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LINKS

Aboriginal medicine ruling ignites debate on children's rights

Hasham, Alyshah; Alamenciak, Tim . Toronto Star ; Toronto, Ont. [Toronto, Ont]20 Nov 2014: GT.1.

ABSTRACT

The case is distinct from other instances where courts have intervened to force medical treatment on minors not considered capable of making their own decisions - often because of religious objections, such as in the case of Jehovah's Witnesses refusing to accept blood transfusions.

FULL TEXT

In 14 words, the decision of a Brantford judge changed the life of an 11-year-old Six Nations girl with leukemia, and sparked a controversy about aboriginal rights and the rights of children in Canada.

The ruling has been supported by aboriginal communities and met with concern by non-aboriginal legal experts who question whether the decision adequately considered the rights of the girl and the duty of the government to protect the best interest of the child.

"D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right," wrote Justice Gethin Edward in his Nov. 14, 2014 decision on the case.

And so Edward did not force the Brant Children's Aid Society to apprehend the girl and undergo the chemotherapy her doctors at the McMaster Children's Hospital said gave her a 90 to 95 per cent chance of survival - her only chance of survival.

He, instead, established that Section 35 of the Constitution protects the aboriginal practice of using traditional medicine and the right of the mother to have her child treated with traditional medicine over chemotherapy.

The hospital has said it has no plans to appeal the decision.

This is a "world of competing sorrows, because no matter what you do somebody is going to be hurt or harmed or upset," says Margaret Somerville, the founding director of the Centre of Medicine, Ethics and Law at McGill University.

The case is distinct from other instances where courts have intervened to force medical treatment on minors not considered capable of making their own decisions - often because of religious objections, such as in the case of Jehovah's Witnesses refusing to accept blood transfusions.

In those cases the courts essentially say to parents, your charter right to freedom of religion does not override your child's right to life, says Cheryl Milne, the executive director of the David Asper Centre for Constitutional Rights at the University of Toronto. She adds that Canada, as a signatory of the UN Convention on the rights of a child, also has obligations to protect the life and health of children.

Edward's decision has left many legal experts in constitutional and family law questioning whether the rights of the child were properly weighed in this case.

"What I find the decision is a little unclear on is the right of her child herself and seeing her rights as separate," says Milne.

"If you look at the cases in this area which are not involving aboriginal children, in almost every case including ones with similar facts to this one, the courts would take the decision-making authority away from the parents," says Somerville.

She argues that one way to see the decision is that the "community interest in having Aboriginal rights upheld is outweighing the right to life for this child and I don't see how they could have justified that because in the law there is a basic presumption in favour of life."

The main and obvious flaw in decision is that the judge doesn't address possible limitations on aboriginal rights, says Bruce Ryder, a law professor at Osgoode Hall specializing in constitutional law.

The judge notes that Section 35 of the Constitution is not part of the Charter of Rights and Freedoms. As such, it is not governed by Section 1 of the charter which places "reasonable limits" on rights like freedom of expression or freedom of religion. Then he stopped - which was wrong, says Ryder.

The Supreme Court of Canada has clearly said that "no rights are absolute, all rights are subject to limits that have to be justified by the government," he said. "The question that the judge didn't even consider is whether the process put in place for imposing treatments on a child, when it's in the best interest of child, might be a justified limit on Section 35."

The judge wrote that a medical doctor on Six Nations, Dr. Karen Hill, works with Alba Jamieson, a traditional medical practitioner, demonstrating that traditional healing continues to be practised on the reserve. He also wrote that the mother sought treatment for the child at an alternative care facility in Florida over the course of the hearing, though it's unclear whether that facility provides traditional medicine.

Refusing chemotherapy "is a decision made by a mother, on behalf of a daughter she truly loves, steeped in a practice that has been rooted in their culture from its beginnings," wrote Edward.

In order to understand the judge's reasoning and the position of the Six Nations community, it is important to view the decision through a historical lens, says Shin Imai, a law professor at Osgoode Hall who has spent the past four decades working in the area of indigenous rights.

"The courts have said the purpose of Section 35 is to reconcile First Nations or aboriginal communities with the rest of Canada," says Imai. "Historically what has been obvious to non-indigenous people as good ended in total disaster. (In residential schools) it was good to beat them when they spoke their own language It was obvious in the '60s when all these children were taken off the reserves."

In the decision, Edward refers to the "dark history of our country's prosecution of those who practised traditional medicine." Every decision from the outside that says "this is good for you and whether you think so or not we're going to do it" has to consider that perspective, Imai said.

In choosing not to unilaterally order the child taken from her parents and community, Imai notes that the judge considered that in addition to loving and caring parents, the Six Nations community was actively involved and concerned about the care of the child.

"Forcing a First Nations child to undergo unwanted, mainstream medical treatment is an affront to the dignity and autonomy of the child, our cultures, and our nations," says a statement from the Six Nations of the Grand River and the Mississaugas of New Credit praising the decision.

"Had our children been forced into treatment, it would have had a disastrous effect on their emotional, psychological, and spiritual well-being."

"I think it's important to note that these parents were not proposing to not have their daughter receive any treatment," says Katherine Hensel, a prominent lawyer with extensive experience representing First Nations people. "(J.J.) was receiving traditional medicines which, to the best of their knowledge, can and should be used. And are always used."

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