Lawyer: Doctors accused of "drive-by capacity assessment' in girl's right to cancer treatment choice

By Donna Duric
Writer

The case of whether or not a Six Nations girl should have the right to choose her own cancer treatments should be before an expert provincial tribunal, not the courts, says Toronto lawyer Mark Handelman.

In his closing submissions at Brantford court last week, Handelman said the 11-year-old's case should have gone to the Consent and Capacity Board as soon as she and her mother decided to cut off chemotherapy treatments in August.

"The consent and capacity board is an expert tribunal," said Handelman. "The statute does not authorize your honour (Justice Gethin Edward) to adjudicate a treatment decision. If she is capable, the decision is hers. She at least would have been in the building where her rights were being adjudicated and attended if she wanted to."

Handelman represents the Brant Family and Child Services (formerly CAS) in court.

McMaster Children's Hospital has taken Brant Family and Child Services to court over the agency's refusal to apprehend a Six Nations girl who stopped chemotherapy treatments in favour of traditional treatments for her acute lymphoblastic leukemia in August.

The case has been playing out in a Brantford court for the past month, where doctors and a hospital lawyer have argued the girl is not capable of making her own treatment decisions and insisting she will die without chemotherapy.

A publication ban prevents identifying the girl or her family.

Handelman said the girl's rights under various statutes were not respected, including the Canadian Charter of Rights and Freedoms, the Child and Family Services Act and the Health Care Consent Act.

Section four of the HCCA defines capacity as the ability to see the consequences of one's decision. Numerous witnesses have testified they believe the girl understands the consequences of her decision to use traditional and alternative medicines.

The test for capacity under the HCCA is "a nuanced test," said Handelman. "There is no longer any age limit in the test. The law starts with the assumption of capacity."

He said he was "still astonished" that doctors at McMaster saw an incapable child while not providing a formal assessment of capability.

"That flies in the face of this legislation," he argued. "You don't get to go around the rights by saying, 'I don't think she's capable.'"

Justice Gethin Edwards (Photo by Donna Duric)

Handelman said the HCCA obliges somebody to tell a person they've been found incapable.

"At some point, somebody should have said to (the girl), 'we don't think you can make this decision' and that did not happen. She was never told."

Sections 10 and 11 of the HCCA say consent to health-related treatment depends on mental capacity, not age, he said.

He also said the HCCA takes into account a person's culture when making health care decisions.

"There's still provisions for her values and beliefs," said Handelman.

He said the issue did not belong in court because courts are not medical experts and can't make medical decisions.

> "With the greatest of respect this could be political puffery," Justice Gethin Edwards to Six Nations Band Council lawyer Eliza Montour argument the UN-DRIP applied to the court's decision.

He said a lack of a capacity assessment breached the girl's rights to life, liberty and security under the Canadian Charter of Rights and Freedoms.

Justice Edward said he was "agonizing" over whether or not a child has the right to choose his or her own medical treatment.

Handelman argued the doctors conducted a "drive-by capacity assessment" of the girl and presumed her to be incapable.

Edward defended doctors and said they're not "obsessed with the law. Doctors are charged with incredible responsibility. Shouldn't doctors be treated with great deference in those circumstances? They practice life instead of law."

Handelman also argued the issue is also not a child protection issue because the girl's mother didn't refuse treatment for her daughter.

"There's no refusal of treatment at all. All that's happened is the doctors don't like the treatment her mother has chosen."

"This court cannot find (the girl) in need of protection," said Handelman. "I ask the court to dismiss this application."

Band Council lawyer Eliza Montour argued in her closing submission last Wednesday that the girl has a right to use traditional medicines under section 35 of the Canadian Constitution, which provides protection for aboriginal and treaty rights in Canada.

Eliza Montour (Photo by Donna Duric)

Montour also argued the girl has a right to refuse chemotherapy and choose traditional medicines because Canada is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which states indigenous people have the right to use traditional medicines.

Edward said Montour's arguments were "political puffery. "With the greatest of respect this could be political puffery," he told her.

He asked Montour how being a signatory to UNDRIP compels the court to act under that declaration.

"How is that binding on this court's decision?" Edward asked.

Montour could not answer, but said, "Six Nations people have been using our own medicine since time immemorial. Traditional medicine has been in existence for longer than western medicine but is treated subordinate to it."

She said Haudenosaunee medicine "is medical care."

"It is our submission there is no medical neglect in this case," said Montour. "Six Nations is asking the court to respect (the girl's) way of life."

She said if the judge decides child services has to apprehend the girl and force her into treatment, it will have a "negative ripple effect on all First Nations across the country."

The case continues in Brantford on Oct. 29 where Sandra Harris, an agent for the Office of the Children's Lawyer, will make closing submission. Edward said he will make a decision on the case on Nov. 14.