

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

BETWEEN:

DR. BRIAN CUTHBERTSON AND DR. GORDON RUBENFELD

APPELLANTS
(Appellants)

- and -

**HASSAN RASOULI BY HIS LITIGATION GUARDIAN AND SUBSTITUTE DECISION
MAKER, PARICHEHR SALASEL**

RESPONDENT
(Respondent)

- and -

**THE CONSENT AND CAPACITY BOARD, EUTHANASIA PREVENTION COALITION,
CANADIAN CRITICAL CARE SOCIETY, CANADIAN ASSOCIATION OF CRITICAL
CARE NURSES, ADVOCACY CENTRE FOR THE ELDERLY AND ARCH
DISABILITY LAW CENTRE, MENTAL HEALTH LEGAL COMMITTEE AND HIV &
AIDS LEGAL CLINIC ONTARIO and EVANGELICAL FELLOWSHIP OF CANADA**

INTERVENERS

INTERVENER FACTUM OF THE EVANGELICAL FELLOWSHIP OF CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

VINCENT DAGENAIS GIBSON LLP
325 Dalhousie Street, Suite 600
Ottawa, Ontario, K1N 7G2

Albertos Polizogopoulos
Tel.: (613) 241-2701
Fax: (613) 241-2599
E-mail: albertos@vdg.ca

**Counsel for the Intervener, Evangelical
Fellowship of Canada**

Harry C.G. Underwood / Erica J. Baron /
Andrew McCutcheon
McCarthy Tétrault LLP
Box 48
66 Wellington Street West, Suite 5300
Toronto, Ontario M5K 1E6

Tel: (416) 601-7911
Fax: (416) 868-0673
Solicitors for the Appellants,
Brian Cuthbertson and Gordon Rubenfeld

J. Gardner Hodder / Guillermo Schible
Hodder Barristers
Adelaide Place, ING Tower
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7
Tel: (416) 601-6809
Fax: (416) 947-0909
Solicitors for the Respondent, Hassan Rasouli
by his Litigation Guardian and Substitute
Decision Maker, Parichehr Salasel

The Consent and Capacity Board
151 Bloor Street West, 10th Floor
Toronto, Ontario M5S 2T5

Hugh R. Scher
Scher Law Professional Corporation
69 Bloor Street East, Suite 210
Toronto, Ontario M4W 1A9

Tel: (416) 515-9686
Fax: (416) 969-1815
Solicitor for the Intervener,
Euthanasia Prevention Coalition

Colin S. Baxter
Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, Ontario K2C 3T2

Tel: (613) 569-8558
Fax: (613) 569-8668
Agent for the Appellants, Brian
Cuthbertson and Gordon Rubenfeld

Gordon K. Cameron
Blake, Cassels & Graydon LLP
World Exchange Plaza
45 O'Connor, 20th Floor
Ottawa, Ontario K1P 1A4
Tel: (613) 788-2222
Fax: (613) 788-2247
Agent for the Respondent, Hassan
Rasouli by his Litigation Guardian
and Substitute Decision Maker,
Parichehr Salasel

Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: (613) 566-2058
Fax: (613) 235-4430
Agent for the Intervener,
Euthanasia Prevention Coalition

Andrew S. Faith / Alexi Wood
Polley Faith LLP
357 Bay Street, Suite 900
Toronto, Ontario M5H 2T7

Tel: (416) 365-1602
Fax: (416) 365-1601
Solicitors for the Intervener,
Canadian Critical Care Society

Rahool P. Agarwal / Richard Olivier /
Nicholas Saint-Martin
Norton Rose Canada LLP
200 Bay Street, Suite 3800
Toronto, Ontario M5J 2Z4

Tel: (416) 216-3949
Fax: (416) 216-3930
Solicitors for the Intervener,
Canadian Association of Critical Care Nurses

Graham Webb / Clara Ho
Advocacy Centre for the Elderly
2 Carlton Street, Suite 701
Toronto, Ontario M5B 1J3

Tel: (416) 598-2656
Fax: (416) 598-7924
Solicitors for the Intervener,
Advocacy Centre for the Elderly
and ARCH Disability Law Centre

Marshall A. Swardon / Mercedes Perez
Swardon Associates
115 Berkeley Street
Toronto, Ontario M5A 2W8

Tel: (416) 362-1234
Fax: (416) 362-1232
Solicitors for the Intervener,
Mental Health Legal Committee and HIV
& AIDS Legal Clinic Ontario

Colin S. Baxter
Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, Ontario K2C 3T2

Tel: (613) 569-8558
Fax: (613) 569-8668
Agent for the Intervener,
Canadian Critical Care Society

Sally Gomery
Norton Rose Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4

Tel: (613) 780-8604
Fax: (613) 230-5459
Agent for the Intervener,
Canadian Association of
Critical Care Nurses

Eugene Meehan, Q.C.
Supreme Advocacy LLP
397 Gladstone Avenue, Suite 100
Ottawa, Ontario K2P 0Y9

Tel: (613) 695-8855, Ext: 101
Fax: (613) 695-8580
Agent for the Intervener,
Advocacy Centre for the Elderly
and ARCH Disability Law Centre

Marie-France Major
Supreme Advocacy LLP
397 Gladstone Avenue, Suite 100
Ottawa, Ontario K2P 0Y9

Tel: (613) 695-8855, Ext: 102
Fax: (613) 695-8580
Agent for the Intervener,
Mental Health Legal Committee and
HIV & AIDS Legal Clinic Ontario

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PART I – STATEMENT OF FACTS

1. The Evangelical Fellowship of Canada¹ (“EFC”) accepts the facts as set out by the Respondents.

PART II – ISSUES

2. While this Appeal deals with the issue of medical consent, at its heart is a question of the value and dignity of human life – what it means to be human; what forms the framework for our understanding of the nature of human life; and the requisite importance of freedom that informed and still informs the principles underlying the establishment of the *Charter of Rights and Freedoms* (“*Charter*”), the recognition of which sustains Canada as a free and democratic society. Canadian society and its foundational principles predate the existence of the *Charter* and inform the recognition that the rights enunciated in the *Charter* and the values illuminated by the *Charter* are established with the acknowledgement that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”²
3. The principles that ground our understanding of what it means to be human and the value of human life recognize that human life is inextricably linked with and inspired by religious, moral and philosophical beliefs. This is a major factor in the Respondent’s refusal to provide consent to the removal of life sustaining measures.³ Similarly, for the Evangelical Christian, all that God created, including human life, is valuable in His sight.⁴ Such sincerely held religious beliefs cannot be divorced from the state’s or the citizen’s understanding of being human, including decisions regarding medical treatment, or its withdrawal.
4. This Appeal concerns itself with how we will make common decisions in a religiously plural and multi-cultural society.

PART III – ARGUMENT

5. The EFC raises the following points of argument:
 - a. *Charter* rights/values, and their underlying principles, should serve as the starting point when interpreting the *Health Care Consent Act* (“*HCCA*”);
 - b. Patient consent should only be given by the individual receiving the treatment or their

¹The Evangelical Fellowship of Canada (“EFC”) is a national association of churches, church-related organizations and educational institutions. The EFC is an interdenominational association representing 40 Protestant denominations, over 100 other organizations and over 700 individual churches. There are 3.8 million Protestants in Canada of which 1.9 million are members or adherents of EFC affiliated organizations.

² *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*, Preamble, *EFC Authorities*, Tab 16.

³ *Rasouli v. Sunnybrook Health Sciences Centre et al.*, [2011] ONSC 1500, at para. 7 [*Rasouli*], Book of Authorities of the Intervener, the Evangelical Fellowship of Canada [*EFC Authorities*’], Tab 10

⁴ See Genesis 1:26, *EFC Authorities*, Tab 13.

substitute decision maker;

- c. Section 7 *Charter* rights/values to life, liberty and security of the person are to be read, considered and applied in connection with section 2(a) rights/values;
- d. Individuals are entitled to make decisions regarding their own life, medical care and medical treatment which are influenced, inspired and in accordance with their sincerely held religious beliefs; and,
- e. Medical practitioners' religious or conscientious beliefs.

A. *Charter* rights/values, and their underlying principles, should serve as the starting point when interpreting the *Health Care Consent Act*

- 6. This Honourable Court has held that where statutory language is ambiguous or capable of more than one meaning, an interpretation consistent with *Charter* values is to be preferred.⁵
- 7. The *HCCA* was established in the context of a society that, pre- and post- *Charter*, accepts principles essential to Canada's system of universal health care, including being "our brother's keeper" and the autonomy of the individual to consent to treatment.
- 8. The *HCCA* is clear that in providing or refusing to provide consent to medical treatment, a substitute decision maker must consider the patient's best interests.⁶
- 9. In considering a patient's best interests, the substitute decision maker must consider, among other things, "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."⁷
- 10. Because it is necessary to consider a person's values and beliefs to determine best interests, the *HCCA* must be read in a manner which protects every Canadian's section 2(a) *Charter* right/value to freedom of religion and conscience as well as his or her section 7 *Charter* right to life, liberty and security of the person.
- 11. In analyzing the *HCCA*, and, in particular, when reviewing decisions to withdraw life-sustaining treatment, courts should consider the *Charter* rights/values of every Canadian.

B. Patient consent should only be given by the individual receiving the treatment or their substitute decision maker

- 12. Consent to medical treatment may only be given by the individual receiving the treatment or their substitute decision maker. In deciding whether or not to provide consent to medical treatment, Evangelical Christians, and indeed all individuals, make that decision through the

⁵ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 61 and 62, *EFC Authorities*, Tab 2.

⁶ *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A, at section 21(1)2 [*HCCA*], *EFC Authorities*, Tab 17.

⁷ *HCCA*, *supra*, at section 21(2)(a), *EFC Authorities*, Tab 17.

lens of their worldview, religious beliefs and conscience. For Evangelical Christians, life is a gift from God which is to be valued, respected and protected through all of its stages.

13. This approach to consent to medical treatment is not novel and is rooted in our common law.

In *Manitoba (Director of Child & Family Services) v. C. (A.)*⁸, this Court affirmed the reasoning in *Malette v. Shulman*⁹ when Abella J. cited with approval:

The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination. [...] in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.¹⁰

14. While this appeal deals with proposed medical treatment to be administered to an incapacitated person, the principle, it is submitted, remains the same. In fact, in *Rodriguez v. British Columbia (Attorney General)*¹¹, this Court confirmed that:

Canadian courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued [...] The United States Supreme Court has also recently recognized that the right to refuse life-sustaining medical treatment is an aspect of the liberty interest protected by the Fourteenth Amendment in *Cruzan v. Director, Missouri Health Department*, 111 L. Ed. 2d 224 (1990). However, that Court also enunciated the view that when a patient was unconscious and thus unable to express her own views, the state was justified in requiring compelling evidence that withdrawal of treatment was in fact what the patient would have requested had she been competent¹².

15. Application of these principles affirms that consent to medical treatment, or its withdrawal, may only be given by the patient, or his or her substitute decision maker.

C. Section 7 Charter rights/values to life, liberty and security of the person are to be read, considered and applied in connection with section 2(a) rights/values

16. The principles underlying and values enshrined in section 7 of the Charter are relevant to, and should inform, the interpretation of the *HCCA*.

17. Section 7 of the *Charter* is, on its face, a life affirming right. This Court's jurisprudence

⁸ *Manitoba (Director of Child & Family Services) v. C. (A.)*, [2009] 2 S.C.R. 181 [*Manitoba*], *EFC Authorities*, Tab 7.

⁹ *Malette v. Shulman*, 37 O.A.C. 281. *EFC Authorities*, Tab 6.

¹⁰ *Manitoba*, *supra*, at para. 44, *EFC Authorities*, Tab 7, (see also *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119 at para. 40, *EFC Authorities*, Tab 4).

¹¹ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*], *EFC Authorities*, Tab 11.

¹² *Rodriguez*, *supra*, at para. 41, *EFC Authorities*, Tab 11.

makes it clear that section 7 of the *Charter* includes an individual's personal autonomy and control over bodily integrity. A person's section 7 *Charter* rights/values are engaged by a decision to withdraw them from life support.

18. It is the EFC's position that when defined and put into context, section 7 of the *Charter* protects an individual's right to live his or her life in accordance with his or her sincerely held religious beliefs as guaranteed in section 2(a) *Charter* rights/values.
19. In *Rodriguez*, this Honourable Court confirmed that section 7 encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress"¹³.
20. This notion is not unique to the *Charter*, but has in fact been advanced by philosophers and legal scholars for centuries. In his seminal work *On Liberty*, John Stuart Mill stated: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁴ There are no allegations that failure to remove an individual from life support will cause harm to others.
21. Section 7 of the *Charter*, the values associated with section 7 and the principles underlying it, however, are not limited to the physical or corporal aspects of an individual. They go beyond that. This Court recognized in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*¹⁵ that:

The interpretation of s. 7 is also informed by the other provisions of the *Charter*. Speaking for the court in *R. v. L. (T.P.)*, supra, I put the matter as follows (at p. 326):

... the rights and freedoms protected by the *Charter* are not insular and discrete ... Rather, the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136), and the particularization of rights and freedoms contained in the *Charter* thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.¹⁶

¹³ *Rodriguez*, supra, at para 21, *EFC Authorities*, Tab 11.

¹⁴ *On Liberty*, John Stuart Mill, Batoche Books, Kitchener, Ontario, 2011, at page 13, *EFC Authorities*, Tab 15.

¹⁵ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*B. (R.)*], *EFC Authorities*, Tab 1.

¹⁶ *B. (R.)*, supra, at para. 77.

22. In *R. v. Morgentaler*¹⁷, this Court stated:

[...] there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the court (p. 205). This interpretation was adopted by a majority of the court, per Lamer J., in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice: see *Singh, Re B.C. Motor Vehicle Act*, and *R. v. Jones*¹⁸.

23. In *Godbout v. Longueuil*¹⁹, this Court defined the right to life, liberty and security of the person as protecting "within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference"²⁰.

24. To properly consider a person's section 7 *Charter* rights/values, courts should consider an individual's view on "life" and "liberty," including as informed by his or her religious beliefs and conscience. Indeed, this Court has recognized that the religiously informed conscience should not be placed at a disadvantage.

[...] if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism²¹ [Emphasis added].

"Life"

25. The Respondent is a devout Shia Muslim and believes that life is sacred²². Similarly, many religions and cultures believe in the sanctity and dignity of human life. For the Evangelical Christian, the Bible is clear that all human beings are made in the image of God and human life therefore, must be protected at all of its stages²³.

26. The notion of the sanctity of life is not unique to religious individuals. Indeed, this Court has

¹⁷ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*], *EFC Authorities*, Tab 9.

¹⁸ *Morgentaler*, *supra*, at para. 16, *EFC Authorities*, Tab 9.

¹⁹ *Godbout v. Longueuil (Ville)*, [1997] 3 S.C.R. 844 [*Godbout*], *EFC Authorities*, Tab 5.

²⁰ *Godbout*, *supra*, at para 66, *EFC Authorities*, Tab 5.

²¹ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at para. 137, in Gonthier J.'s dissent, although concurred with on this point by the Court, *EFC Authorities*, Tab 3.

²² *Rasouli*, *supra*, at para. 7, *EFC Authorities*, Tab 10.

²³ See Genesis 1:26, *EFC Authorities*, Tab 13.

recognized the general principle of the sanctity of life and its need for protection²⁴. In *Rodriguez*, this Court stated:

I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin (*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993)) to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution which embodies our most fundamental values a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well.

[...]

What the preceding review demonstrates is that Canada and other Western democracies recognize and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. However, these same societies continue to draw distinctions between passive and active forms of intervention in the dying process, and, with very few exceptions, prohibit assisted suicide in situations akin to that of the appellant. The task then becomes to identify the rationales upon which these distinctions are based and to determine whether they are constitutionally supportable²⁵ [Emphasis added].

“Liberty”

27. With respect to the term “liberty”, this Court has defined it in the following manner:

One particular provision which affords a clue to what liberty means is s. 1 of the *Charter*, the general balancing provision. It is useful to recall its wording: the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits as can be demonstrably justified in a free and democratic society. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J.C. stated the following (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and

²⁴ See *Rodriguez*, *supra*, at paras. 10, 14, 15, 16, 34 and 52, *EFC Authorities*, Tab 11, (see also, *Manitoba*, *supra*, at paras. 16 and 125, *EFC Authorities*, Tab 7).

²⁵ *Rodriguez*, *supra*, at paras. 14 and 52, *EFC Authorities*, Tab 11.

freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified²⁶ [Emphasis added].

28. The Court went on to state:

[...] liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy, and choice in decisions going to the individual's fundamental being. She stated, at p. 166:

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.²⁷

29. Finally, this Court has recognized that "liberty" includes the absence of coercion or constraint:

The type of balance I have in mind was well expressed by Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.* In that case, Dickson J. gave a liberal interpretation of the word "freedom," albeit in the context of s. 2(a) of the *Charter* (at pp. 336-337):

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Although the English version of the *Charter* employs two different words, "freedom" and "liberty", both emanate from the same concept. In French, the term "*liberté*" is

²⁶ *B. (R.)*, *supra*, at para. 78, *EFC Authorities*, Tab 1.

²⁷ *B. (R.)*, *supra*, at para. 80, *EFC Authorities*, Tab 1.

used in s. 2 as well as in s. 7.²⁸ [Emphasis added].

30. The underlying principles and values associated with the right to liberty under section 7 of the *Charter* include both the making of decisions that are of fundamental personal importance to the individual and autonomy in making those decisions. The right to liberty cannot be divorced from an individual's sincerely held religious beliefs as these beliefs are of fundamental personal importance to the individual and inform his or her decision making.
31. The fundamental freedoms to life and liberty are inextricable. In order for a person's section 7 *Charter* rights/values to be honoured, that person must have the liberty to live according to his or her sincerely held religious and moral beliefs.
32. In the context of this appeal, as in the context of all cases relating to the withdrawal of life sustaining measures of a patient, consideration must be given to the person's sincerely held religious beliefs when considering his right to life and liberty.
33. To properly understand a person's *Charter* rights/values, this Court has established that one must consider how they relate to other *Charter* rights and their historical context, which includes their underlying principles:

Thus, the wording of the provision, its structure, the context in which it is found, the relationship there may be between it and the other provisions, as well as the historical context in which the *Charter* was adopted, are all factors that must be taken into consideration in seeking to identify the purpose of a protected right or freedom, in order to preserve the coherence of the entire constitutional text and maintain the integrity of the intention of Parliament. A proper and prudent interpretation of the *Charter* is especially necessary because it is a constitutional document of great import that cannot be altered by a mere statutory amendment if this Court were to misunderstand or err as to the scope of the rights and freedoms to which exceptional protection is afforded²⁹ [Emphasis added].

34. To consider and treat an individual's life, liberty and security of the person rights without considering his or her religious, spiritual or moral views on "life" and "liberty" is to ignore and deny the nature and scope of the right to life, liberty and security of the person itself.

D. The right of individuals to make decisions regarding their own life, medical care and medical treatment which are influenced, inspired and in accordance with their sincerely held religious beliefs

35. The section 2(a) *Charter* right to freedom of religion has been consistently held to include

²⁸ B. (R.), *supra*, at para 79, *EFC Authorities*, Tab 1.

²⁹ B. (R.), *supra*, at para 17, *EFC Authorities*, Tab 1.

the right to hold and practice one's sincerely held religious beliefs. This Court has stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination³⁰ [Emphasis added].

36. The evidence before this Court is that the Respondent's expectation of Canadian health care and sincerely held religious beliefs lead him to believe that "access to health care is a fundamental right and that a person is entitled to remain alive until all signs of life are gone"³¹.

37. It is not the role of the State to interpret or judge a person's religious belief, instead, it is the State's obligation to protect it:

[t]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion³².

38. The notion of religious beliefs affecting the way in which a religious individual conducts his or her life is not a novel one. Indeed, the Honourable Chief Justice Beverly McLachlin has acknowledged this in her essay Freedom of Religion and the Rule of Law³³:

Charles Taylor has contributed greatly to our understanding of the way in which individuals and communities situate themselves in society and ascribe meaning to their actions and experiences. In the opening chapter of his most ambitious work, *Sources of the self*, Professor Taylor develops his thesis that people are always acting and finding meaning in a normative context. He argues that we orient ourselves towards the good based on our evaluation of what is incomparably crucial to being human. The good, therefore, forms the horizon, or the framework, in which we take a stance with respect to "good human living" and, as a corollary, "a good and just society." While Professor Taylor is speaking in this volume of individual identity, I think that our understanding of the dynamics of community and societal identity are equally enriched by his observations: "My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it

³⁰ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 94, *EFC Authorities*, Tab 8.

³¹ *Rasouli*, *supra*, at para. 7, *EFC Authorities*, Tab 10.

³² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para. 50, *EFC Authorities*, Tab 12.

³³ McLachlin, Beverly, *Freedom of Religion and the Rule of Law*, taken from: *Religion: Recognizing Religion in a Secular Society*, Edited by Douglas Farrow, McGill-Queen's University Press, 2005 [McLachlin], *EFC Authorities*, Tab 14.

is the horizon within which I am capable of taking a stand.”³⁴

39. A person’s sincerely held religious beliefs not to be withdrawn from life support must be protected.
40. The EFC appreciates that freedom of religion has never been absolute. The decision to withdraw life sustaining treatment or to continue with treatment does not raise a conflict of competing rights – the rights, values and underlying principles associated with sections 2(a) and (7) of the *Charter* lead to the same conclusion – that life is precious and worth protecting.

E. Medical practitioners’ religious or conscientious beliefs.

41. The EFC does not argue that medical practitioners should be compelled to provide treatment which they do not support, either for religious or personal conscience reasons.
42. The facts of this case do not raise a conflict between the *Charter* rights/values of patients and the rights/values of medical practitioners – this case is not about medical practitioners removing life-sustaining treatment based on their religious or conscientious beliefs.
43. The Court of Appeal decision, by honouring the *HCCA*, does not violate the *Charter* rights/values of medical practitioners, but rather, protects and honours the *Charter* rights/values of all Canadians who may be faced with a decision to continue to withdraw life-sustaining treatment. Canadians should not be deprived of perhaps the most fundamental freedom there is: the right to life.


PART IV – COSTS

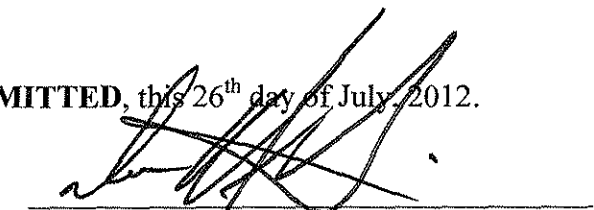
44. The EFC does not seek costs, and asks that no costs be awarded against it.

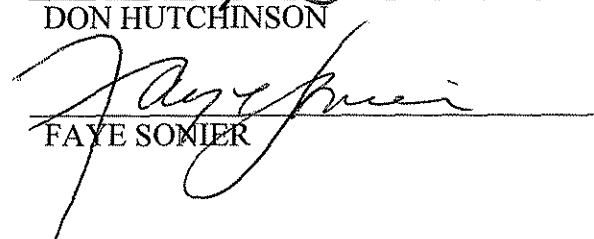
PART V – ORDER SOUGHT

45. The EFC respectfully requests permission to present oral arguments at the hearing of this matter and that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of July, 2012.


ALBERTOS POLIZOGOPOULOS
Counsel for The Evangelical Fellowship of Canada


DON HUTCHINSON


FAYE SOMIER

³⁴ McLachlin, *supra*, at pages 29-30, *EFC Authorities*, Tab 14.

PART VI: TABLE OF AUTHORITIES

<u>CASES</u>	<u>PARAGRAPH(S)</u>
<i>B. (R.) v. Children's Aid Society of Metropolitan Toronto</i> , [1995] 1 S.C.R. 315	21, 27, 28, 29, 33
<i>Bell ExpressVu Limited Partnership v. Rex</i> , [2002] 2 S.C.R. 559	6
<i>Chamberlain v. Surrey School District No. 36</i> , [2002] 4 S.C.R. 710	24
<i>Ciarlariello v. Schacter</i> , [1993] 2 S.C.R. 119	13
<i>Godbout v. Longueuil (Ville)</i> , [1997] 3 S.C.R. 844	23
<i>Malette v. Shulman</i> , 37 O.A.C. 281	13
<i>Manitoba (Director of Child & Family Services) v. C. (A.)</i> , [2009] 2 S.C.R. 181	13
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	35
<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	22
<i>Rasouli v. Sunnybrook Health Sciences Centre et al.</i> [2011] ONSC 1500	3, 25, 36
<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519	14, 19, 26
<i>Syndicat Northcrest v. Amselem</i> , [2004] 2 S.C.R. 551	37
<u>Other References</u>	
The Bible (reproduction of Genesis 1:26)	3, 25
McLachlin, Beverly, <i>Freedom of Religion and the Rule of Law</i> , taken from: <i>Religion: Recognizing Religion in a Secular Society</i> , Edited by Douglas Farrow, McGill-Queen's University Press, 2005	38
<i>On Liberty</i> , John Stuart Mill, Batoche Books, Kitchener, Ontario, 2011	20

PART VII: LEGISLATIVE PROVISIONS

<i>Canadian Charter of Rights and Freedoms</i> , Part I of <i>The Constitution Act, 1982</i> , <i>Schedule B to the Canada Act 1982 (UK), 1982</i> , c 11 (Preamble, Section 2(a) and Section 7).	2, 10, 16, 17, 18, 19, 21, 24, 30, 31, 35, 40
<i>Health Care Consent Act</i> , 1996, S.O. 1996, c. 2, Sched. A	5(a), 7, 8, 9, 10, 11, 16, 43

Preamble

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Préambule

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

[...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[...]

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

[...]

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

[...]

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Ontario Statutes

Health Care Consent Act, 1996

S.O. 1996, c. 2, Sched. A, as am. S.O. 1998, c. 26, s. 104; 2000, c. 9, ss. 31-48; 2002, c. 18, Sched. A, s. 10; 2004, c. 3, Sched. A, s. 84(1)-(5), (6) (Fr.), (7)-(11); 2006, c. 19, Sched. L, s. 2; 2006, c. 21, Sched. C, s. 111; 2006, c. 26, s. 14; 2006, c. 34, s. 34; 2006, c. 35, Sched. C, s. 52; 2007, c. 8, s. 207 [s. 207(2)-(8), (11)-(14), (18) not in force at date of publication.]; 2007, c. 10, Sched. O, s. 13, Sched. P, s. 15, Sched. Q, s. 13, Sched. R, s. 14 [Cannot be applied.]; 2009, c. 26, s. 10 [s. 10(2) not in force at date of publication.]; 2009, c. 33, Sched. 18, s. 10; 2010, c. 1, Sched. 9.

Part I — General**1. Purposes**

The purposes of this Act are,

- (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.

2.**2(1) Definitions**

In this Act,

"attorney for personal care" means an attorney under a power of attorney for personal care given under the *Substitute Decisions Act, 1992*;

"Board" means the Consent and Capacity Board;

"capable" means mentally capable, and **"capacity"** has a corresponding meaning;

"care facility" means,

- (a) a long-term care home as defined in the *Long-Term Care Homes Act, 2007*, or
- (b) a facility prescribed by the regulations as a care facility;
- (c) [Repealed 2007, c. 8, s. 207(1).]
- (d) [Repealed 2007, c. 8, s. 207(1).]

"community treatment plan" has the same meaning as in the *Mental Health Act*;

"course of treatment" means a series or sequence of similar treatments administered to a person over a period of time

20(8) Not spouse

Two persons are not spouses for the purpose of this section if they are living separate and apart as a result of a breakdown of their relationship.

20(9) Meaning of "partner"

For the purpose of this section,

"partner" means,

- (a) [Repealed 2004, c. 3, Sched. A, s. 84(5).]
- (b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives.

20(10) Meaning of "relative"

Two persons are relatives for the purpose of this section if they are related by blood, marriage or adoption.

20(11) Meaning of "available"

For the purpose of clause (2)(d), a person is available if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal.

2002, c. 18, Sched. A, s. 10; 2004, c. 3, Sched. A, s. 84(1)-(5)

21.**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.

21(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

Court File Number: 34362

**DR. BRIAN CUTHBERTSON,
DR. GORDON RUBENFELD**

and

**HASSAN RASOULI BY HIS LITIGATION
GUARDIAN AND SUBSTITUTE DECISION-
MAKER PARICHEHR SALASEL**

and

CONSENT AND CAPACITY BOARD et al.

Appellants

Respondents

Interveners

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF
APPEAL FOR THE PROVINCE
OF ONTARIO)**

**FACTUM OF THE INTERVENER,
THE EVANGELICAL
FELLOWSHIP OF CANADA**

VINCENT DANGENAIS GIBSON LLP/s.r.l.
325 Dalhousie Street, Suite 600
Ottawa, Ontario K1N 7G2

ALBERTOS POLIZOGOPOULOS
Tel : 613-241-2701
Fax : 613-241-2599
Solicitors for The Evangelical Fellowship
of Canada