

# The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



## ***A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30***

<http://scc.lexum.org/en/2009/2009scc30/2009scc30.html>

*This case examined the ability of the courts to order medical treatment for children under 16 years of age.*

**Date Released: June 26, 2009**

### **The Facts**

A child in Manitoba, A.C., was admitted to hospital two months before her 15<sup>th</sup> birthday, suffering from gastrointestinal bleeding caused by Crohn's disease. The child, a devout Jehovah's Witness, had previously completed a medical directive containing written instructions not to be given blood transfusions under any circumstance, including potential medical emergencies. The child's doctor believed that the internal bleeding created an imminent and serious risk to her health and potentially her life. The child, however, refused to consent to receiving blood despite the professional medical opinion of her doctor, because of her religious beliefs. The majority of Jehovah's Witnesses believe that the Bible prohibits the ingestion of blood, including blood transfusions in medical emergencies.

The Director of Child and Family Services apprehended her as "a child in need of protection". As provided for under ss. 25(8) and (9) of the *Manitoba Child and Family Services Act (CFSA)*, the Director sought a treatment order from the court to authorize the medical treatment of the child. The *CFSA* gives the court this power when the court considers the treatment to be in the "best interests" of the child, and the child is still under the age of 16. The court ordered the child to receive the blood transfusions prescribed by her doctor; she survived and made a full recovery.

#### ***Manitoba Child and Family Services Act***

25(8) Subject to subsection (9), upon completion of a hearing, the court may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child.

25(9) The court shall not make an order under subsection (8) with respect to a child who is 16 years of age or older without the child's consent unless the court is satisfied that the child is unable.

- (a) To understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or
- (b) To appreciate the reasonably foreseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment

The *CFSA* presumes that the “best interests” of a child over 16 years of age will be most effectively promoted by allowing their views to be determinative, unless the child does not understand or appreciate the consequences. Because the child is under 16, the court can authorize medical treatment through an interpretation of what is in the child’s “best interest,” with the child’s views not being considered as the final decision.

The child and her parents appealed the court order for treatment arguing that it was unconstitutional because it unjustifiably infringed the child’s rights under s. 2(a), 7, and 15(1) of the *Charter*. Unsuccessful at the provincial level, the case was brought before the Supreme Court of Canada (SCC).

### ***Canadian Charter of Rights and Freedoms***

2. Everyone has the following fundamental freedoms:

(a) Freedom of conscience and religion;

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.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### **The Decision**

The SCC dismissed the appeal by a majority of 6 to 1, and declared ss. 25(8) and (9) of the *CFSA* constitutional. The majority held that when the “best interests” standard is properly interpreted, the legislative scheme does not infringe on s. 7, 15 or 2(a) of the *Charter* because it is neither arbitrary, discriminatory, nor infringes on religious freedom. When a child’s “best interests” are interpreted in a way that sufficiently respects their capacity for mature and independent judgment in a medical decision-making context, the legislation remains constitutional.

Under s. 7 of the *Charter*, the majority held that, while it may be arbitrary to assume that children under the age of 16 do not have the ability to make responsible medical treatment decisions, the assumption is not arbitrary because children are given the chance to establish a maturity level that facilitates making such important decisions. A young person is entitled to lead evidence of sufficient maturity to have her wishes respected. Chief Justice McLachlin added that such legislation successfully balances society’s interest in ensuring that children receive necessary medical care on the protection of their autonomy.

Accordingly, although s. 25(9) identifies 16 years of age as the threshold for ensuring self-determination, it does not constitute age discrimination under s. 15 of the *Charter* because the ability to make treatment decisions is “ultimately adjusted in accordance with maturity, not age.” Additionally, the law is aimed at protecting the interests of minors as a vulnerable group by utilizing a rational standard that affords the child a degree of input, which is not discriminatory by the very definition of s. 15 of the *Charter*.

Finally, if the child is entitled to prove sufficient maturity, the Manitoba legislation cannot be seen to be violating their religious convictions under s. 2(a). Consideration of a child's "religious heritage" is one of the statutory factors to be considered in determining their "best interests" and therefore is not being unconstitutionally disregarded. Even if the child's religious beliefs are considered to be infringed upon, s. 1 of the *Charter* justifies the infringement "when the objective of ensuring the health and safety and of preserving the lives of vulnerable young people is pressing and substantial, and the means chosen – giving discretion to the court to order treatment after a consideration of the relevant circumstances – is a proportionate limit on the right."

## The Dissent

Justice Binnie wrote that the *Charter* is not just about protecting "the freedom to make the wise and correct choice," but rather to protect the individual autonomy and religious freedom to refuse medical treatment regardless of what the judge thinks is in their best interest. He expressed the opinion that the government has not shown that the limitations on the rights of mature minors are proportionate to the alleged positive effects. Justice Binnie concluded that the best interests of the child should be determined the child if she has the capacity to make the decision and understand the consequences.

Contrary to the majority's opinion, Justice Binnie found that the provisions violated ss. 2(a) and 7 of the *Charter*. The presumption that a child under the age of 16 lacks capacity arbitrarily denies mature minors the same rights as children over the age of 16. It limits their religious freedoms and infringes on their life, liberty and security of the person in an arbitrary manner that is not proportionate to the positive effects the laws have on immature minors, which he argues are none. The benefits of ensuring judicial control over medical treatment for "immature" minor is not advanced by overriding the *Charter* rights of "mature" minors under 16 years old who are not in need of judicial control.

### Discussion Issues

1. Do you think the threshold age of 16 is an appropriate age at which to give individuals the autonomy to make decisions about their medical health? Should the age be lower or higher? Explain why.
2. Why do you think the courts are concerned with the child making a decision independent of parental influence? What potential consequences do you foresee?
3. Do you agree with the decision of the majority or Justice Binnie? Do you think the government should decide what is in the "best interests" of a child? If not, who should? Should the government be able to override parental decisions regarding the health of their child? Does your answer change depending on the age of the patient?
4. Is it more important to have the ability to make one's own health choices, regardless of age, or to ensure that human life is protected? Explain.