LEGISLATION CONSIDERED

The *Health Care Consent Act, (HCCA)* sections 2, 32 and 35
The *Vital Statistic Act,* section 21
The *Public Hospitals Act,* R.R.O. 1990 Regulation 965 s. 17
Trillium Gift of Life Network Act, R.S.O. 1990, c H.20 s. 7
Consent and Capacity Board Rules of Practice.

PARTIES

UH, the incapable person
AD, the Substitute Decision Maker
Dr. Corey Sawchuk, the health care practitioner

PANEL

Mr. Eugene Williams, senior lawyer and presiding member

APPEARANCES

Mr. James Orme represented UH.
Mr. Paul Marshall represented AD
Ms. Erica Baron represented Dr. Corey Sawchuk.

WITNESS:

Dr. Corey Sawchuk

THE EVIDENCE

The evidence consisted of the testimony of Dr. Sawchuk and two exhibits as follows:

1 Notice of Motion and Affidavit of Dr. Corey Sawchuk including Exhibits A – E inclusive; and,
2 Medical Certificate of Death (blank) Form 16.

INTRODUCTION

UH was a 20-year -old man who was critically injured on October 1, 2016. He received medical attention, including mechanical ventilation, in the Intensive Care Unit of the Hamilton General Hospital. However, his condition deteriorated. On October 14, 2016, UH's doctors issued a Death Certificate for him pursuant to the *Public Hospital Act*. That Certificate stated that death had occurred on October 6, 2016 at 12:45. It was issued after the attending physician had performed certain neurological tests and confirmed that UH had met the neurological criteria for brain death (NDD).

UH's treatment team advised AD, UH's substitute decision-maker, that they intended to remove the mechanical ventilation. AD was opposed to this action and applied to the Board pursuant to section 35 of the *Health Care Consent Act, (HCCA)* to ask the Board for directions concerning consent for this action.

Prior to the hearing, Counsel for the hospital and the attending physician notified the parties and the Board of their intention to raise a preliminary issue concerning the Board's jurisdiction to consider AD's application for Directions.

PRELIMINARY ISSUE

In a Notice of Motion delivered to the Board on October 17, 2016, Erica Baron, Counsel for the attending physician, Dr. Sawchuk, brought a motion seeking a ruling as to whether the *HCCA*

applied in this case. The issue was whether the *HCCA* applied where, as here, there was a neurological determination of death.

The affidavit of Dr. Sawchuk, Chief of Critical Care Medicine at Hamilton Health Sciences, and its accompanying exhibits were tendered as Exhibit 1 on the motion. In his affidavit, Dr. Sawchuk stated that UH suffered "catastrophic injuries including acute head trauma" on October 1, 2016. Following his admission to the Intensive Care Unit of the Hamilton General Hospital, the treatment team instituted invasive medical treatments including mechanical ventilation.

Over the next few days, UH's medical condition deteriorated. Dr. Sawchuk stated that it was apparent to the physicians treating him that he would be unable to recover from his injuries. Clinical examinations performed by the treating physicians on October 6, 2016 disclosed that UH had experience neurological death or brain death.

Dr. Sawchuk described the medical criteria for neurological death, and provided documentation setting out the requirements necessary to meet the criteria for determining neurological death. He stated that UH "was found to meet the neurological criteria for brain death on October 6, 2016." Dr. Sawchuk noted that at the request of UH's family testing to determine neurological death, was postponed by a few days. An exhibit to his affidavit outlined the testing that was conducted and the test results upon which the determination of neurological death was based.

Dr. Sawchuk deposed that UH was found to meet the neurological criteria for brain death. He noted that several physicians including a cardiologist, neurologist, respirologist and a critical care physician, have concurred with that finding since that date. He said that "[t]he etiology that could have caused brain death for [UH] was increased intercranial pressure (ICP) and catastrophic closed head injury, which were caused by the head trauma he suffered in the accident." Dr. Sawchuk noted that UH had no confounding factors for brain death testing and two physicians completed the testing to support the finding of neurological death.

In his affidavit Dr. Sawchuk also said that neurological death is accepted as death in Ontario. He noted that once such a declaration has been made, "a death certificate is signed indicating the date

of death as the date on which brain death occurred ... ." Attached as an Exhibit to his affidavit was the death certificate for UH that was issued pursuant to the *Public Hospitals Act*.

In reply to the panel's questions, Dr. Sawchuk stated that testing revealed that UH had no brain stem function. Brain stem function directs bodily responses such as gag reflex, spontaneous breathing, and eye movements. He said that without brain stem functions the body would not respond to stimuli. He also stated that in his clinical experience there is no possibility of a return to brain stem function once it has been lost. He said that the loss of brain stem function is standard declaration of death. He also confirmed that with one exception, the October 6, 2016 tests to determine the neurological definition of death were repeated the following day and the results confirmed that UH had experienced brain death.

In response to questions from the panel, Dr. Sawchuk stated that UH's condition differed from that of a person in a vegetative state. He noted that those in a vegetative state have some degree of brain stem function that can permit them to respond to stimuli. He said that the circumstances relating to UH differed from those in the Rasouli case[1].

Counsel for AD and UH were given an opportunity to cross-examine Dr. Sawchuk. In reply to questions from Mr. Marshall. Mr. Marshall asked about the impact that the insertion of a tube in UH's chest would have on the neurological test results. Dr. Sawchuk stated that the insertion of a chest tube would not impair UH's drive or ability to breathe and would not account for the significant rise in Carbon Dioxide levels that were noted during one of the tests. Dr. Sawchuk acknowledged that the tube could splinter breathing but added that since UH had no drive to breathe the tube did not affect the results. He noted that UH could still breathe with the tube in place if he had the drive to breathe.

Counsel for Dr. Sawchuk, Ms. Baron, submitted that the Board lacks jurisdiction to deal with the application because the *HCCA* has no application when the patient has been declared dead. Counsel submitted that the neurological definition of death is the legal definition of death.

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[1] *Cuthbertson v. Rasouli,* [2013] S.C.C. 53

Counsel argued that s. 35 of the *HCCA* authorizes either a substitute decision-maker or a health practitioner who proposed a treatment to apply to the Board for directions. Counsel submitted that in this case UH has died. And, where a person has died, removing mechanical ventilation is not a withdrawal of treatment because the person has died.

Counsel also submitted that the removal of the mechanical ventilation does not fall within the definition of treatment in s. 2 of the *Act*. Counsel argued that removing the mechanical ventilation is not something done for a therapeutic or preventive or other health related purpose because of the person's death. Counsel submitted that the definition of treatment is purposive and requires one to look at why the treatment is proposed. Counsel sought to distinguish the facts of this case from the circumstances in Rasouli on this basis.

Counsel also submitted that if the removal of the mechanical ventilation could be viewed as treatment, it was specifically excluded by paragraph 'g' in the definition of treatment. That was because in the circumstances of this case, removing the mechanical ventilation poses little or no risk of harm to the person.