capable wishes, then the entire Order should fall. I disagree. A determination under section 21 of the *HCCA* as to whether a substitute decision-maker has complied with the principles for giving consent involves a two-step inquiry: (i) did the incapable person express a prior capable wish applicable to the circumstances; and (ii) if he did not, did the substitute decision-maker act in the patient's best interests? The CCB also addressed the second question in its Reasons, and I therefore turn to that portion of its Reasons to see whether it was reasonable.

B. Section 21(2) of the *HCCA*

[64] Section 21 of the HCCA deals with the consideration of the incapable person's best interests as follows:

> 21(1) A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:
>
> …
>
> 2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.
>
> (2) In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,
>
> (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;
>
> (b) any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and
>
> (c) the following factors:
>
> 1. Whether the treatment is likely to,
>
> i. improve the incapable person's condition or well-being,
>
> ii. prevent the incapable person's condition or well-being from deteriorating, or
>
> iii. 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 incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment.
>
> 3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.
>
> 4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

[65] This statutory regime tries to respect an incapable person's well-being and dignity where that person's consent or refusal to treatment cannot be established: *M. (A.) v. Benes* (1999), 46 O.R. (3d) 271 (C.A.), at para. 42.

C. The Board's decision on the best interests of Stadoje Barbulov

[66] In its Reasons the CCB dealt with the issue of Mr. Barbulov's best interests under section 21(2) of the *HCCA* as follows:

> Dr. Cirone's evidence was clear, cogent and compelling.
>
> In considering best interests the panel had to consider the risks and benefits of the treatment proposed by Dr. Cirone. His medical evidence provided us with insight into what would likely happen to B. His future would be deterioration. His brain function would not improve. His respiratory capacity would diminish because of recurrent pneumonia. After several episodes of pneumonia there was a likely possibility of encountering a treatment resistant organism referred to as a "superbug" which would be untreatable with antibiotics. There would be continued renal failure, which would require constant dialysis. There was no evidence of likely improvement in any of those areas.
>
> Dr. Cirone's evidence was consistent that the medical team could not determine adequate cognitive functioning and that it would not likely improve. This view was in opposition to that of D and the other family members who believed that some of his utterances and movements were evidence of higher cognitive functioning. That view was in contradiction of four intensivists and two neurologists. In response to a direct question, Dr. Cirone assured the panel of the specialized expertise of B's treating caregivers. We preferred the evidence of Dr. Cirone.
>
> On repeated questioning concerning the existence of a P of A by the hospital, D did not acknowledge in (sic) existence of a P of A and coincidentally consented to the introduction of treatments prohibited in the P of A, while acting as a substitute decision-maker. D said he hated doctors, thought they were dangerous and didn't trust them. D said that he didn't believe Dr. Cirone. D said that he knew that Dr. Cirone was wrong. D based his opinion on his own review of information that he obtained from the Internet. We did not agree with D.
>
> The family was adamant that they wished B to live by any artificial means in the hope that there would be recovery. They could not acknowledge the predictive likelihood that B would not recover, as expressed by Dr. Cirone and the other treating physicians. It was clear that the family members remained emotionally attached to B. We recognized the emotionality of their objections and their wish for natural death. In our view, their wishes were not realistic.
>
> Ms. Tucker, in her submissions, asked the panel to consider a further wish of B, contained in paragraph 4(f) of his P of A, that he be allowed to die at home rather than in

> an institution. We could not conceptualize how B could be taken home given the treatment that he was receiving on the date of the hearing.
>
> It was clear to us, having taken into consideration all of the evidence, that D was not acting in accordance with the best interests of B as set at it in the section 21 criteria.

D. Review of the Board's Reasons

[67] Given my conclusion that the Board's finding that the 1995 POA expressed a prior capable wish of Mr. Barbulov was unreasonable, the review of the CCB's decision on the patient's best interests must put aside any reliance placed by the tribunal on the 1995 POA and focus, instead, on whether the balance of its Reasons on the best interests issue were reasonably supportable. For the reasons set out below, I conclude that they were reasonable and supported by the evidence. Let me review the Reasons against the criteria set out in section 21(2) of the *HCCA*.

D.1 Treatment and Mr. Barbulov's condition or well-being: s. 21(2)(c)

(a) Evidence at the hearing

[68] The CCB concluded the evidence showed that Mr. Barbulov's condition would deteriorate in the future, his brain function would not improve, his respiratory capacity would diminish, there would be continued renal failure, and that he would not recover. In short, Mr. Barbulov is dying, although the Board did not use that term.

[69] The CCB carefully reviewed the medical evidence before it. Dr. Cirone described the treating team's assessment of Mr. Barbulov's condition. No contrary medical evidence was led before the CCB. The CCB accepted Dr. Cirone's evidence, which it summarized in the following passages of its reasons:

> Dr. Cirone said that all members of the team, including four intensive care physicians and two neurologists agreed that B's level of cognitive function was severely impaired. He couldn't hear and there was no indication that he understood anything. He was not able to communicate or participate in any interaction and there was no medical cure for the loss of his cognitive abilities. A panel member asked Dr. Cirone the meaning of "peg feeds" as described in the current plan of treatment on page 2 of Exhibit 1. Dr. Cirone explained that it was tube feeding that went directly through the abdominal wall to the stomach. He said that nasal gastric tubes are uncomfortable, and for a prolonged use, the physicians recommended abdominal feeding.
>
> Dr. Cirone described the functioning of these organs at the time of the hearing. He said that the brain essentially had two major components. One component was the cerebral cortex, which handled complex functioning, including consciousness, motor activity, sensations and emotions. The second component was the brain stem, which he said

looked after automatic functions that a person did not have to think about including breathing and the beating of one's heart. Dr. Cirone said that B was severely disabled in the higher function. He said that as a consequence of his neurologic function B was subject to numerous and recurrent pneumonias which required a ventilator and tracheotomy. He was removed from the ventilator, but required ongoing suctioning of secretion. At the time of the hearing he was on the ventilator and was getting support from that machine in the range of 30 to 50%. Dr. Cirone said that without the ventilator, B would not be able to sustain himself for a long period of time. He said that up to 2 1/2 weeks prior to the hearing, B made his own urine. At the time of the hearing his kidneys did not function and he had replacement therapy. Without the benefit of a 24-hour dialysis machine his kidneys would not work. He said that at the time of B' s kidney failure, he was getting medications to remove excess fluid because he was quite swollen and it was hurting his breathing. Dr. Cirone said that from the medication B developed pneumonia, septic shock and dehydration, which likely caused the kidney failure.

Dr. Cirone said that Dr. Vanek prepared the clinical summary prior to Christmas 2008. He said that since that date B had deteriorated further. B had renal failure and had pneumonia again. Dr. Cirone said that since admission to hospital in August of 2008, B was either in an intensive care unit (ICU) or a high dependency unit (HDU). He explained that HDU was a unit midway between a patient being on the floor and being in ICU. There was one nurse for a maximum of two patients and the level of care was higher than on a regular ward.

To a panel member's question, Dr. Cirone said that B was not receiving any treatment that would impair his level of consciousness or his capacity to communicate. He said that B would not improve, but would deteriorate further.

To questions from Ms. Tucker, Dr. Cirone said that B was not conscious, but he opened his eyes occasionally. He said that B's breathing was not stable, and that suctioning took place every 2 or 3 hours. He said that if B was off the ventilator, he would suffer respiratory arrest and cardiac arrest probably within 24 to 48 hours. He said that if B was off the dialysis machine he would die within days. He said that if they withdrew the feeding tube, B would eventually waste away because he could not consume any food by mouth as he had no adequate swallowing reflex.

Dr. Cirone said that in light of the P of A the treatment plan would change from the plan proposed in Exhibit 1. He said that the treatment should include withdrawal of life-support therapy and institution of treatment that would focus on B's comfort rather than to try to cure him of conditions that they did not believe were curable. He said that B would receive sedative medication to ensure no discomfort during withdrawal of the life-support. In his evidence and submissions, Dr. Cirone said that the step-by-step process of termination of life support would start with the removal of ventilative support with no reinstitution of the ventilator. In his submissions, he indicated that B's demise would occur without the removal of other life support. He said that if they withdrew dialysis

support, B's heart would stop within days. He said that it was not necessary to withhold hydration or nutrition.

[70] In its Reasons the Board also reviewed at length the evidence given by family members about responses by Mr. Barbulov which they had observed over the months. The CCB concluded that the family members were misguided by their hope of a recovery by Mr. Barbulov. That conclusion was reasonable on the evidence.

(b) Fresh evidence motion

[71] At the hearing of the appeal counsel for Dr. Cirone sought leave to introduce a written update on Mr. Barbulov's clinical condition. Counsel for Drago Barbulov objected to its introduction on the basis that Dr. Cirone had not sworn the document, nor had there been any opportunity to cross-examine him on it. Counsel for Stadoje Barbulov had no objection to the court reviewing the clinical update.

[72] In the result, I ruled that I would accept fresh evidence of Mr. Barbulov's clinical condition from Dr. Cirone, but on terms: *HCCA*, s. 80(9). I did so because the evidence was not available at the hearing, consisting as it did of a recent clinical update. As well, in view of the broad powers available to an appellate court under section 80(10) of the *HCCA* and the inclusion of the condition of the incapable person as a factor in considering Mr. Barbulov's best interests under section 21(2) of the HCCA, I determined that the evidence was relevant to issues on this appeal. I permitted Dr. Cirone to give evidence about Mr. Barbulov's current condition, and he was cross-examined by counsel for Drago Barbulov and Mr. Barbulov. I also ruled that Drago Barbulov could present evidence regarding his observations about his father's condition since the date of the CCB hearing, but he elected not to do so.

(c) Fresh evidence about Mr. Barbulov's current condition

Neurologic condition

[73] Dr. Cirone testified that since the hearing there has not been any improvement in Mr. Barbulov's overall neurologic functioning, and over the past few weeks he may have had a slight deterioration in his responses. Dr. Cirone confirmed that Mr. Barbulov was not on medication that would dampen his responses.

[74] Dr. Cirone consulted with Dr. Alex Birnbaum, one of Mr. Barbulov's attending neurologists, who concurred that Mr. Barbulov might very well be worse. Dr. Birnbaum is of the view that Mr. Barbulov remains in a "persistent vegetative state", and his extremities are becoming progressively more contracted and rigid. Another consulting neurologist, Dr. Martin Chepesiuk, whose assessment report was produced, also expressed the opinion that Mr. Barbulov remained in a "persistent vegetative state" and that no hope for a meaningful neurologic recovery existed. Dr. Chepesiuk examined Mr. Barbulov on March 4, 2009, in the presence of a Serbian translator and there did not appear to be any conscious awareness by Mr. Barbulov, nor any comprehension of the commands that were given to him during the examination. Dr. Chepesiuk remained of the opinion that Mr. Barbulov is in a chronic vegetative state and that there is no hope for any additional neurologic recovery.

[75] At the Board hearing Dr. Cirone testified that he did not think Mr. Barbulov was in a "persistent vegetative state". During his evidence on the appeal he stated that he now thought Mr. Barbulov was in such a state at the time of the hearing. When asked what had changed his opinion, Dr. Cirone testified that he now had a better understanding of the duration a person must continue in that kind of neurologic state before he could be so diagnosed. He observed that at the time of the hearing two neurologists were of the opinion that Mr. Barbulov was in such a neurologic state.

[76] Dr. Cirone testified that the term "persistent vegetative state" describes a diagnosis where a patient demonstrates severe cognitive and neurologic impairment with no improvement over time. While I recognize that "persistent vegetative state" is a diagnosis used by the medical profession, I must express some discomfort in using a term that equates the condition of a human being with that of a thing. As the House of Lords stated in *Airedale NHS Trust v. Bland*, [1993] 1 All E.R. 821, at p. 846, a patient diagnosed as being in a persistent vegetative state "remains a person and not an object of concern". To maintain that clear distinction, I prefer simply to refer hereafter to Mr. Barbulov's severely impaired neurologic condition, rather than to the medical diagnosis of "persistent vegetative state".

[77] In his assessment report Dr. Chepesiuk noted that there had been case reports of improvement in coma patients treated with stimulant drugs. He recommended trying Mr. Barbulov on levodopa to see if it led to any improvement; he observed that Ritalin could also be tried. Dr. Chepesiuk concluded by noting that in most persons who show some improvement after such a prolonged time after head trauma or after hypoxic encephalopathic injuries, such as that suffered by Mr. Barbulov, the prognosis is uniformly dismal. Dr. Cirone confirmed that levodopa had been administered to Mr. Barbulov, but with no improvement. Levodopa is regarded as the gold standard treatment for Parkinson's disease, and it is unusual for a person not to respond. Dr. Cirone advised that Mr. Barbulov had not been tried on Ritalin.

Ventilation

[78] The combination of Mr. Barbulov's neurologic status and recurring pneumonias has necessitated ventilation. Mr. Barbulov remains completely dependent on a ventilator, and recurrent attempts to wean him from ventilatory support have failed. Although Mr. Barbulov makes spontaneous efforts to breathe, without the help of the ventilator his breaths would not be sufficient to oxygenate the blood. Mr. Barbulov's lungs were damaged from pneumonias and he cannot live without the ventilator. Accordingly, the likelihood of removing Mr. Barbulov off the ventilator is getting smaller.

Renal function, blood pressure and pneumonias

[79] Dr. Cirone testified that Mr. Barbulov's kidney function had improved and for the last 10 days he has not required regular hemodialysis. The doctor anticipated that Mr. Barbulov would not need hemodialysis in the short term, but in his view Mr. Barbulov remained at high risk of a recurrence of his acute renal failure. Presently Mr. Barbulov does not require any medications to support his blood pressure, and his diabetes is stable, with good blood sugar control on insulin.

[80] Mr. Barbulov recently completed a course of antibiotics to treat a resistant form of pneumonia. Dr. Cirone anticipated that Mr. Barbulov would continue to have recurrent pneumonia and eventually the bacteria would be resistant to all currently available antibiotics. Mr. Barbulov does not appear to have had any recent seizures or major bleeding episodes.

Nutrition

[81] Mr. Barbulov continues to accept nutrition through a peg feed through his abdominal wall. Dr. Cirone testified that although there had been a period of time when Mr. Barbulov was experiencing some difficulty with his peg feeds, medication helped in moving his bowels and there had been no trouble feeding Mr. Barbulov in the last several weeks.

Prognosis

[82] Dr. Cirone testified that it is the opinion of the attending physicians in the ICU that Mr. Barbulov's condition will continue to deteriorate despite ongoing therapies, and that these therapies will not reduce the rate of his deterioration. In his view, Mr. Barbulov is at very high risk of ongoing complications and harm from these therapies, with no reasonable expectation of benefit from them.

[83] Dr. Cirone testified that Mr. Barbulov's prognosis for recovery from his severely impaired neurologic condition is exceptionally poor, if not impossible. As to ventilation, he testified that Mr. Barbulov is rapidly deteriorating and the chance of weaning him from the ventilator is very slim, if not impossible.

(d) Summary on Fresh Evidence

[84] Although Dr. Cirone's more recent evidence disclosed that the function of Mr. Barbulov's kidneys had improved, the evidence regarding Mr. Barbulov's overall condition and well-being reinforced that heard by the Board – Mr. Barbulov suffers from severe neurologic impairment and he cannot exist without the artificial support of a ventilator. The evidence shows that his condition is irreversible and fatal; in short, Mr. Barbulov is dying. Medical treatment cannot make him better and, as Dr. Cirone recently stated, Mr. Barbulov stands at high risk of complications and harm from his on-going treatments.

(e) Case law on "condition and well-being"

[85] Counsel for the respondent drew my attention to two Ontario cases which have considered the issue of the withdrawal of life-support. Neither involved a decision of the CCB under section 37 of the *HCCA*. In the first case, *London Health Sciences Centre v. R.K. (Guardian ad litem of)*, [1997] O.J. No. 4128 (S.C.J.), the patient's substitute decision-maker ultimately agreed to the withdrawal of artificial life support, so the application became moot. However, in *obiter*, McDermid J. reviewed whether the proposed treatment plan was in the patient's best interests by inquiring whether any treatment could improve the patient's condition, whether there was any hope for improvement, and whether the patient's condition would continue to deteriorate: para. 10.

[86] The second case, *Janzen v. Janzen*, [2002] O.J. No. 450 (S.C.J.), involved competing applications by family members to be appointed guardians of the person of a severely brain-damaged man who could not survive if ventilator support was withdrawn. The family members differed on whether a palliative care treatment plan should be put in place, or whether all possible steps should be taken to prolong the person's life. Although the applications were brought under the *Substitute Decisions Act*, in considering the merits of the competing guardianship plans the court drew on the best interest criteria found in section 21(2) of the *HCCA* to inform its assessment of the contending guardianship applications. As in the *R.K.* case, the court considered the medical evidence regarding the prospects for recovery, whether treatment would improve the patient's condition, or whether medical interventions might harm his well-being.

[87] In the course of its reasons the court in *Janzen* commented that the concept of "well-being" in section 21(2) of the *HCCA* was "a very broad concept which encompasses many considerations, including quality of life". With respect, I question whether that is so. The phrase "quality of life" does not occur in section 21 of the *HCCA*, whereas it is found in the Act's provisions dealing with best interests criteria for the purposes of making decisions for incapable persons about the admission to care facilities (s. 42(2)) and personal assistance services (s. 59(2)). That the Legislature omitted the concept of "quality of life" from Part II of the *HCCA* dealing with "treatment" may very well signal that it was alive to the possible dangers associated with the use of that term, especially in the context of end-of-life treatment. Dignity attaches to a person from the beginning through to the end of his or her physical existence, irrespective of a person's ability to act on the various capacities he or she possesses as a human being. Dignity surrounds the unresponsive, dying person, just as it does the active one. To the extent that one equates the notion of "quality of life" with one's ability to pursue an "active life", one risks diminishing the innate dignity of those whose ability to act on their human capacities may be impaired through temporary illness, handicap, or the approach of death. A person at death's door possesses a dignity as robust and worthy of protection as the active one. The difference between a healthy, self-conscious human being and an incapacitated, or impaired, human being is not one of kind, but only one of degree. To fold the concept of "quality of life" into the statutory concept of "well-being" in section 21(2) of the *HCCA* risks losing sight of this innate dignity when considering the appropriateness of treatment plans at the end of life.

D.2 Mr. Barbulov's values and beliefs: s. 21(2)(a)

[88] The Board did not comment in its Reasons on Mr. Barbulov's values and beliefs because no evidence was placed before it on that issue. Mrs. Barbulov testified that her husband adheres to the Eastern Orthodox faith, but no evidence was led as to how that would shape his values or beliefs applicable to the circumstances.

D.3 Mr. Barbulov's wishes: s. 21(2)(b)

[89] Similarly, there was no evidence before the CCB about any wishes expressed by Mr. Barbulov with respect to treatment that did not constitute "prior capable wishes" within the meaning of section 21(1)1 of the *HCCA*.

[90] Although Drago Barbulov's testimony on the issue was difficult to follow, as I read his evidence he stated that his father had not engaged in any specific discussion with him about his wishes, save that he wanted his son and wife to decide what would be done: Transcript, Vol. I, pp. 144 – 147. Mrs. Barbulov testified that she did not know what her husband's understanding was about life support or what to do should he become ill because they had not talked about it: Transcript, Vol. II, pp. 22 and 26. Jasmina Agius said she had never discussed with her father his wishes about "do not resuscitate" orders or what should happen in the event he became critically ill: Transcript, Vol. II, pp. 44 and 47-48.

E. Conclusion about CCB Decision on "best interests"

[91] Drago Barbulov, as his father's substitute decision-maker, refused to consent to the treatment plan proposed by the physicians' team in the clinical summary accompanying the Form G Application, or to the revised plan put forward at the hearing by Dr. Cirone after learning about the 1995 POA. Instead, the appellant insisted that his father continue to receive full support as his treatment. The CCB found that the appellant's actions as substitute decision-maker were not in the best interests of his father. That conclusion, I find, was reasonable. Even when one removes from the section 21(2) analysis any consideration of the 1995 POA, a significant body of evidence remained to support, as reasonable, the remainder of the Board's reasoning about Mr. Barbulov's best interests. The CCB's conclusion that Drago Barbulov had failed to act in accordance with the best interests of his father, Stadoje Barbulov, in giving or refusing consent to treatment was a reasonable one. I see no reason to interfere with that conclusion by the Board.

[92] By contrast, the appellant's main point that, as his father's substitute decision-maker, he, and he alone, can decide what is in his father's best interests is not tenable at law in face of the criteria set out in section 21 of the *HCCA*: *M. (A.) v. Benes* (1999), 46 O.R. (3d) 271 (C.A.), at paras. 42 and 46.

X. Disposition of this appeal

[93] Although I have found that the Board's decision that the 1995 POA expressed the prior capable wishes of Stadoje Barbulov was not reasonable, I have concluded that the Board reasonably decided that Drago Barbulov, as his father's substitute decision-maker, had failed to act in accordance with the best interests of his father in giving or refusing consent to treatment. Accordingly, I dismiss the appeal.

[94] However, pursuant to section 80(10) of the *HCCA*, I vary the Board's order. In its Decision the Board directed Drago Barbulov to comply with the requests contained in the 1995 POA. In light of my decision on the third ground of appeal, that part of the Decision cannot stand.

[95] Evidence of three treatment plans was before the CCB: (i) the full care plan implemented following Mr. Barbulov's admission to St. Joseph's; (ii) the treatment plan contained in the clinical summary attached to the Form G Application; and, (iii) the plan proposed by Dr. Cirone at the hearing after learning of the 1995 POA. Given my decision on the CCB's finding about

the 1995 POA, the last plan cannot be said, on the evidence before me, to be in the best interests of Stadoje Barbulov. Instead, the treatment plan contained in the clinical summary attached to the Form G Application represents the treatment plan in the evidence which is most consistent with the best interests of Stadoje Barbulov in light of his condition.

[96] That treatment plan is as follows:

> Mr. Barbulov's treatment team shall provide him with full care, but that care will not include cardio resuscitation (CPR), pressure support or dialysis. As well, the team may remove Mr. Barbulov from the ventilator, if it is safe to do so, and there will be no re-ventilation if he deteriorates.

Of course, the treatment team should administer such treatment as required to maintain Mr. Barbulov's comfort.

[97] Pursuant to the order of D. Wilson, J. made February 6, 2009, the Public Guardian and Trustee was appointed as Mr. Barbulov's interim substitute decision-maker pending the hearing of the appeal. On March 16, 2009, I continued her order until the disposition of the appeal. I restore Drago Barbulov as his father's substitute decision-maker.

[98] I direct Drago Barbulov to give or refuse consent to treatment for his father in accordance with the treatment plan described in paragraph 96 of this decision. If he does not do so by 5 p.m. on Tuesday, April 14, 2009, he will be deemed not to have met the requirements of s. 20(2) of the *HCCA.* In that event, the Public Guardian and Trustee shall act as the substitute decision-maker for Stadoje Barbulov, and I direct that the PGT give or refuse consent to treatment for Mr. Barbulov in accordance with the treatment plan described in paragraph 96 above no later than 12 noon on Thursday, April 16, 2009. Thereafter, subject to any further order of this court, the PGT shall consent to any further treatments, or changes to treatment, in accordance with the best interests of Stadoje Barbulov as determined in accordance with the principles contained in section 21(2) of the *HCCA.*

[99] In the circumstances of this case I would be inclined not to award any costs of this appeal. If, however, any party wishes to make submissions on costs, they should contact my office and I will establish a timetable for the filing of written cost submissions.

D. M. Brown J.

DATE: April 9, 2009