Consent and Capacity Board | Commission du consentement et de la capacité | Ontario

17-3261-01
17-3261-02

IN THE MATTER OF
The ***Health Care Consent Act***
S.O. 1996 c.2, Sch. A
as amended

AND IN THE MATTER OF
NS
A PATIENT AT
WILLIAM OSLER HEALTH SYSTEM - BRAMPTON CIVIC HOSPITAL
BRAMPTON, ONTARIO

REASONS FOR RULING

PURPOSE OF THE HEARING

NS was a patient at William Osler Health System – Brampton Civic Hospital (the "Hospital"). Dr. Andrew Healey had commenced a Form G Application to the Board under section 37(1) of the *Health Care Consent Act* for a determination as to whether or not the substitute decision-maker for NS, DD, had complied with section 21 of the Act, the principles of substitute decision-making when making a decision about his proposed treatment plan (the "Healey Application"). DD brought a motion seeking an Order dismissing the Healey Application on the basis that it was an abuse of process (the "Motion"). The Board convened to hear and make a determination in respect of the Motion.

DATES OF THE HEARING, ORDER/ENDORSEMENT AND REASONS

The hearing of the Motion took place on November 8, 2017 via teleconference. The Board also released its Order/Endorsement and Amended Order/Endorsement (the "Ruling") on November 8, 2017. The Ruling provided that reasons would be provided within the timelines described in the *Health Care Consent Act* for Reasons for Decision, which Reasons for Ruling (contained in this document) were released on November 14, 2017.

LEGISLATION CONSIDERED

Statutory Powers Procedure Act, RSO 1990, c S.22 ("SPPA"), including section 23
Health Care Consent Act, SO 1996, c2 Sched A ("HCCA"), including sections 1, 2, 11, 13, 21, 22, 37, and 37.1.

PARTIES

NS, the incapable person
Dr. Andrew Healey, the responding party and health practitioner who proposed treatment
DD, the moving party and substitute decision-maker

None of the parties attended the hearing of this Motion.

PANEL MEMBERS

Krista Bulmer, senior lawyer member

PRELIMINARY MATTERS

The presiding member set out the materials before the Board for the purposes of the Motion that were not made Exhibits as follows: the moving party's Notice of Motion dated October 27, 2017, the moving party's Book of Authorities dated October 30, 2017, the Responding Factum of Dr. Andrew Healey dated November 1, 2017 and the Written Submissions on Behalf of NS Re: Motion dated November 6, 2017, as well as the oral submissions of counsel to the parties. The

Motion Record of Dr. Healey dated November 1, 2017 was the only material before the Board containing evidence and it was made an Exhibit as set out below. These above-mentioned materials together with the Exhibit are referred to herein collectively as the "Motion Materials."

Ms Szigeti noted in her Written Submissions that she remained uninstructed as a result of the medical condition of NS and therefore viewed her role as akin to that of *amicus curiae* to the Board. Due to the lack of instructions, she said she was unable to take a position on the Motion but made submissions in an effort to ensure the Board would not be led into legal error and to highlight evidence and submissions of both the moving and responding parties to the extent they may assist the Board in ruling on the Motion.

THE EVIDENCE

The evidence on the Motion consisted of the following documentary Exhibits:

1. Motion Record of Dr. Healey dated November 1, 2017, attaching the Affidavit of Leah Ostler, sworn November 1, 2017 and the following Exhibits:
    - A Dr. Miletin's Form G Application dated August 10, 2017
    - B Dr. Hayani's Form G Application dated August 24, 2017
    - C Order of Dr. Miletin
    - D Consult Notes from Dr. Tullio, Dr. Dodig and Dr. Best
    - E Note from Intensivist Case Conference held on August 28, 2017
    - F The Consent and Capacity Board's Order Dismissing Applications, dated September 23, 2017
    - G The Consent and Capacity Board's Reasons for Decision dated September 29, 2017
    - H Physicians' notes from meeting on September 23, 2017.
    - I Letter from Dr. Trop to DD in English and Punjabi dated October 6, 2017
    - J Dr. Healey's Form G Application dated October 11, 2017
    - K Notice of Appeal of Dr. Omar Hayani , dated September 29, 2017
    - L Notice of Abandonment of Dr. Omar Hayani, dated October 23, 2017

THE LAW

Jurisdiction

The Board has the jurisdiction to consider whether some or all of an application ought to be dismissed based on abuse of process pursuant to section 23(1) of the SPPA, which provides that a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Form G

The purposes of the HCCA are set out in section 1 as follows:

(a) to provide rules with respect to consent to treatment that apply consistently in all settings;

(b) to facilitate treatment, admission to care facilities, and personal assistance services, for persons lacking the capacity to make decisions about such matters;

(c) to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services by,

(i) allowing those who have been found to be incapable to apply to a tribunal for a review of the finding,

(ii) allowing incapable persons to request that a representative of their choice be appointed by the tribunal for the purpose of making decisions on their behalf concerning treatment, admission to a care facility or personal assistance services, and

(iii) requiring that wishes with respect to treatment, admission to a care facility or personal assistance services, expressed by persons while capable and after attaining 16 years of age, be adhered to;

(d) to promote communication and understanding between health practitioners and their patients or clients;

(e) to ensure a significant role for supportive family members when a person lacks the capacity to make a decision about a treatment, admission to a care facility or a personal assistance service; and

(f) to permit intervention by the Public Guardian and Trustee only as a last resort in decisions on behalf of incapable persons concerning treatment, admission to a care facility or personal assistance services.

The elements of consent are set out in section 11 of the HCCA as follows:

Elements of consent

11 (1) The following are the elements required for consent to treatment:

1. The consent must relate to the treatment.
2. The consent must be informed.
3. The consent must be given voluntarily.
4. The consent must not be obtained through misrepresentation or fraud.

Informed consent
(2) A consent to treatment is informed if, before giving it,
(a) the person received the information about the matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and
(b) the person received responses to his or her requests for additional information about those matters.

Same
(3) The matters referred to in subsection (2) are:
1. The nature of the treatment.
2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action.
6. The likely consequences of not having the treatment.

Express or implied
(4) Consent to treatment may be express or implied.

Section 21 of the HCCA sets out the principles for giving or refusing substitute consent on behalf of an incapable person:

21. (1) Principles for giving or refusing consent. – 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:
1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.
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) Best interests. – 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.

Section 37 of the HCCA allows a health practitioner to apply to the Board if he or she believes that a SDM is not adhering to the principles contained in s. 21:

> **37.(1) Application to determine compliance with s. 21. –** If consent to a treatment is given or refused on an incapable person's behalf by his or her 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 section 21, the health practitioner may apply to the Board for a determination as to whether the substitute decision-maker complied with section 21.
>
> **(2) Parties.** – The parties to the application are:
> 1. The health practitioner who proposed the treatment.
> 2. The incapable person.
> 3. The substitute decision-maker.
> 4. Any other person whom the Board specifies.
>
> **(3) Power of Board**. – In determining whether the substitute decision-maker complied with section 21, the Board may substitute its opinion for that of the substitute decision-maker.
>
> **(4) Directions. –** If the Board determines that the substitute decision-maker did not comply with section 21, it may give him or her directions and, in doing so, shall apply section 21.
>
> **(5) Time for compliance. –** The Board shall specify the time within which its directions must be complied with.
>
> **(6) Deemed not authorized**. – If the substitute decision-maker does not comply with the Board's directions within the time specified by the Board, he or she shall be deemed not to meet the requirements of subsection 20 (2).
>
> **37.1 Deemed application concerning capacity**. – An application to the Board under section 33, 34, 35, 36 or 37 shall be deemed to include an application to the Board under section 32 with respect to the person's capacity to consent to treatment proposed by a health practitioner unless the person's capacity to consent

to such treatment has been determined by the Board within the previous six months.

THE CHRONOLOGY

My review of the Motion Materials disclosed the following chronology:

1. On July 31, 2017, the 24-year-old son of DD, NS, suffered a cardiac arrest resulting in anoxic brain injury and was admitted to Brampton Civic Hospital. (See Exhibit 1D, E, G and H.) I note the Notice of Motion mistakenly stated NS was admitted to hospital on July 21, 2107 but hospital notes in Exhibit 1 reflected that NS was admitted to hospital on July 31, 2017. I presumed the date in the Notice of Motion was a typographical error.

2. On August 10, 2017, Dr. Michael Miletin submitted a Form G Application requesting the Board to determine whether DD, as the substitute decision-maker ("SDM") for DS, complied with the principles for substitute decision-making set out in the HCCA (the "Miletin Application"). (Exhibit 1A)

3. On August 14, 2017, the Miletin Application was withdrawn. (Exhibit 1)

4. On August 24, 2017, Dr. Hayani, a member of the same treatment team, filed another Form G application requesting the Board determine whether DD complied with the principles for substitute decision-making set out in the HCCA (the "Hayani Application"). (Exhibit 1B)

5. The Hayani Application was heard on September 11, 21 and 22, 2017. (Exhibit 1F and 1G) The parties agreed that Dr. Healey gave evidence for a full day at the hearing of the Hayani application.

6. On September 23, 2017, the Board issued its Order Dismissing Applications ("Hayani Dismissal Order"), dismissing the Hayani Application on the basis that "it had not been proven that sufficient information for informed consent within the meaning of the Act, had been provided to DD, prior to the Form G application being filed Aug. 24th 2017.

Without that information, she was unable to apply section 21 of the Act, to the proposed treatment plan." The Dismissal Order also dismissed the deemed Form A application. (Exhibit 1F)

7. On September 23, 2017, after the parties received the Hayani Dismissal Order, a family meeting was held with NS's mother, brother, sister and cousin, Dr. Alex Patel, Dr. Healey, and a hospital approved official translator in attendance. At this meeting, Drs. Healey and Patel reviewed "a new treatment plan asking for consent to this treatment plan." At this meeting, DD indicated she did not consent to the treatment plan. (Exhibit 1H)

8. On September 29, 2017, the Board delivered its Reasons for Dismissal. (Exhibit 1G)

9. Also on September 29, 2017, Dr. Hayani served a Notice of Appeal of the Hayani Dismissal Order (the "Appeal"). (Exhibit 1K)

10. On October 7, 2017, Dr. Trop delivered a letter written by Dr. Healey dated October 6, 2017 to DD, in English and Punjabi. (Exhibit 1I)

11. On October 11, 2017, Dr. Healey submitted a Form G application requesting the Board to determine whether DD complied with the principles for substitute decision-making set out in the HCCA in respect of the attached treatment plan (the "Healey Application"). (Exhibit 1J)

12. At a prehearing conference on October 17, 2017, Mr. Hiltz raised the possibility that his client would bring a motion to dismiss the Healey Application. This was reflected in the Order of the Board dated October 17, 2017.

13. At a prehearing conference on October 20, 2017 Mr. Hiltz advised he had been instructed to pursue this Motion and Ms Wadsworth also advised that she had been instructed to

abandon the appeal of the Hayani Dismissal Order. This was reflected in the Order of the Board dated October 20, 2017.

14. According to the Notice of Motion, on October 21, 2017, the Record and Transcript in support of the appeal was served on NS and DD.

15. On October 23, 2017, Dr. Hayani served a Notice of Abandonment in which he abandoned the Appeal. (Exhibit 1L)

16. At a prehearing conference on October 23, 2107, Mr. Hiltz reconfirmed DD would proceed with this Motion. This was reflected in the Order of the Board dated October 23, 2017.

ANALYSIS

The Board has no inherent jurisdiction to determine allegations of abuse of process but, as noted above, the jurisdiction of the Board to do so is derived from section 23 of the SPPA.

The Law of Abuse of Process

There were several cases in DD's Book of Authorities and they all set out various principles for consideration where there is an allegation of abuse of process. All of the cases cited by DD are distinguishable from this matter on the facts but, as Mr. Hiltz correctly pointed out, the principles to be considered remain the same. The key points from the leading cases are outlined below.

In *Toronto (City)* v. *C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 (CanLII) ("CUPE"), Arbour J. wrote for the majority of the Supreme Court of Canada at paragraph 35 that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process. At paragraph 36 Arbor J. also noted that the doctrine not only applies to criminal law, but also to a variety of contexts.

At paragraph 55 of *Canam Enterprises Inc.* v. *Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.) ("Coles"), Gouge J.A. noted in his dissent (approved by the Supreme Court of Canada in *Canam Enterprises Inc.* v. *Coles*, [2002] 3 S.C.R. 307, 2002 SCC 63 (CanLII)):

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

The Court in CUPE cited the following passage of Doherty JA with approval at paragraph 44:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

At paragraph 52 of CUPE, Arbour J. listed three circumstances where relitigation may be necessary to enhance the credibility and effectiveness of the adjudicative process. They are:

> . . . (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.

In *Aba-Alkahail* v. *University of Ottawa*, 2013 ONCA 633 (CanLII), the Court of Appeal of Ontario said at paragraph 12 that "...the abuse of process doctrine can apply not only to bar re-litigation of issues that were actually determined in the administrative process but also to issue

that could have been determined... This gives further incentive to raise all issues at the administrative proceeding and to participate with "full vigour".

In *Raba* v. *Vaccarelli*, 2014 HRTO 97 (CanLII), the panel noted at paragraph 18 (citing CUPE) that the doctrine of abuse of process is not confined to instances where a repeat adjudication of the merits (by the same of different adjudicative bodies) is at issue. This case involved an applicant who failed to comply with Tribunal procedures resulting in a decision that the application was abandoned. The Tribunal found that it had fully complied with the requirements of procedural fairness in respect of the first application and that it would undermine the finality of the Tribunal's process to essentially revisit its previous decisions.

The Position of DD

DD took the position that the Healey Application was, for all intents and purposes, the same as the Miletin Application and the Hayani Application since: the patient was the same, the substitute decision-maker was the same, the Applicants were all part of the NS treatment team, Dr. Healey provided the evidence at the hearing of the Hayani Application, all Applicants were represented by the same legal counsel, the treatment plan was for all intents and purposes the same with the exception of "no chest compressions" being added to the proposed treatment plan.

Counsel to DD noted that, prior to commencing a Form G Application, a physician/applicant had a statutory obligation to ensure that sufficient information was provided to the substitute decision-maker regarding the proposed treatment which would fulfill the requirements for informed consent. For a physician to act on the decision of a substitute decision-maker in the treatment of an incapable person when information required by law to be provided was not provided, is a violation of the fundamental right of the incapable person to have decisions made on their behalf based on informed consent. This is most significant when the decision involves life and death. Mr. Hiltz submitted on behalf of his client that this occurred in the present case.

DD argued that, for a physician to commence repeated Form G Applications in relation to the same patient, the same substitute decision-maker and the same proposed treatment, when

information necessary for the Application was not provided to the substitute decision-maker, was an abuse of process. DD took the position that this occurred in the present case.

DD further took the position that the commencement of a Form G Application during the currency of an Appeal from a Decision of the Board dismissing a prior Form G Application in relation to the same substitute decision-maker, the same patient and the same proposed treatment, was an abuse of process. DD took the position that this also occurred in the present case.

In respect of the treatments added to the treatment plan relating to no further resuscitation maneuvres, DD's counsel submitted DD was unaware there was an option to refuse consent to the "no CPR order" made on August 10, 2017 (Exhibit 1C) and advised the treatment team she did not consent once it was clear she could refuse to consent. This occurred after the hearing of the Hayani Application. Dr. Healey then added what Mr. Hiltz characterized as "no chest compressions" to the proposed treatment plan. A reading of the proposed treatment plan revealed that the additions to the proposed treatment plan encompassed much more than simply "no chest compressions."

DD submitted that allowing a further Hearing in relation to the Healey Application would be oppressive and violate the fundamental principles of justice, that it was a misuse of the Board's process bringing the administration of justice into disrepute and that the emotional and financial cost of retaining counsel should be taken into account.

The Position of Dr. Healey

Dr. Healey took the position his Form G application did not attempt to re-litigate issues heard in the previous hearing. He submitted that the Board disposed of the previous application on the basis that the test for informed consent had not been satisfied and the Board made no findings with respect to the best interests test under section 21 of the HCCA. His new application sought an adjudication of the evidence and decision with respect to whether DD's refusal to consent to

the proposed treatment plan contravenes section 21 and this was not considered in the Hiyani Dismissal Order. There was therefore no risk of disturbing a final decision of the Board or of creating inconsistent decisions.

Dr. Healey submitted that the proposed treatment plan in the Healey Application differs from that considered during the previous hearing in one important respect. After the hearing, DD was alleged to have revoked her consent to the "no-CPR" order that had been in place since August 10, 2017 at Exhibit 1C and the new treatment plan "no further resuscitation maneuvres", including chest compressions, defibrillation, vasopressors or inotropes, reintubation or dialysis. (Exhibit 1J) Ms Wadsworth argued that Mr. Hiltz significantly downplayed this change to the treatment plan in his submissions.

Dr. Healey did not accept that the Appeal regarding informed consent rendered the Healey Application an abuse of process, but that it was unnecessary to deal with that argument since the Appeal was abandoned as evidenced by the Notice of Abandonment at Exhibit 1L.

The Submissions of Ms Szigeti

Ms Szigeti stated in her Written Submissions that the filing of the Healey Application was a clear abuse of process in the face of the Appeal because the proposal was to rehear essentially the same case before the Board while seeking relief that the matter be returned to the tribunal for decision on the same issues, but based on evidence tendered at the earlier hearing. In her view, the question was not whether there was an abuse of process in filing the Healey Application but rather whether the Notice of Abandonment cured the abuse. For the reasons set out below, I disagreed that it was clear there was any abuse of process.

Analysis

There was no hearing of the Miletin Application since it was withdrawn based on the doctor's understanding or belief that DD would consent to the proposed treatment plan once family from India had an opportunity to visit. (See Exhibit 1G.) The Hayani Application was commenced

after DD failed to consent to the treatment plan as had been anticipated. I agreed with Ms Szigeti's characterization of the Hayani Application being akin to the recommencement of the earlier application rather than a separate application, despite a new application being technically necessary. In reality those two applications were effectively one and the same.

Given the nature of these proceedings, the background evidence heard in the Hayani Application would need to be presented again at the hearing of the Healey Application in order to provide context. The parties remained essentially the same and the matter in issue similar but based on new evidence that arose after the conclusion of the Hayani Application.

Evidence was heard on all matters in issue in the Hayani Application relating to the Form G and the deemed Form A application. However, the Dismissal Order was very narrow and only found there was insufficient information provided to DD for informed consent. In effect, there was no informed refusal to consent subject to review since the preconditions for a review or analysis on the merits were not met. Neither the Dismissal Order nor the Reasons for Dismissal canvassed the evidence in respect of the best interests test under section 21 of the HCCA or made findings of fact in that regard. Neither canvassed the evidence presented on the deemed Form A application or made findings in that regard.

After the hearing of the Hayani Application, DD withdrew her alleged consent to the "CPR order" of August 10, 2017. It is worth noting that Section 2(2) of the HCCA provides that a reference in the Act to refusal to consent includes withdrawal of consent.

After the Hayani Application was heard and the Dismissal Order provided to the parties, Dr. Healey sought fresh consent from DD to a new treatment plan, appended to the Healey Application at Exhibt 1J. The proposed treatment plan had been expanded from the treatment plan referred to in the Hayani Application to include "no further resuscitation maneuvres" in the event of cardiac arrest, including chest compressions, defibrillation, vasopressors or inotropes, reintubation or dialysis. The revised treatment plan was discussed in the family meeting on September 23, 2017 (Exhibit H) and DD declined to consent to the revised treatment plan. The

letter to DD dated October 6, 2017, together with a Punjabi version (Exhibit 1I) set out a summary of NS's condition, the role of the SDM, the proposed treatment plan, and a summary of the family meeting on September 23, 2017 during which DD declined to consent to the proposed treatment plan. I found that the family meeting constituted a fresh attempt to obtain informed consent and a fresh request for consent. DD declined to consent to the expanded treatment plan not only during the family meeting on September 23, 2017 but continued to decline after delivery of the letter to DD on October 7, 2017, prompting commencement of the Healey Application. I found that Dr. Healey was entitled to commence a new Form G application in the circumstances.

The Appeal sought an Order quashing the Hayani Dismissal Order and in its place that the Court find DD was provided with sufficient information to satisfy principles for informed consent, and an Order that the matter be sent back to the Board to determine best interests under section 21(2) of the HCCA based on evidence heard in the Hayani Application. Had that Appeal been allowed and the matter been sent back to the Board for a determination on the merits, there was a risk of inconsistent factual findings based on overlapping evidence. However, the core issue being decided in the Hayani Application remained in respect of consent sought from DD to a different treatment plan on or before August 24, 2017. The treatment plan had since changed, fresh consent was sought and the Appeal was withdrawn, eliminating any risk associated with multiple proceedings. The Responding Factum notes that parties have only seven days in which to file a Notice of Appeal and I accepted Ms Wadsworth's submission that Dr. Hayani wanted to preserve his rights to an Appeal. Mr. Hiltz and Ms Szigeti referred to the fact that the Notice of Appeal prompted the Board to serve an appeal record and transcripts on the parties but there was no suggestion that the Appeal was otherwise perfected or scheduled. Instead, the Appeal was withdrawn and that resolved any issue relating to potential multiplicity of proceedings. Mr. Hiltz argued that the Appeal was only withdrawn in the face of a motion to dismiss for abuse of process but the parties were notified that the Appeal would be abandoned during the same prehearing conference in which Mr. Hiltz said he had instructions to proceed with a Motion to Dismiss. I found that no adverse inference ought to be drawn in respect of the abandonment of the Appeal. It was just as likely that the Appeal was withdrawn given that circumstances had changed, fresh consent had been sought and the within Form G application was determined to be the appropriate process going forward.

There was no doubt that DD and her family found themselves in one of the most difficult circumstances imaginable and the emotional toll of being asked to make an end of life decision was enormous. I was also sympathetic to the added emotional and financial burden of a legal process. However, I remained mindful that the key person whose rights and interests were at the heart of this legal process was NS. Bearing this in mind, I found there was nothing in the legislation that prohibited a physician from commencing more than one Form G application in respect of the same SDM and I disagreed that a physician or team of physicians ought to be precluded from bringing a new Form G application once a determination has been made on a previous Form G application where there is a change in circumstances or where there is new evidence that warrants the hearing of a new application, even where the parties remain the same.

Since the Healey Application was based on a fresh request for consent to the revised treatment plan made after the Hayani Application was heard, I found that there was no risk of inconsistent decisions even if the Appeal were to have proceeded. This was because the request for consent that formed the basis of the Hayani Application was made prior to the date the Hayani Application was filed on August 24, 2017. The Healey Application was based on new evidence that arose after the conclusion of the Hayani Application and which was unavailable for the previous hearing. The purported refusal to consent to the treatment plan in place as of August 24, 2017 would not be an issue to be decided in the Healey application. The matter to be decided in the Healey application was whether the DD satisfied the requirements under section 21 of the HCCA when she declined to consent to the new treatment plan proposed at the family meeting on September 23, 2017 and detailed in the letter dated October 6, 2017. In my view, this was not an attempt to relitigate the previous application or an attempt to obtain a different result from a different panel. Rather, it was a fresh application seeking a determination based on a new set of facts.

The Board is empowered to control its own process under Rule 3 of the Consent and Capacity Board Rules of Practice, and to prevent an abuse of process pursuant to section 23 of the SPPA. A decision is a discretionary one having regard to the applicable law.

I also found that an applicant in a Form G application should not be forever bound by an earlier determination on a Form G application where there is a change in circumstances or a change in treatment or treatment plan requiring fresh consent. In this case, there was no determination of the earlier Form G application on the merits, prompting the treatment team to create a revised treatment plan that included the content of the previous proposed treatment plan but that also addressed DD's withdrawal of consent to the "CPR order". A fresh attempt was made to provide the information required under section 11 of the HCCA in order to meet the preconditions for a Form G application and fresh consent was then sought from DD. DD declined to provide her consent. A new Form G application was appropriate in those circumstances. This was not a situation that brought the administration of justice into disrepute and was not an abuse of process.

Other "Housekeeping" Matters

Ms. Szigeti suggested that the Board consider, for the sake of expediency and efficiency, the use of transcripts from the previous Form G hearing at the upcoming hearing. There was no consensus among counsel to the parties about how or the extent to which transcripts ought to be used, if at all. I therefore declined to make an order in that regard and left this to the presiding member of the hearing on its merits should the parties wish to raise the use of transcripts as a preliminary issue.

November 13, 2017 had been proposed as a second date to be reserved in the event the hearing did not finish in one day. However, after the hearing of this Motion concluded I was advised by Board staff that the Board is not holding hearings on November 13, 2017 since it was a holiday date in lieu of Remembrance Day. Therefore, any adjournments, if required, will be dealt with by the presiding member at the hearing on November 10, 2017.

RESULT

For the foregoing reasons, I decided that the commencement of Dr. Healey's Form G application did not constitute an abuse of process and that the hearing on the merits was to proceed as scheduled on November 10, 2017.

Dated: November 14, 2017

Krista Bulmer
Lawyer Member