IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

Dylan Jacob
Appellant

– and –

Attorney General of Canada
Respondent

# FACTUM OF THE RESPONDENT

Counsel for the Respondent:
Team 8

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## PART I – OVERVIEW

[1] The legislative scheme concerning physician-assisted suicide is a tailored and incremental government policy, addressing the needs of terminally ill individuals who are facing imminent death and are otherwise precluded from ending their lives with dignity. The amendments reflect Parliament's recognition of the difficult social and moral issues posed by physician-assisted suicide.

*Criminal Code*, RSC 1985, c C-46, s 241.1 [*Criminal Code*].

[2] Terminally ill individuals face the specific disadvantage of an imminent death. Section 241.1 is a genuinely ameliorative program that alleviates this disadvantage by giving terminally ill patients control over the timing and means of their death, while providing necessary safeguards to prevent abuse of the provision. The provision is thereby shielded under section 15(2) of the *Charter*. Moreover, the provisions do not make a discriminatory distinction under section 15(1), as any distinction does not perpetuate prejudice or stereotypes. In addition, the provisions do not infringe the Appellant's section 7 rights of life, liberty or security of the person, and in the alternative, any established deprivation is in accordance with the principles of fundamental justice. Finally, any perceived infringement of the Appellant's *Charter* rights is a justifiable limit in a free and democratic society under section 1.

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 1, 7, 15 [*Charter*].
*Criminal Code*, *supra* para 1, s 241.1.

## PART II – STATEMENT OF FACTS

### A. The Appellant's History

[3] The Appellant was diagnosed with undifferentiated schizophrenia in 2000. The attending psychiatrist, Dr. Said, found it very difficult to treat the Appellant because of his consistent refusal to take his medication. As a result, the Appellant suffers from lengthy psychotic episodes during which he becomes aggressive and violent.

Official Problem, the Wilson Moot 2013, paras 3, 4, 6 [Official Problem].

[4] While in a psychotic state in October 2007, the Appellant stabbed his father nineteen times, after the latter suggested that his son be committed to a psychiatric hospital to receive treatment for his psychosis. The Appellant was charged with second-degree murder, and found not criminally responsible. Following a hearing with the Ontario Review Board, the State remanded the Appellant to the Oak Ridges Centre for Mental Health for treatment.

Official Problem, *supra* para 3 at paras 8 -10.

[5] The Appellant was last competent in March 2011. Accordingly, the Appellant has not been competent since the enactment of section 241.1. Although the Appellant has received excellent care at Oak Ridges, the Appellant remains in a psychotic state most of the time. Due to the aggressive and violent behaviour caused by his psychosis, the Appellant is often restrained to his bed. During his time at Oak Ridges, the Appellant has experienced only four lucid periods, each lasting no more than five days. During his last three lucid periods, the Appellant has expressed his wish to end his life to his sister, Ms. Jacob, and to his psychiatrist, Dr. Lee. He did not express a wish to due during his first lucid period

Official Problem, *supra* para 3 at paras 11, 13, 14, 17.

[6] After the enactment of section 241.1, Ms. Jacob asked Dr. Lee about obtaining physician-assisted suicide for Dylan in accordance with his previously expressed wishes. Dr. Lee refused Ms. Jacob's request, because the Appellant was neither mentally competent nor terminally ill. As a result, Ms. Jacob commenced an application challenging the constitutional validity of section 241.1, acting as the Appellant's litigation guardian.

Official Problem, *supra* para 3 at para 2.

**B. The Nature of Mental Illness**

[7] Patients with psychiatric illnesses are generally at a higher risk of neglect or abuse than patients with many other types of disabilities, and suicidal ideation is often a feature of mental illness. Such patients are vulnerable to involuntary or non-voluntary euthanasia.

Official Problem, *supra* para 3 at paras 23, 25.

[8] The federal and provincial governments have devoted significant resources to mental health awareness and suicide prevention programs. The main objectives of these programs are to destigmatize mental illness and urge people with mental health issues to seek medical attention.

Official Problem, *supra* para 3 at para 23.

[9] Physician-assisted suicide is a highly contentious issue within the medical profession. A majority of physicians believe that physician-assisted suicide is not medically-defensible in cases of incurable psychiatric illness.

Official Problem, *supra* para 3 at para 25.

[10] It can be more difficult to give certain prognosis in cases of mental illness than in cases of terminal physical illness. This is partly because the field of psychiatric medicine is continually evolving. New treatments may have promise in difficult cases.

Official Problem, *supra* para 3 at para 22.

### C. The Legislative History of Section 241.1

[11] Section 241.1 was enacted in response to a number of high profile cases in which patients suffering from terminal illnesses either travelled abroad to commit physician-assisted suicide or died in deplorable conditions within Canada. With the intent of addressing this specific social problem, Parliament amended the *Criminal Code* prohibition against assisted suicide, and enacted section 241.1 as a tailored and rational policy response for terminally ill individuals suffering severe pain.

*Criminal Code*, *supra* para 1, s 241.1.
Official Problem, *supra* para 3 at para 26.

### D. The Procedural History

[12] At first instance, Justice Wire allowed the Appellant's application, and held that section 241.1(1) of the *Criminal Code* discriminated against individuals with mental illness. Justice Wire found that the regime could not be justified in a free and democratic society.

*Criminal Code*, *supra* para 1, s 241.1.
Official Problem, *supra* para 3 at para 27.

[13] On appeal, Justice Rainfoot overturned the decision of the Ontario Superior Court of Justice, and found that it was unnecessary to engage in a section 15(1) inquiry because the provision was an ameliorative program within the meaning of section 15(2) of the *Charter*. Moreover, she determined that any distinction created by section 241.1 is not discriminatory within the meaning of section 15(1). She held that that the nature of serious

psychiatric illnesses is distinct from that of physical illnesses, and that the distinction corresponds to the actual needs and circumstances of those with mental illness. With respect to section 7, Justice Rainfoot found that there was no violation as the restriction is not arbitrary and is consistent with the government's objective. In dissent, Justice Singh largely adopted the reasoning of Justice Wire.

*Criminal Code*, supra para 1, s 241.1.
Official Problem, supra para 3 at para 27.
*Charter*, supra para 2, ss 15(1), 15(2).

## PART III – STATEMENT OF POINTS IN ISSUE

[14] There are three issues on appeal:

Issue 1: Does section 241.1 of the *Criminal Code* infringe section 15 of the *Charter*?

Issue 2: Does section 241.1 of the *Criminal Code* infringe section 7 of the *Charter*?

Issue 3: If the answer to issues 1 and/or 2 is "yes", is the infringement demonstrably justified in a free and democratic society, under section 1 of the *Charter*?

## PART IV – ARGUMENT

### Issue 1: Section 241.1 of the *Criminal Code* does not constitute discrimination under section 15 of the *Charter*

[15] The physician-assisted suicide provision does not violate section 15(1) of the *Charter,* as any distinction made does not constitute an analogous or enumerated ground. In the alternative, any distinction based on an analogous or enumerated ground is shielded under section 15(2). It is a genuinely ameliorative program targeted at alleviating the disadvantages faced by the terminally ill, by giving those facing a certain death the option to die with dignity. Moreover, any established distinctions do not create a disadvantage by perpetuating prejudice or false stereotyping under section 15(1).

> *R v Kapp*, 2008 SCC 41 at para 42, 294 DLR (4th) 1 [2008] [*Kapp*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 323, [2013] ACS No 5 [*Quebec v A*].

### A. Any distinction is not based on an analogous or enumerated ground

[16] The distinction created in section 241.1 is between individuals who are competent and have a terminal illness, and those who are not. The law does not distinguish directly on the basis of an analogous or enumerated ground, as it draws a distinction between a subset of individuals with a specific form of illness, and the rest of society.

> *Charter*, *supra* para 2, s 15(1).

#### *i) Lack of terminal illness is not an analogous ground*

[17] The appellant is excluded from physician-assisted suicide because he does not have a terminal illness, which is not an analogous ground for the purpose of section 15(1). Terminal illness is not coincident with physical disability. Those without terminal illness are not necessarily disadvantaged, nor do they constitute a "discrete and insular minority"

lacking in political power or control. Although mental and physical disabilities are enumerated grounds, no analogous distinction is made when differentiating between individuals with and without a terminal illness.

*Charter*, *supra* para 2, s 15(1).
*Miron v Trudel*, [1995] 2 SCR 418 at para 80, 124 DLR (4th) 693.

***ii) The distinction does not have an adverse effect on mentally ill individuals***

[18] Individuals are not precluded from obtaining physician-assisted suicide because their illness is psychiatric, but because they are either incompetent or do not have a terminal illness. There is no evidence that the terminal illness requirement in s. 241.1 disproportionately excludes the mentally ill. In fact, the terminal illness requirement is no more likely preclude the mentally ill than any other group in society that does not suffer from terminal illness. Similarly, the factual record does not establish that individuals with terminal illness are more likely to be found incompetent. Accordingly, this requirement does not create an adverse impact.

Official Problem, *supra* para 3.

## B. In the alternative, section 241.1 of the *Criminal Code* is an ameliorative program, thereby shielded under section 15(2)

[19] Should the court find a distinction based on an analogous or enumerated ground, it is unnecessary to engage in a substantive review under section 15(1), as section 241.1 of the *Criminal Code* is a genuinely ameliorative program, and is thereby shielded by section 15(2).

*Criminal Code*, *supra* para 1, s 241.1.
*Kapp*, *supra* para 15 at para 42.

[20] Section 241.1 is saved by section 15(2) of the *Charter* because it satisfies the two-part test enunciated in *Kapp*:

a. the provision is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality; and

b. the distinctions drawn by the provision are on enumerated or analogous grounds that "serve and are necessary to" the ameliorative purpose.

*Kapp*, *supra* para 15 at para 42.

***i) Section 241.1 is genuinely ameliorative for terminally ill, competent patients***

[21] The distinction drawn in section 241.1 is between terminally ill, competent patients, and the rest of society. Should the court find this distinction to be based on an analogous or enumerated ground, this group is the appropriate target for an ameliorative program. The Supreme Court in *Rodriguez* acknowledged that those with terminal illness constitute a disadvantaged group.

*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 40, [2011] 2 SCR 670 [*Cunningham*].
*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 149, [1993] SCJ No 94 [*Rodriguez*].

[22] Section 241.1 is genuinely ameliorative because it is directed at improving the situation of terminally ill patients who face the disadvantage of an imminent and inevitable death. The object of section 241.1 is not to offer a choice of whether or not to die, as death is inevitable for these individuals, but to give those facing certain death the option to die with dignity. This object correlates with the actual disadvantages suffered by terminally ill individuals.

*Cunningham*, *supra* para 21 at para 59.

[23] The legislative goal of section 241.1 is *not* to provide an option to die with physician assistance, but to provide those individuals already facing certain death with control over their imminent death and hence, a measure of dignity. The object of an ameliorative program "must be determined as a matter of statutory interpretation, having regard to the words of the enactment, expressions of legislative intent, the legislative history, and the history and social situation of the affected groups" (*Cunningham*). Section 241.1 was enacted in response to highly publicized cases concerning terminal diseases. This social and historical context, in combination with language of paragraph 241.1(1)(c), indicates that the physician-assisted suicide legislation is specifically tailored to address the disadvantages faced by individuals with terminal illnesses.

> *Cunningham*, *supra* para 21, at paras 61, 63, 66.
> Driedger, *Construction of Statutes,* 2nd ed (Toronto: LexisNexis Butterworths, 1983).
> Official Problem, *supra* para 3 at para 26.

***ii) The distinctions drawn in section 241.1 serve and advance the ameliorative purpose***

[24] It is *rational* to conclude that the means chosen by the Respondent would contribute to achieving its ameliorative goal, as the distinction in a general sense serves or advances the object of the program. *Cunningham* expressly states that it is not necessary to prove that the exclusion is essential to realizing the object of the ameliorative program.

> *Kapp*, *supra* para 15 at para 49.
> *Cunningham*, *supra* para 21 at para 45.

[25] The distinction drawn between terminally ill individuals and the rest of society in paragraph 241.1(1)(c) does not go "further than is justified by the object of the ameliorative program," which is to improve the situation of terminally ill individuals for whom death is not a choice. That objective is not to give terminally ill individuals the

choice of whether to die, because death is inevitable for those with terminal illness. Rather, it is to provide those facing imminent death with the ability to die with dignity.

> *Cunningham*, *supra* para 21 at para 45.
> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 41, [2012] BCJ No 2460.

[26] The competency distinction in paragraph 241.1(1)(a) serves the purpose of the legislation, which is to provide individuals facing certain death with a measure of control over the time and means of their death, allowing them to die with dignity. This ensures that terminally ill individuals exercise true autonomous control over their own deaths, and respects the right of terminally ill individuals to change their minds. It recognizes the fact that this is a fundamentally personal decision, and prevents abuse of the provision.

[27] Parliament's policy decision to limit physician-assisted suicide to competent and terminally ill individuals through paragraphs 241.1 (a) and (c) serves the legislative objective of remedying the specific plight of those patients who are in severe pain and facing certain and imminent death. These requirements reflect the fact that Parliament has elected to take an incremental and tailored policy approach to addressing the disadvantages faced by those suffering from terminal illness.

> Official Problem, *supra* para 3 at para 13.

***iii) Section 15(2) protects ameliorative laws targeted at specific groups, like section 241.1***

[28] In addition to satisfying the two-part test enunciated in *Kapp*, the use of section 15(2) in this context corresponds with the spirit and purpose of section 15(2).

> *Kapp*, *supra* para 15 at para 49.
> *Charter*, *supra* para 2, s 15(2).

[29] Courts have adopted a deferential standard to the application of section 15(2), and this deferential standard should apply to the complex and controversial policy area of physician-assisted suicide. If governments are obligated to benefit all disadvantaged people equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The high level of controversy surrounding physician-assisted suicide indicates that, if unable to create specific policies that necessarily exclude some groups, the government may be unable to legislate at all.

> *Cunningham*, *supra* para 21 at para 40.
> *Kapp*, *supra* para 15 at para 49.

[30] It is open to Parliament to address the specific disadvantages faced by terminally ill individuals through rationally designed and tailored policy decisions. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. In *Cunningham,* the court affirmed that "section 15(2) recognizes that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities".

> *Cunningham*, *supra* para 21 at paras 41, 43.
> *Kapp*, *supra* para 15 at paras 25, 28.
> *Lovelace v Ontario*, 2000 SCC 37 at para 44, [2000] 1 SCR 950.

### C. In the alternative, section 241.1 of the *Criminal Code* is not discriminatory under section 15(1)

[31] Should the court consider it necessary to proceed to a consideration of s. 15(1), section 241.1 does not create a disadvantage by perpetuating prejudice or stereotyping. The Supreme Court's recent decision in *Quebec v A* confirms that in order to establish a

violation of section 15(1), a claimant must prove that the "government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage". In writing for the majority on the subject of section 15(1) in *Quebec v A*, Justice Abella clarifies that, although the indicia of "prejudice and stereotyping are not discrete elements of the test", these factors can be used to determine whether a challenged law violates the norm of substantive equality.

> *Kapp*, *supra* para 15 at paras 17, 23.
> *Quebec v A*, *supra* para 15 at para 323.
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] SCJ No 12 [*Withler*].
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, DLR (4th) 1.

[32] The legislature is free to create targeted social programs, provided it does not do so in a discriminatory manner. A legislative choice "not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect ... does not give rise to s. 15(1) review" (*Auton*).

> *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 at para 41, [2004] 3 SCR 657 [*Auton*].

[33] Although the physician-assisted suicide statutory scheme prevents non-terminally ill or incompetent individuals from seeking physician-assisted suicide, it does not perpetuate disadvantages nor is it rooted in stereotypical assumptions about the nature of non-terminal illness. Instead of "exclud[ing] vulnerable [individuals] from protections" (*Quebec v A*), section 241.1 specifically targets terminally ill individuals and protects against involuntary or non-voluntary euthanasia by requiring competence at the time of death.

> *Charter*, *supra* para 2, s 15(1).
> *Quebec v A*, *supra* para 15 at para 349.

***i) The provision does not perpetuate prejudice and disadvantage***

[34] The competency requirement in the physician-assisted suicide provisions does not perpetuate pre-existing disadvantages, but rather, helps to alleviate the unique historical disadvantages faced by individuals with mental illness by *protecting* incompetent individuals from involuntary or non-voluntary euthanasia. Mentally ill individuals are more susceptible to abuse or neglect, which could lead to non-voluntary or involuntary physician-assisted suicide. Additionally, the high level of stigma against these illnesses, in combination with the very nature of mental illness, indicates that mentally ill individuals are more likely to commit suicide as a result of depression, rather than of a rational wish to die. Individuals with chronic mental illness, who are institutionalized, like Mr. Jacob, may feel either internal or external pressure to end their lives.

> *Criminal Code*, *supra* para 1.
> Official Problem, *supra* para 13.

[35] The alleged exclusion does not match the types of disadvantages that mentally ill individuals face. Although mentally ill persons face certain disadvantages, this provision in no way perpetuates their disadvantage. The provision is targeted at persons whose death is imminent and who thereby may gain a measure of control and dignity. That is not a disadvantage faced by the mentally ill in general, so to the extent that the provision tends to exclude mentally ill persons from the regime of physician-assisted suicide, this exclusion does not perpetuate an existing disadvantage of the claimant group.

***ii) The distinction corresponds to the Appellant's needs, circumstances and capacities***

[36] The requirements in the statutory scheme do not arise from demeaning stereotypes, but are "neutral and rationally defensible policy choice[s]" that take into account the actual needs, circumstances and capacities of the Appellant and others in similar situations (*Hutterian Brethern*). The Supreme Court of Canada affirmed in *Quebec v A* that, to the extent a provision takes into account the claimant's actual situation in a manner that respects the claimant's needs, capacities and circumstances, it is less likely to be discriminatory.

> *Gosselin v Quebec (Attorney General)*, 2000 SCC 84 at para 38, [2002] 4 SCR 429.
> *Quebec v A*, *supra* para 15 at para 418.
> *Withler*, *supra* para 32 at para 67.
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 108, [2009] 2 SCR 567 [*Hutterian Brethren*].

[37] The requirements in section 241.1 are not rooted in stereotypical assumptions about the mentally ill, but recognize the unique features of non-terminal and mental illness:

- It is much more difficult to give a certain prognosis in cases of mental illness. New treatments may have promise in difficult cases, indicating that there is potential for improvements in the quality of life of non-terminal patients.
- Patients with serious psychiatric illness are at a higher risk of neglect or abuse, face a high level of stigmatization in society, and are at a higher risk of involuntary or non-voluntary euthanasia.
- Suicidal ideation, which is very different from a rational wish to die, is often a feature of mental illness. This indicates that those with psychiatric illnesses are at a higher risk of involuntary euthanasia, and at risk of committing suicide due to feelings of worthlessness or being a burden on their caregivers.

> *Criminal Code*, *supra* para 1, s 241.1.
> Official Problem, *supra* para 3 at paras 23, 25.

[38] While the Respondents are deeply sympathetic to the Appellant's situation, the state has a duty and obligation to protect those under its care. The Canadian regime concerning the criminal behaviour of mentally ill individuals under the Not Criminally Responsible (*NCR)* system is based on the premise that the state has the dual responsibility of protecting society and providing treatment for the mentally ill. Permitting incarcerated mentally ill individuals to seek physician-assisted suicide would undermine the protective and treatment-based structure upon which the system is based.

*Criminal Code*, *supra* para 1, ss 241.1, 672.1.

**Issue 2: Section 241.1 does not violate the section 7 *Charter* rights of the Appellant**

**A. Section 241.1 does not deprive the Appellant of his right to life, liberty or security of person**

[39] Section 241.1 of the Criminal Code does not deprive the Appellant of life, liberty or security; in the alternative, any deprivation is in accordance with the principles of fundamental justice. The Appellant has failed to discharge his burden of proving that a deprivation and breach of fundamental justice has occurred.

*Charter*, *supra* para 2, s 7.
*Criminal Code*, *supra* para 1, s 241.1.
*Canadian Foundation for Children*, *Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 3, [2004] 1 SCR 76 [*Canadian Foundation*].

[40] Section 241.1 does not deprive the Appellant of his right to life, liberty or security of person because section 7 does not encompass an individual's right to commit suicide. In the alternative, the Appellant is unable to obtain the benefits of section 241.1 because his section 7 rights have been constitutionally limited due to his incarceration.

*Rodriguez*, *supra* para 21 at paras 129-130.

[41] Section 7 of the *Charter* does not provide an individual with the right to end his or her life. An individual's right to life, liberty or security of person does not encompass the right to commit suicide because this section is intrinsically concerned about the well-being of a living human being. The government's policy is that human life is sacred and should not be depreciated by allowing life to be taken. This view is reflected within our *Criminal Code*, which prohibits murder and other acts of violence that cause death. The view that human life is inviolable is fundamental to our society's conception of sanctity of life. Section 241 reflects the state's continuing position that life should be preserved; however, acknowledges for some death is imminent. The State has the authority to regulate assisted suicide, and such regulation does not deprive an individual of his or her section 7 rights.

> *Charter*, *supra* para 2, s 7.
> *Rodriguez*, *supra* para 21 at paras 129, 130, 149.

[42] In the alternative, the Appellant's section 7 rights to life, liberty and security of person have been constitutionally limited by his incarceration at Oak Ridges. The Appellant is currently under the government's custody as he was found NCR for the murder of his father. In *Winko*, the Supreme Court held that State imposed mandatory treatment following an NCR verdict is constitutional. Chief Justice McLachlin stated,

> [t]he NCR accused is to be treated in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill ... he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public (*Winko*).

The NCR regime reflects the State's continuing position that it has a duty to treat and protect the mentally ill. Permitting physician-assisted suicide while under this regime would undermine the protective structure upon which the system is based.

> *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 30, [1999] SCJ No 31 [*Winko*].
> Official Problem, *supra* para 3 at paras 8, 10, 11, 19.

## B. In the alternative, any violation of the Appellant's life, liberty or security is in accordance with the principles of fundamental justice

[43] Paragraphs 241.1(1)(a) and (c) are in accordance with the principles of fundamental justice. The government is constitutionally permitted to deprive its citizens of life, liberty and security as long as the deprivation complies with the principles of fundamental justice. Fundamental justice is violated by limitations that are arbitrary, overly broad or disproportionate to the State's objectives.

> *R v Malmo-Levine*, 2003 SCC 74 at para 130, [2003] 3 SCR 571 [*Malmo-Levine*].
> *Canadian Foundation*, *supra* para 39 at para 3.

### *i) The provisions further a valid state interest*

[44] The State's twin objectives in enacting section 241.1 are to provide those who are terminally ill and in severe pain with a measure of control over their imminent death and to limit abuse of physician-assisted suicide. The competency requirement furthers the State's objective of preventing abuse of this provision. The terminal illness requirement is necessary in furthering the State's objective of providing the terminally ill with control over their imminent death.

[45] Although the jurisprudence surrounding the definition of arbitrariness is not settled, paragraphs 241.1(1)(a) and (c) are not arbitrary under either of the competing legal tests. Chief Justice McLachlin, writing for the majority in *Chaoulli*, held that a law is arbitrary if the limit imposed was not necessary to further the state's objectives. In dissent, Justice Binnie was of the view that a law is arbitrary if "it bears no relation to, or is inconsistent with, [the state interest behind enacting the legislation]."

> *Canada (Attorney General) v PHS Community Service Society*, 2011 SCC 44 at para 132, [2011] 3 SCR 134 [*PHS*].
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 131, 232, [2005] 1 SCR 791 [*Chaoulli*].

[46] The competency requirement is not arbitrary because it furthers the State's objective of protecting against abuse of this provision. Requiring competency at death ensures that physicians are acting in accordance with a patient's true wishes at the moment of death, and thus, will decrease the possibility of patients being involuntarily euthanized. This is particularly important for patients suffering from psychiatric illnesses, given that they are at a higher risk for neglect and abuse, and more susceptible to involuntary euthanasia.

> *Criminal Code*, *supra* para 1, s 241.1(a).
> Official Problem, *supra* para 3 at para 23.

[47] The terminal illness requirement also prevents the predatory use of this provision. Unless properly regulated an assisted suicide provision could be used as a means of eliminating those who are viewed by some as a burden to society. The terminal illness requirement protects this provision from being diverted from its original purpose by placing a strict, unambiguous limitation on its scope. Further, this requirement inherently provides those who are terminally ill with control over their imminent death by providing them with a dignified way of ending their lives at a time and manner of their choosing.

> *Criminal Code*, *supra* para 1, s 241.1.
> *Rodriguez*, *supra* para 21 at para 187.

### *ii) The provisions are not overly broad or vague*

[48] Paragraphs 241.1(1)(a) and (c) are neither broad nor vague. Legislation that pursues a legitimate objective is unconstitutionally overbroad only if it is "broader than is necessary to accomplish that objective." A provision is vague when it does not provide sufficient guidance for legal debate.

> *R v Heywood*, [1994] 3 SCR 761 at para 49, [1994] SCJ No 101 [*Heywood*].
> *Canadian Foundation*, *supra* para 39 at para 15.

[49] The competency requirement does not restrict the Appellant's section 7 rights more than is necessary to accomplish its goals. This requirement protects vulnerable patients from involuntary euthanasia by ensuring a person is competent at the time the lethal dose is administered. The State recognizes that an individual may change his or her mind and refuse the lethal dose up until it is administered. Competency at death is particularly important to protect patients suffering from psychiatric illnesses, as they are more vulnerable to involuntary euthanasia.

Official Problem, *supra* para 3 at paras 23, 25.

[50] The terminal illness requirement is carefully tailored for the State to accomplish its objective of providing the terminally ill with control over their imminent death. In considering whether legislation is overly broad, the Court should be deferential to the government's role in balancing complex social considerations. It reflects a reasonable limit in the balancing of the complex social policy considerations relevant to physician-assisted suicide. By placing a strict, unambiguous limitation, the State ensures that this provision provides those who are terminally ill with control over their imminent deaths while also protecting against predatory abuse.

*Heywood*, *supra* para 48 at para 50.
*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 79, 58 DLR (4th) 57 [*Irwin Toy*].

[51] Further, Section 241.1 is not unduly vague as it provides an adequate basis for legal debate.

***iii) The provisions are not grossly disproportionate to the state's objective***

[52] Paragraphs 241.1(1)(a) and (c) are not grossly disproportionate to the State's interest. In *Malmo-Levine*, the Supreme Court provided a two-step analysis test for disproportionality:

first, does the law pursue a legitimate State interest; and second, is the law grossly disproportionate to the State interest?

*Malmo-Levine*, *supra* para 43 at para 143.

[53] Paragraphs 241.1(1)(a) and (c) pursue the legitimate State objectives of providing those who are terminally ill a measure of control over their imminent death; and to prevent abuse by placing reasonable restrictions on the scope of section 241.1.

[54] Paragraph 241.1(1)(a) is not grossly disproportionate to the State's objective of preventing abuse. The mental competency requirement provides physicians with carefully crafted statutory rule for administering physician-assisted suicide. The competency requirement decreases the risk of involuntary euthanasia by requiring a physician to ensure a patient's true wishes at the time of death. This protects vulnerable patients, such as the mentally ill, from being involuntarily euthanized.

[55] Paragraph 241.1(c) is not grossly disproportionate to the State's objective because it explicitly provides the terminally ill with a measure of control over their imminent death. This requirement is not grossly disproportionate to the State's legitimate interest of preventing abuse because it limits the scope of section 241.1 to a manageable standard. As mentioned in *Rodriguez*, assisted suicide provisions are susceptible to being used to disguise murder and other grave abuses. By placing strict statutory limitations on the scope of this provision, the State protects this provision from being diverted from its original purpose.

*Rodriguez*, *supra* para 21 at para 187.

**Issue 3: In the alternative, any infringements are justified under section 1 of the *Charter***

[56] Any infringement of the Appellant's section 7 or section 15 *Charter* rights are prescribed by law and demonstrably justified in a free and democratic society. Section 241.1 has a pressing and substantial objective and the State has employed means that are proportional in obtaining those objectives. The means in provision 241.1 are proportional, as the provisions are rationally connected to the State's objective, minimally impairing on the Appellant's rights and the salutary effects of the provision outweigh its deleterious effects.

> *Charter*, *supra* para 2, ss 1, 7, 15.
> *R v Oakes*, [1986] 1 SCR 103 at paras 69-71, 26 DLR (4th) 200 [*Oakes*].
> *Hutterian Brethren*, *supra* para 36 at para 71.

**A. The provisions reflect a pressing and substantial legislative objective**

[57] The government's pressing and substantial objectives in enacting section 241.1 are to provide those who are terminally ill and in severe pain with control over the time and manner of their imminent death, and to limit abuse of physician-assisted suicide by limiting the scope of the provision.

[58] Historically, the State has opposed the enactment of assisted suicide provisions. Underlying this blanket prohibition was the notion that absolute preservation of human life was fundamental to our understanding of sanctity of life. However, this view has evolved. In *Rodriguez*, Justice Sopinka stated, "the principle of sanctity of life is no longer seen to require that all human life be preserved at all costs. Rather, it has come to be understood ... as encompassing quality of life considerations."

> *Rodriguez*, *supra* para 21 at paras 149, 175.

[59] Section 241.1 was enacted in response to highly publicized cases concerning terminally ill patients who died in deplorable conditions. Section 241.1 reflects the government's recognition that the principle of sanctity of life includes quality of life considerations. The state recognizes that those who are terminally ill face certain and imminent death. This provision is specifically tailored to provide those who are terminally ill with a measure of control over their death.

Official Problem, *supra* para 3 at para 26.

[60] Paragraph 241.1(1)(a) reflects the State's continuing concern that providing a blanket right to die may become "uncontainable and susceptible to grave abuse." Historically, society has devalued the lives of those who are physically or mentally disadvantaged. Given the negative stereotypes that exist regarding the quality of life of these individuals, it is imperative that the State place internal limits within any assisted-suicide provision to protect such individuals from abuse. The Appellant is at a higher risk for neglect and abuse because of his psychiatric illness. Without the terminal illness and competency limitations in the physician-assisted suicide provision, patients such as the Appellant would be vulnerable to involuntary euthanasia. As mentioned in *Rodriguez*, an assisted-suicide provision needs to be properly regulated, or it runs the risk of becoming uncontainable and open to predatory abuse.

*Rodriguez*, *supra* para 21 at para 138.
Official Problem, *supra* para 3 at para 23.

[61] Further, the Supreme Court has held that preventing severe harm is a pressing and substantial objective sufficient to override a *Charter* right. The harm that arises from involuntary euthanasia is death, the most severe form of harm. Given that section 241.1 allows those in intolerable pain to commit assisted suicide, it follows that the State will

place reasonable limitations to prevent the provision from being diverted from its original purpose.

> *R v Keegstra*, [1990] 3 SCR 697 at paras 58-64, 117 NR 1 [*Keegstra*].
> Official Problem, *supra* at paras 23, 26 & 27.
> *Charter*, *supra* para 2, s 7.

**B. The provisions are rationally connected to the government's objectives**

[62] Section 241.1 is rationally connected to the government's objective of providing the terminally ill with a measure of control over their imminent death and preventing the misuse or abuse of this provision. The rational connection test is met where the government can show that it is reasonable to suppose that the limit will further their objective. Here, it is reasonable to suppose that the limitations within section 241.1 will further the government's objectives. This provision is carefully tailored to allow those who are terminally ill a method of ending their life in dignity. Further, the strict statutory rules ensure that physicians are acting in accordance with a patient's true wishes to commit suicide, and provide a reasonable and manageable limitation on the scope of this provision.

> *Hutterian Brethren*, *supra* para 36 at para 48.

**C. The provisions minimally impair the Appellant's rights**

[63] Section 241.1 is minimally impairing because it is a reasonable course of action to balance competing social policy considerations. In assessing whether the impugned provisions minimally impair the Appellant's rights, the government is not required to choose the least intrusive means to achieve its objective. When the State is balancing competing social policy considerations, the Court should consider whether the government's action were reasonable, not whether the infringement was "literally minimal." Similarly, in *Hutterian Brethren,* Chief Justice McLachlin stated, "the courts must accord the legislature a measure

of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives." Physician assisted suicide is precisely this type of “complex social issue.” Accordingly, the Court should assess minimal impairment based on its reasonableness, not whether the infringement is "literally minimally" impairing on the Appellant's rights.

> *Oakes*, *supra* para 57 at para 70.
> *Irwin Toy*, *supra* para 51 at para 79.
> *Hutterian Brethren*, *supra* para 36 at para 26.

[64] The competency requirement is supported by the facts of this case. Given the fact that suicidal ideation is a feature of many psychiatric illnesses and that many patients who suffer from psychiatric illnesses are at a high risk of neglect and abuse, it is reasonable for the State to enact a mental competency requirement to help protect these vulnerable patients from being coerced into ending their lives. By imposing a strict statutory rule of mental competency at death, the State ensures that physicians act in accordance with a patient's true wishes at the time the lethal dose is administered. This rule reflects the State's recognition that an individual may change their mind up until the lethal dose is administered.

> Official Problem, *supra* para 3at paras 23, 25.

[65] It is inappropriate for a substitute decision maker to make decisions regarding physician-assisted suicide. Physician-assisted suicide cannot be considered “medical treatment” for the purposes of the *Health Care Consent Act* (*HCA*). Although the Ontario Court of Appeal decided in *Rasouli* that the withdrawal of life-saving treatment constituted medical treatment, this finding relied on the link between palliative care and the withdrawal of treatment. There is no such link in the context of physician-assisted suicide. Accordingly,

physician-assisted suicide is not medical treatment for the purposes of this the *HCA*, and the substitute decision maker protocol is neither applicable nor appropriate in this situation.

> *Health Care Consent Act, 1996*, SO 1996, c 2, Schedule A [*HCA*].
> *Rasouli (Litigation guardian of) v Sunnybrook Health Sciences Centre*, 2011 ONCA 482 at para 52, 281 OAC 183.

[66] The terminal illness requirement reflects a reasonable limit, as it is a rational policy decision that balances the complex social policy considerations relevant to physician-assisted suicide. As stated by former Chief Justice Lamer in *Rodriguez*, the legislature is dealing with a "contentious" and "morally laden" issue. As such, the government should be afforded some deference in their decision to limit section 241.1 to only those who are terminally ill. The government's legislative choice to limit this provision to those who are terminally ill and suffering from severe pain is supported the majority of practicing Canadian physicians.

> Official Problem, *supra* para 3 at para 25.

[67] The legislature determined that paragraphs 241.1(1)(a) and (c) are the most reasonable way for the government to achieve its objective of providing those who are terminally ill and suffering from severe pain control over their imminent death while preventing predatory use of the provision. The restrictions fall within the range of reasonable alternatives for which the legislature is entitled to deference.

> *Hutterian Brethren*, *supra* para 36 at para 37.

[68] Alternative methods would fall short of achieving this goal. The evidence presented in this case does not allow for a reasonable alternative for the government to carry out its objective. The remedies suggested by Justice Wire would fail to accomplish the State's objectives. Justice Wire's suggestions would provide too much deference to physicians in

deciding whether the patient is suffering from extreme pain, or whether the patient truly wishes to die. Further, given the difficulty in diagnosing mental illness, and the continuous development of new psychiatric treatments, it would require that the State perform a case-by-case assessment of each assisted suicide to determine whether the physicians acted in accordance with section 241.1. Requiring the creation of an elaborate administrative regime imposes an unreasonable burden on the government. In addition, the administrative delays potentially caused by such a regime will cause those who are terminally ill and unable to commit suicide more harm.

Official Problem, *supra* para 3 at paras 22, 27.

## D. Any alleged deleterious effects of the provisions are proportional to their salutary effects

[69] The salutary effects of paragraphs 241.1(1)(a) and (c) significantly outweigh any alleged deleterious effects on the Appellant. In *Hutterian Brethren*, Chief Justice McLachlin stated, "the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure."

*Hutterian Brethren*, *supra* para 36 at para 78.

[70] Any alleged deleterious effects of section 241.1 are proportional to its salutary effects. Although the trial judge found the amendments failed to take into account mentally ill patients who find themselves in pain without a method to end their lives with dignity, most of those affected by the impugned provisions will not find themselves in the same situation as the Appellant. The Appellant's situation is unique because his section 7 *Charter* rights are constitutionally limited by his incarceration at Oak Ridges. Further, the Appellant wishes to die because he is appalled by this quality of life at Oak Ridges. Although the

Appellant has expressed distress at his treatment options, the field of psychiatric medicine is evolving. In the future, doctors may be able to develop new treatments that will alleviate the Appellant's psychosis and improve his quality of life.

Official Problem, *supra* para 3 at paras 9, 14, 22, 27.

[71] The salutary effects of the terminal and competency requirements ensure that no one dies against his or her will. The competency requirement protects the interests of those suffering from psychiatric illnesses from being coerced into ending their lives against their will. A strict statutory requirement of mental competency at the time of death ensures certainty of patient's true wish to end their life. By striking down mental competency at death, individuals such as the Appellant will be susceptible to severe abuse. Mentally ill patients could be coerced into ending their lives by those who view them as a burden to others or society. The competency requirement protects against such abuse of this provision by ensuring that the physician act in accordance with a patient's true wishes at the time of death, rather than relying on previously obtained consent.

*Rodriguez*, *supra* para 34 at para 187.

[72] The terminal illness requirement is a reasonable limit in controlling their assisted suicide provision. As mentioned in *Rodriguez*, "once recognized, rights to die might be uncontainable and might be susceptible to grave abuse." Given the possible abuse that can arise from a relaxed standard as mentioned above, paragraph 241.1(c) is a necessary safeguard.

*Rodriguez*, *supra* para 21 at para 138.

[73] The salutary effects of section 241.1 outweigh its deleterious effects on the Appellant.

## PART IV – ORDER SOUGHT

[74] The Respondent requests that the appeal be dismissed.

## PART V – LIST OF AUTHORITIES AND STATUTES

**SECONDARY SOURCES** **PARAGRAPHS**



**OFFICIAL WILSON MOOT SOURCES** **PARAGRAPHS**



## STATUTORY PROVISIONS

Relevant Provisions of:

## *Criminal Code*, RSC 1985, c C-46, ss 241-241.1

241: Counselling or aiding suicide

Everyone who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

241.1: Physician assisted Dying

(1) despite sections 14 and 241 of this Code, a physician commits no offence where the physician provides and/or administers a lethal dose of medication to a patient, for the purposes of assisting the patient to end his or her life, where all of the following conditions are met:

(a) the patient is competent

(b) the patient has repeatedly and explicitly expressed the wish to end his or her life

(c) the patient is experiencing severe pain as a result of a terminal illness

(d) the physician has informed the patient of the treatments available for the patient's condition, and those options have been exhausted or refused by the patient, and

(e) the physician has consulted a second physician, who has provided a written opinion that it is in the patient's best interest for the patient to be able to end his or her life.

Official Problem, *supra* para 3 at pages 2-3