IN THE HIGH COURT OF THE DOMINION OF CANADA

ON APPEAL FROM

THE ONTARIO COURT OF APPEAL

BETWEEN

JACOB
(LITIGATION GUARDIAN OF)

Appellant

- AND -

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE RESPONDENT
TEAM 5

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PART I – OVERVIEW

[1] In this case, the Court is tasked with balancing two objectives: (i) providing access to physician-assisted suicide and (ii) ensuring adequate protection for potentially vulnerable Canadians.

[2] This appeal concerns the inability of the mentally ill to obtain physician assistance in the termination of their lives. The Appellant alleges that section 241.1 of the *Criminal Code* infringes his rights to equality, liberty and security of the person contained in sections 15 and 7 of the *Canadian Charter of Rights and Freedoms*. The Respondent submits that there can be no breach of *Charter* rights because section 241.1 has an ameliorative purpose and does not operate to restrain the Appellant's liberty or security of the person. Even if the Appellant can establish a breach under either section 15 or 7, any limitation of rights is justifiable under section 1 of the *Charter*.

RSC 1985, c C-46, s 241.1 [*Code*].
Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

PART II – STATEMENT OF FACTS

[3] The Appellant, Dylan Jacob ("Mr. Jacob"), represented by his litigation guardian, Stephanie Jacob, challenges the decision of the Ontario Court of Appeal that upholds section 241.1 of the *Criminal Code* and its limitation on access to physician-assisted suicide.

[4] In 2000, Mr. Jacob was diagnosed with undifferentiated schizophrenia. His schizophrenia was not well controlled and expressed by hallucinations, delusions and psychotic episodes.

Official Problem, the Wilson Moot 2013, at 3.

[5] In October 2007, Mr. Jacob's father, James, threatened to have him placed in a psychiatric hospital. Jacob responded by killing his father, stabbing him nineteen times. Mr. Jacob was found not criminally responsible for the murder of James. He was subsequently remanded to the medium-security unit at Oak Ridges and has remained there since under the oversight of Dr. Lee, a physician at the facility.

Official Problem, *supra* para 4 at 4.

[6] Since his incarceration at Oak Ridges, Mr. Jacob's condition has worsened. However, he has experienced four periods of lucidity. During one instance, Mr. Jacob consented to electroconvulsive therapy. The treatment had no effect.

Official Problem, *supra* para 4 at 4.

[7] In three of his last lucid periods, while in the company of both Stephanie and Dr. Lee, Mr. Jacob expressed a wish to die. During two of these periods, he attempted suicide but failed. It was found that Mr. Jacob possessed the requisite competency for the purposes of section 241.1. However, since March 2011, Mr. Jacob no longer satisfies the competency requirement.

Official Problem, *supra* para 4 at 5.

[8] Dr. Lee confirmed the lasting nature and severity of Mr. Jacob's illness. She expressed confidence in the well-informed and enduring nature of Mr. Jacob's wish to die. She also

confirmed that treatment options have been exhausted. Dr. Grimshaw stated his willingness to provide the second opinion mandated under section 241.1. However, despite their support for Mr. Jacob, both Dr. Lee and Dr. Grimshaw admitted the difficulty of giving a certain prognosis in cases of mental illness relative to physical illness.

Official Problem, *supra* para 4 at 5-6.

The Impugned Law

[9] Section 241.1 of the *Code* was enacted by Parliament following a number of well-publicized cases involving patients suffering from Lou Gehrig's disease and cancer travelling abroad to see assistance to end their lives. It is an exemption to section 241, which makes it a criminal offence to aid and abet or counsel suicide. In order to qualify for these exculpatory benefits, section 241.1 requires that:

241.1 (1)

(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.

[10] Sub-sections 241.1(3) and (4) provide definitions of both "physician" and "patient". For the purposes of this section, a "physician" is one who is licensed by the college of physicians and surgeons (or equivalent authority) of the province and a "patient" is a person who is being treated by the physician for a medical condition.

Procedural History

[11] At trial, Justice Wire allowed the application, finding the terminal illness and competency requirements discriminated against individuals with mental illness. He did not address section 7 of the *Charter*. The provision could not be saved under section 1.

[12] This judgment was overturned on appeal. The majority of the Ontario Court of Appeal determined that section 241.1 is an ameliorative program designed to improve the condition of severely disabled patients who lack the means to end their own lives. The provision was found not to be discriminatory. As well, the majority concluded that section 241.1 did not violate section 7, that any infringement of liberty or security of the person was consistent with the principles of fundamental justice.

PART III – STATEMENT OF POINTS IN ISSUE

Four issues on appeal:

[13] THE RESPONDENT RESPECTFULLY SUBMITS THAT section 241.1 is an ameliorative program within the meaning of section 15(2) of the *Charter*.

[14] ALTERNATIVELY, IT IS RESPECTFULLY SUBMITTED THAT if the impugned law is not ameliorative, it does not violate section 15(1) of the *Charter*.

[15] IT IS FURTHER SUBMITTED THAT section 241.1 does not operate to restrict the Appellant's section 7 rights to liberty and security of the person.

[16] ALTERNATIVELY, IT IS RESPECTFULLY SUBMITTED THAT, if a breach is established under either section 15 or 7, any limitation of rights is justifiable under section 1 of the *Charter*

PART IV - ARGUMENT

[17] The Appellant cannot establish a breach of equality rights under section 15 of the *Charter*. To establish a breach, the Appellant must show that the provision creates a distinction based an enumerated or analogous ground. Once established, the Respondent will show that the impugned law is ameliorative and thus constitutional under section 15(2). However, in the alternative, if the impugned law is not ameliorative, the Appellant cannot establish a breach of rights under section 15(1).

A. THERE IS A DISTINCTION BASED ON AN ENUMERATED GROUND

[18] Mr. Jacob's claim satisfies the requirement established by the Supreme Court in *R v Kapp* that the Appellant demonstrate a distinction drawn on an enumerated or analogous ground. Section 241.1 creates a requirement that the patient requesting physician-assisted suicide be experiencing severe pain as a result of a terminal illness. The Supreme Court in *Rodriguez v British Columbia (Attorney General)* identified that individuals with terminal illnesses "who are or will become physically unable to commit unassisted suicide" fall within the scope of physical disability under section 15. Additionally, Mr. Jacob's undifferentiated schizophrenia is captured by the enumerated ground of mental disability.

> *R v Kapp*, 2008 SCC 41 at paras 16-17, [2008] 2 SCR 438 [*Kapp*].
> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 544, 107 DLR (4th) 342 [*Rodriguez*]

[19] Accordingly, section 241.1 makes a distinction based on the enumerated grounds of physical and/or mental disability.

B. SECTION 241.1 IS AN AMELIORATIVE MEASURE THAT SATISFIES SECTION 15(2)

[20] The distinction made by section 241.1 is justifiable under section 15(2) because it has an ameliorative purpose which serves and advances substantive equality. Section 15(2) requires the Respondent to show that (i) the measure has an ameliorative purpose and (ii) that the distinction serves or advances that purpose. If section 241.1 can be justified under section 15(2) it is unnecessary to proceed to a section 15(1) analysis.

i. The measure has an ameliorative purpose

[21] An ameliorative purpose is one that is "directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality" (*Cunningham*).

> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37 at para 44, [2011] 2 SCR 670 [*Cunningham*].

[22] Section 241.1 was enacted by Parliament for the purpose of improving the situation of terminally ill individuals. These individuals are or will become physically unable to commit suicide without physician assistance. The enactment followed a series of high-profile cases in which patients suffering from Lou Gehrig's disease or terminal cancers travelled abroad to obtain physician-assisted suicide in countries where it was legal.

> Official Problem, *supra* para 4 at 8.

[23] An ameliorative program must be determined as a matter of statutory interpretation, which includes having regard to the words of the enactment (*Cunningham*). When engaging in statutory interpretation the Supreme Court in *Ontario v Canadian Pacific Ltd.* succinctly summarized the general approach:

> [T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention.
>
> *Ontario v Canadian Pacific Ltd,* [1995] 2 SCR 1031 at para 11, 1995 CarswellOnt 532 [*Canadian Pacific*].

[24] Section 241.1 explicitly requires an individual to be suffering from a terminal illness. The inclusion of the "severe pain" requirement does not operate on its own to include individuals suffering from mental illness. Severe pain, whether it is a result of physical or psychological distress, must accompany the requirements that the individual be competent and terminally ill.

[25] This decision reflects the opinion of Justice McLachlin, as she then was, in *Rodriguez.* In contemplation of Ms. Rodriguez's condition, she concluded that "...the choice is not whether to live as she is or to die, but rather when and how to experience a death that is inexorably impending." This characterization recognizes, as Parliament has, the significance of the terminal requirement.

> *Cunningham, supra* para 21 at para 61.
> *Rodriguez, supra* para 18 at 567-568.

[26] The plain meaning of Section 241.1 clearly reflects Parliament's intent to limit the relief provided by this ameliorative measure to the terminally ill. Providing assistance to those who are unable to commit suicide as a result of terminal illness enhances substantive equality by allowing them access to that which is otherwise available to most Canadians.

ii. The distinction serves or advances the ameliorative purpose

[27] Section 15(2) protects all distinctions drawn on enumerated or analogous grounds that "serve and are necessary to" the ameliorative purpose. The Supreme Court in *Cunningham* interpreted this requirement, stating that the term "necessary" should not be understood as "requiring proof that the exclusion is essential". Furthermore, the Court stresses a purposive approach which requires that the "impugned distinction in a general sense serves or advances the object of the program".

> *Cunningham, supra* para 21 at para 45.

[28] The fundamental question comes from *Kapp* which asks whether it was "rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to [its

ameliorative] purpose." The object of section 241.1 is to improve the situation of terminally ill individuals by providing them assistance in suicide. In order to advance this objective, the legislature has rationally targeted individuals for whom death is impending.

Kapp, supra para 18 at para 49.

[29] The distinction drawn between terminal individuals and the mentally ill is necessary to achieve the purpose of the legislature. To include the mentally ill within the purview of this provision would undermine the legislature's objective because it would ignore the policy considerations which informed its drafting.

[30] The Court in *Cunningham* affirmed 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." The distinction drawn by section 241.1 serves the ameliorative priorities set by Parliament in two ways: a) by recognizing the unique characteristics of interested groups and b) by mitigating the detrimental effects on the terminally ill.

Cunningham, supra para 21 at para 41.

a) *Uniqueness of the groups*

[31] The government has elected to provide assisted suicide to those where the choice is not whether to live or die, but the manner in which death occurs. For the mentally ill, death is not necessarily foreseeable. Ostensibly, these groups are fundamentally different. Including the mentally ill under the same statutory regime as the terminally ill would ignore the unique characteristics of each group.

[32] The thrust of section 15 jurisprudence is a "need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach" (*Withler).* In the interest of substantive equality, Parliament has enacted programs directly tailored to the mentally

ill. The federal and provincial governments have spent approximately $180 million on mental health awareness and suicide prevention programs over the past three years.

> *Withler v Canada (Attorney General)* 2011 SCC 12 at 43, [2011] 1 SCR 368 [*Withler*].
> Official Problem, *supra* para 4 at 6.

[33] Furthermore, in the context of euthanasia, the lower courts have recognized that patients with psychiatric illnesses are generally at a higher risk of neglect or abuse than patients of many other types of disabilities. Expert evidence reveals a legitimate concern regarding the vulnerability of such patients to involuntary or non-voluntary euthanasia. These concerns likely informed Parliament's careful drafting of the section 241.1 requirements.

> Official Problem, *supra* para 4 at 6-7.

[34] Had Parliament intended to include the mentally ill within the scope of the new amendments, they would have explicitly provided for their unique interests as they have with existing programs tailored to their benefit.

b) Detrimental effects on the terminally ill

[35] The inclusion of the mentally ill within the scope of section 241.1 will have a detrimental effect on the advancement of its ameliorative purpose by: (i) creating difficulties in accessing physician-assisted suicide and (ii) changing the standard upon which the terminally ill with psychiatric symptoms will receive care.

[36] In cases where the patient is terminally ill, there is currently only marginal support for physician-assisted suicide in the medical community. A survey conducted by the Canadian Association of Physicians in 2011 found that 52 percent of Canadian physicians supported physician-assisted suicide to "alleviate cases of unbearable suffering with no realistic prospect of relief, where the patient will likely otherwise die within two years." Furthermore, in jurisdictions

with unrestricted access to physician-assisted suicide, a study conducted by Physicians for Death with Dignity found that 80 percent of physicians *declined* to assist patients when the request was motivated by psychiatric illness.

Official Problem, *supra* para 4 at 4.

[37] These results suggest that physicians will be faced with a serious ethical dilemma if the scope of section 241.1 was broadened. When taken together, the adduced evidence suggests that physicians may refuse to practice assisted suicide. It is clear that a large majority of physicians oppose providing assisted suicide where psychiatric illness is the sole reason for the request. Because only 52 percent of Canadian physicians support this practice where there are strict terminal requirements, broadening the scope may tip the balance against assisted suicide. Accordingly, it is reasonable to infer that this dilemma will result in many physicians refusing to practice this type of care, thus limiting access to it for terminal patients.

Official Problem, *supra* para 4 at 7-8.

[38] Furthermore, terminally ill patients with a psychiatric basis for requesting assisted suicide may find themselves treated as a psychiatric patient first and a terminal patient second. Expert evidence confirms that the medical community is not comfortable with psychiatric motivations for assisted suicide. Dr. Petra Wolinski recognized that suicidal ideation is a feature of many psychiatric illnesses. This creates a difficulty for physicians to ascertain whether or not the patient's request is competent or a manifestation of mental illness. Likewise, the Appellant's physicians, Dr. Lee and Dr. Grimshaw, admit that it can be more difficult to give a certain prognosis in cases of mental illness than in cases of terminal illness. These experts suggest that the continual advancement of psychiatric medicine creates promise for these patients. Conversely, terminally ill patients have no such promise.

Official Problem, *supra* para 4 at 6-7.

[39] The demonstrated lack of support by the medical community for psychiatric motivations for suicide suggests that terminal patients with these motivations may be subject to undue scrutiny. The purpose of section 241.1 is to reduce the barriers of access to assisted suicide for the terminally ill. However, if the scope of the provision were broadened, the medical community's adverse presumptions towards psychiatric motivations would create new hurdles for the terminally ill to overcome.

[40] As the distinction created by section 241.1 is based on an enumerated ground and has an ameliorative purpose that satisfies section 15(2), the Respondent submits that there can be no breach of equality rights.

C. IN THE ALTERNATIVE, SECTION 241.1 DOES NOT INFRINGE SECTION 15(1)

[41] Even if section 241.1 cannot be justified as an ameliorative program under section 15(2), the Appellant has still not established a breach of equality rights under section 15(1). Whereas section 15(2) operates as an inquiry into whether a law positively impacts substantive equality, section 15(1) ensures that the law does not create a negative impact. A law that does neither is still constitutionally valid.

[42] The Supreme Court has set out the steps for a section 15(1) analysis in *Kapp* which was subsequently reaffirmed and refined in *Quebec (Attorney General) v A*. To establish a breach, the Appellant must show that the impugned law (i) creates a distinction and (ii) creates a disadvantage by perpetuating a prejudice or by stereotyping.

> *Kapp, supra* para 18 at para 17.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at 170-184, (available on LexUM)

i. The distinction is drawn upon valid grounds

[43] It is not disputed that both terminal illness and mental illness are within the scope of either the enumerated or analogous grounds of section 15. While the Appellant can establish that section 241.1 creates a distinction on these valid grounds, he has failed to demonstrate that this distinction perpetuates a disadvantage or stereotype.

ii. The distinction does not perpetuate a disadvantage or stereotype

[44] In *Withler,* the Supreme Court established that a breach of substantive equality exists where "the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics." This analysis requires the Court to look "at the circumstances of the members of the group and the negative impact on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential for the impugned law to worsen their situation" (*Withler*).

Withler, supra para 32 at paras 35-37.

[45] In the case at bar, the impugned law creates a distinction by requiring that the individual be a) terminal and b) competent. When conducting the required contextual analysis, this Court may look to the enumerated factors found in *Law*. However, the Court in *Withler* recognized that these factors "need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory." The following analysis incorporates generally the following factors: (i) the correspondence between the actual needs of the mentally ill and the impugned law, and (ii) the ameliorative purpose with respect to the needs of the terminally ill.

Withler, supra para 32 at para 66.
Law v Canada (Minister of Employment and Immigration), [1999] SCR 497, 170 DLR (4th) 1 [*Law*].

a) Terminal Requirement

[46] Section 241.1 creates a distinction on the basis of physical disability by requiring that the individual requesting suicide suffer from a terminal illness. The terminal requirement limits the scope of the provision which would otherwise extend to all members of Canada.

[47] The Appellant alleges that, in drawing this distinction, section 241.1 unnecessarily excludes the mentally ill. In his view, the new law is under-inclusive and does not respond to the circumstances and characteristics of the Appellant's recognized group. This is an incorrect approach to section 15. The question to consider when conducting this analysis is not whether the law confers a benefit on one group to which another group considers itself entitled. Instead, the question is whether or not the law negatively impacts the claimant's group by perpetuating or worsening a disadvantageous situation (*Withler).*

Withler, supra para 32 at para 37.

[48] The mentally ill do not suffer from any disadvantage as a result of this law. Presumably, Mr. Jacob's disadvantage is his inability to take his own life without assistance. However, Mr. Jacob does not reflect the circumstances of the mentally ill as a group. Any Canadian citizen, including the mentally ill, is free and able to take his or her own life. Generally, there is no need for assistance unless there is a *physical* limitation that affects one's ability to do so. Unlike the terminally ill, "who are or will become physically unable to commit unassisted suicide" (*Rodriguez*), the mentally ill are fully capable. In the Appellant's case, the inability to commit suicide, and ultimately the "disadvantage" alleged, emanates from his incarceration and not his mental illness. But for his incarceration, which is a constitutionally justifiable restriction on his liberty (*Winko*), Dylan Jacob would be free to take his life.

Rodriguez, supra para 18 at 544.
Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625 at paras 64-73, 175 DLR (4th) 193 [*Winko*].

[49] There is no need to provide assisted suicide to the mentally ill because they already have access to suicide. A more valid claim would be that the law disadvantages the physically disabled who are not terminally ill. This group, unlike the mentally ill, is unable to commit suicide without assistance. This would perpetuate an existing disadvantage for the physically disabled.

[50] However, a section 15 analysis must have regard to the relevant context. The Supreme Court in *Withler* urges that "a central consideration is the purpose of the impugned provision" and that "legislative policy goals" are matters to consider. While suicide has been decriminalized, it is clear that Parliament does not necessarily promote the act. For example, the government programs recognized by Dr. Wolinski are not intended to counsel mentally ill individuals *toward* suicide, but to bring them in contact with the health system to dissuade them from doing so. Furthermore, the inclusion of the "terminal" requirement in section 241.1 is deliberate and indicates that Parliament is only willing to resort to suicide where the individual is already facing death. As this Court in *Rodriguez* aptly recognized, for the terminally ill, "the choice is not whether to live ... or to die, but rather when and how to experience a death that is inexorably impending." Removing the terminal illness requirement would drastically change the provision in a manner that would be an affront to the policy considerations underlying its drafting.

Rodriguez, supra para 18 at 567-568.
Official Problem, *supra* para 4 at 7.

b) Competency Requirement

[51] Section 241.1 requires that an individual be "competent" in order to request physician-assisted suicide. The Respondent submits that this requirement is not prejudicial and does not perpetuate a pre-existing disadvantage.

[52] In this case, Justice Rainfoot of the Ontario Court of Appeal suggested that "the very nature of serious psychiatric illness is that patients have diminished capacity to make rational decisions" and thus, any distinction that excludes the mentally ill corresponds to their needs. It may be argued that Justice Rainfoot's assumption regarding psychiatric illness and diminished rational capacity is inaccurate. Nonetheless, it is entirely valid to suggest that the competency requirement is a necessary safeguard that corresponds both to the needs of the mentally ill and the legislative policy concerns regarding involuntary and non-voluntary euthanasia.

Official Problem, *supra* para 4 at 9.

[53] It is clear that the Appellant cannot show that the condition that one be "competent" will perpetuate any disadvantage. Mr. Jacob himself was not subject to any disadvantage based on competency. Instead, Justice Wire found that he was sufficiently competent to satisfy the statutory requirement.

Official Problem *supra* para 4 at 5, 9.

[54] The Appellant may also argue that the competency requirement perpetuates stereotyping. However, to construe that this requirement would perpetuate prejudice among physicians ignores the value of their opinion as experts. In jurisdictions where physician-assisted suicide is permitted for both physical and psychiatric illness, when the request was made by a mentally ill patient, 80 percent of physicians declined treatment. On its face, this appears prejudicial. However, the most commonly cited reason for this refusal was that the patient's illness could be managed by means that had not yet been exhausted. Because there cannot be a treatment decision of greater consequence than to prescribe suicide, deference should be given to a physician's opinion. What may appear prejudicial out of context is more likely an exercise of an expert's careful consideration that is responsive to the individual's circumstances and characteristics.

Official Problem, *supra* para 4 at 7.

[55] While section 241.1 can be said to draw a distinction on valid grounds, it does not perpetuate a disadvantage or stereotype. The Appellant has failed to discharge his burden. As a result, no breach of section 15 rights can be established.

D. SECTION 241.1 DOES NOT VIOLATE THE APPELLANT'S SECTION 7 RIGHTS

[56] The Appellant cannot establish a breach of his section 7 rights. To do so, the Appellant must demonstrate on a balance of probabilities that: (i) the impugned provision interferes with or limits the Appellant's right to life, liberty or security of the person, and (ii) that the interference or limitation is not in accordance with the principle of fundamental justice (*PHS*).

PHS Community Servicers Society v Canada, 2011 SCC 44 at para 84, [2011] 3 SCR 134 [*PHS*].

i. The provision does not engage the Appellant's liberty

[57] Section 241.1 does not engage Mr. Jacob's section 7 right to liberty. The concept of liberty protects the autonomy of individuals to make choices for themselves (*Big M*). Specifically, those choices must be fundamental or inherently personal such that they affect one's personal dignity and independence (*Godbout*). To properly assess the engagement of the Appellant's section 7 rights, it is necessary to clearly define the nature of the interference. According to the Court in *Bedford v Canada (Attorney General)*, "the nature and extent of the interference with the Respondent's rights must be identified before the court can properly assess a claim that the legislation is inconsistent with the principles of fundamental justice."

R v Big M Drug Mart, [1985] 1 SCR 295 at para 3, 60 AB 161 [*Big M Drug Mart*].
Godbout v Longeuil City, [1997] 3 SCR 844, 1997 CarswellQue 883 at para 12 [*Godbout*].
Bedford v Canada (Attorney General), 2012 ONCA 186 at para 96, 109 OR (3) 1 [*Bedford*].

[58] The Appellant alleges the impugned law infringes his autonomy to make fundamental, personal choices. While it is true that his decision-making ability is circumscribed, this is not due to the operation of section 241.1. Rather, the circumstances of his incarceration at Oak Ridges Psychiatric Hospital give rise to this restriction. Thus, the challenge to the engagement of Mr.

Jacob's liberty lies not against the provision, but against his physical restraint by virtue of his incarceration.

[59] The effect on autonomy created by incarceration is an accepted principle of the criminal law. Rule 718 (c) of the *Criminal Code* provides for the separation of convicted criminals from the rest of society. This principle animates the role of imprisonment in sentencing decisions. The rationale for this is evident in *Cunningham v Canada*, in which the Supreme Court explains that restraint of a convicted individual's liberty is legitimate "only to the extent that this is shown to be necessary for the protection of the public." The Supreme Court in *Dumas v Leclerc Institute of Laval* recognized three relevant deprivations to consider in analyzing the liberty engagement of incarcerated individuals. These include: (i) the initial deprivation, (ii) a substantial change in the circumstances which amount to a further restriction of liberty and (iii) a continuation of the deprivation of liberty. Generally, the Court upholds the initial deprivation of liberty unless it can be show that there has been a significant change in the conditions of one's confinement. In the case of Mr. Jacob, the circumstances of his incarceration have not changed, negating a challenge on this basis.

> *Cunningham v Canada,* [1993] 2 SCR 143 at para 20, 80 CCC (3d) 492 [*Cunningham 2*].
> *Dumas v Lecler Institute of Laval*, [1986] 2 SCR 459, 1986 CarswellQue 23 at paras 12-13 [*Dumas*].

[60] Mr. Jacob is not prevented from committing suicide by virtue of his mental condition. He is physically capable of taking his own life. His failure to do so effectively is due entirely to his constitutionally justifiable confinement at Oak Ridges (*Winko*). Thus, any engagement of Mr. Jacob's liberty is not caused by section 241.1.

> *Winko, supra* para 48 at 64-73.

[61] The only liberty interest that is engaged with respect to the operation of the assisted suicide provision is that of Dr. Lee. Under section 241, physicians who assist patients in suicide

are criminally responsible unless the patient qualifies under section 241.1. The Supreme Court has held that liberty interests are engaged "as of the moment it is open to the judge to impose imprisonment" (*B.C. Motor*). However, this interest is engaged by section 241 and *not* by section 241.1, the provision that is the focus of this appeal. Moreover, to rely on Dr. Lee's interest in order to proceed with the section 7 inquiry necessarily restricts the remainder of the analysis to Dr. Lee's interests. It is not open to consider the effects on Mr. Jacob

Re BC Motor Vehicle Act, [1985] 2 SCR 486 at para 76, 24 DLR (4th) 536 [*BC Motor*]

[62] Mr. Jacob's liberty is not engaged by section 241.1. His decision-making autonomy is not restricted by the provision but rather by his incarceration. The effects of section 241 on Dr. Lee are an insufficient basis upon which to analyze the impact of the provision on Mr. Jacob himself.

ii. The provision does not engage the Appellant's security of the person

[63] Mr. Jacob will also fail to establish that his right to security of the person is engaged by section 241.1. The Supreme Court in *Morgentaler* identified psychological and physical integrity as central to one's security of the person. In *Rodriguez,* the Supreme Court concluded that a criminal law that "deprives the Appellant of autonomy over her person and causes her physical pain and psychological stress" may "impinge on her security of the person".

R v Morgentaler, [1988] 1 SCR 30 at 32, 63 OR (2d) 281 [*Morgentaler*].
Rodriguez, supra para 18 at para 22.

[64] The autonomy of Mr. Jacob over his person is in fact restricted. But, as with his liberty, the source of that restriction is not section 241.1 but his confinement at Oak Ridges. Generally, mentally ill individuals posses the same level of rights as non-mentally ill Canadians. Mr. Jacob's case is unique. His autonomy is circumscribed not by his mental state but by virtue of his incarceration. Were Mr. Jacob a free man, his mental condition would pose no barrier to

successfully ending his own life. Once again, the challenge lies not against the impugned provision but against the legitimacy of his confinement.

[65] Furthermore, this analysis must focus on the law itself. It is incorrect to blame the Appellant's mental condition as the primary reason for his distress. For the criminal law to engage one's security of the person, the provision must be the source of the alleged physical or psychological harm. This was the case in both *Morgentaler* and *Rodriguez.* In *Rodriguez,* the operation of section 241 was the cause of the claimant's physical and psychological harm. Similarly, in *Morgentaler,* the cumbersome process and inequitable access of the therapeutic exemption to section 251 was the source of harm. In contrast, Mr. Jacob's interests are not affected by the operation of section 241.1. This section provides a positive benefit to eligible individuals; it imposes no restrictions. As a free man, Mr. Jacob would have the same opportunity to end his own life as an average Canadian. The source of the restriction on his autonomy is his confinement, not the criminal law.

Morgentaler, supra para 63 at 37.
Rodriguez, supra para 18 at para 13.

[66] Section 241.1 does not compromise Mr. Jacob's security of the person. The Appellant's psychological and physical integrity is impinged upon by his confinement, not by the criminal provision.

iii. Any limitation is in accordance with the principles of fundamental justice

[67] Even if an infringement of either Mr. Jacob's liberty or security of the person is established, the Appellant will fail to demonstrate that section 241.1 does not accord with the principles of fundamental justice. Specifically, it is consistent with the principles of arbitrariness and illusory defences.

a) Arbitrariness

[68] Mr. Jacob will fail to prove that section 241.1 is arbitrary. The principle of arbitrariness refers to situations in which the deprivation of the right in question does nothing to enhance the objective of the law (*Malmo-Levine*). If the restriction "lacks a real connection on the facts to the purpose the interference is said to serve" it will be "impermissibly arbitrary". Arbitrariness demands a two-part analysis (*PHS*). The Court must identify: (i) the objective of the law and (ii) the relationship between the state interest and the impugned law. The question becomes whether the application of the law fulfills its general purpose.

> *R v Malmo-Levine*, 2003 SCC 74 at para 135, [2003] 3 SCR 571 [*Malmo-Levine*].
> *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 at para 134, [2005] 1 SCR 791 [*Chaoulli*].
> *PHS, supra* para 56 at paras 129-130.

[69] The objective of section 241.1 is to provide physician-assisted suicide to terminally ill patients who are or will become unable to end their lives. It is intended to alleviate the suffering of those whose death is imminently foreseeable. This purpose is evident based on the factors informing the enactment of the provision as well as its specific wording. The measure was drafted in response to a series of high profile cases where patients suffering from ALS and terminal cancer travelled abroad to obtain legal physician-assisted suicide. In crafting an exemption to section 241, the legislature explicitly restricted its scope to patients "experiencing severe pain as a result of a terminal illness". Clearly, Parliament intended the law to apply exclusively to the terminally ill.

> Official Problem, *supra* para 4 at 8.

[70] The state interest with respect to assisted suicide in general was articulated in *Rodriguez*. The Supreme Court identified two imperatives of the state: the protection of life and the policy that "human life should not be depreciated by allowing life to be taken".

> *Rodriguez*, *supra* para 18 at para 34.

[71] The strict requirements of section 241.1 relate to these state interests by protecting vulnerable individuals and limiting its application to those for whom death is a certainty. These safeguards include: (i) a requirement of competence, (ii) the exhaustion or refusal of available treatments, and (iii) a second medical opinion confirming that suicide is in the patient's best interest. These stipulations demand free and fully informed decisions regarding suicide, made without undue influence. These conditions clearly relate to the state's interest in protecting vulnerable individuals and maintaining an appreciation for human life.

[72] On the facts, section 241.1 is clearly connected to its purpose and is therefore not arbitrary.

b) Illusory Defences

[73] The Supreme Court in *Morgentaler* established that an exemption to a criminal law violates the principles of fundamental justice if it is "not available in the circumstances in which it is held out as being available." This principle has not been considered by the Court since.

[74] The Appellant cannot establish that the provision is merely an illusory defence. The principle requires that the defence be practically unattainable. In *Morgentaler*, the exemption to the criminal ban on abortion contained in the former section 251(4) of the *Criminal Code* was determined to be illusory. Women who would otherwise qualify for the exemption were unable to benefit from it because, "the administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience." Women seeking a therapeutic abortion were required by law to go before a therapeutic committee. These committees were often not available at local hospitals, requiring many women to travel far afield in order to gain

the exculpatory benefit of the provision. The exemption contained in section 251(4) was found to be illusory on this basis.

Morgentaler, *supra* para 63 at 34.

[75] In *R v Parker*, the Ontario Court of Appeal considered the exemption provision for medical marijuana within the *Controlled Drugs and Substances Act*. The Court held that the lack of legal source for marijuana rendered the provision an illusory defence.

R v Parker, 49 OR (3d) 481, 2000 CarswellOnt 2627 at paras 155-157 [*Parker*].

[76] The exculpatory benefit conferred by section 241.1 is not illusory. It is well established that "parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability" (*Morgentaler*) Provided the requirements of the impugned provision are met, the exemption is available to all who qualify. There is no evidence to indicate that access to this care will require certain patients to travel or overcome cumbersome, administrative obstacles, as was the case in *Morgentaler*. Furthermore, no evidence indicates that a lethal dose of medication is unattainable for licensed medical practitioners. In the absence of such evidence, the defence cannot be deemed *prima facie* illusory. Its current structure and application pose no immediate or self-evident inequities to its access other than fulfilling its explicit conditions.

Morgentaler, *supra* para 63 at 73.

[77] The Appellant has adduced no evidence to demonstrate that the exculpatory benefits are a mere illusion. Nothing on the face of the provision indicates this to be true. As a result, the defence is not illusory.

[78] Section 241.1 does not engage either the Appellant's rights to liberty or security of the person. The circumstances of his confinement, not the provision, are the cause of his inability to commit suicide. If an infringement of Mr. Jacob's right to either liberty or security of the person

is established, any violation is in accordance with the principles of fundamental justice, namely arbitrariness and the norm that defences not be illusory.

E. EVEN IF A BREACH OF SECTION 15 OR SECTION 7 RIGHTS CAN BE ESTABLISHED, SECTION 241.1 IS JUSTIFIED UNDER SECTION 1 OF THE CHARTER

[79] If section 241.1 infringes the Appellant's *Charter* rights, that infringement is justified under section 1 of the C*harter*. In the case of a section 7 violation, while rare, it is possible to justify an infringement under section 1 (*DB*). In the context of section 15, *Charter* breaches have been regularly upheld under section 1 (*Lavoie*).

R v DB, 2008 SCC 25 at paras 88-90, [2008] 2 SCR 3 [*DB*]. See also *Bedford, supra* para 57.
See e.g. *Lavoie v Canada,* 2002 SCC 23, [2002] 1 SCR 769 [*Lavoie*]; *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66, [2004] 3 SCR 381 [*NAPE*]; *Egan v Canada,* [1995] 2 SCR 627, 124 DLR (4th) 609 [*Egan*]; *Weatherall v Canada (Attorney General),* [1993] 2 SCR 872, 105 DLR (4th) 210 [*Weatherall*].

i. An analysis of section 241.1 requires deference to Parliament

[80] An effective section 1 analysis demands a correct assessment of the level of deference to afford Parliament. In *Thomson Newspapers Co v Canada (Attorney General)* and subsequent Supreme Court jurisprudence, the Court recognized the importance of "characterizing the context of the impugned provision" where the subject matter is a complex social issue.

Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877at para 88, 109 OAC 201 [*Thomson*].

[81] The Court in *Alberta v Hutterian Bretheren of Wilson Colony* determined that "[w]here a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the section 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused." Section 241.1 is a regulatory response to the complex social issue of assisted suicide and does not threaten one's liberty through penal consequences.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 37, [2009] 2 SCR 567 [*Hutterian*].

[82] Recently, the British Columbia Supreme Court in *Carter v Canada* considered section 241. In its analysis it favoured deference to Parliament in on the basis of: (i) the complex social policy implications of assisted suicide, (ii) the difficulty in balancing the individual harm against the potential harm to others, and (iii) the lack of clear scientific proof. As section 241.1 also deals with the same subject matter, these factors apply to the case at bar.

Carter v Canada (Attorney General), 2012 BCSC 886 at para 1179, 2012 CarswellBC 1752 [*Carter*].

[83] The Respondent submits that given the context of section 241.1, this Court should employ a deferential approach to Parliament in its section 1 analysis.

ii. Section 241.1 meets the requirements of the *Oakes* test

[84] Under the *Oakes* test, the government must demonstrate that the provision is "justified in a free and democratic society". To do so, the government must first, establish a pressing and substantial objective. Second, the means chosen must be proportionate to the impairment of rights.

R v Oakes, 1 SCR 103 at paras 69-70, 26 DLR (4th) 200 [*Oakes*].

[85] To establish proportionality, it must be demonstrated that (i) the means are rationally connected to the objective, (ii) the provision minimally impairs the right, and (iii) there is proportionality between the effects of the measures and the impairment (*Oakes*).

Oakes, supra para 84 at para 70.

a) The protection of vulnerable groups is a pressing and substantial objective

[86] While the purpose of section 241.1 is to provide assistance to individuals who are or will become unable to end their lives as a result of terminal illness, Parliament was guided by the pressing and substantial objective of protecting vulnerable patients from abuse and involuntary euthanasia.

[87] The Supreme Court in *Rodriguez* concluded that the principle of the preservation of life and the protection of vulnerable patients was the legislative objective underlying section 241. It stands to reason that Parliament remained consistent with this objective when drafting section 241.1. The numerous safeguards enumerated in the provision attest to the legislature's careful consideration of these values.

Rodriguez, supra para 18 at 561

b) Section 241.1 is rationally connected to its objective

[88] For a rational connection to exist, "the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations" (*Oakes*). Chief Justice Dickson clarified that "as long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational" (*Taylor*). The result of these statements is the creation of a threshold test that simply aims to end the inquiry in situations where the actions of the government cannot be seen to rationally further a legitimate legislative objective. A rational connection is made out where "it is reasonable to suppose that the limit *may* further the goal" and not *factually* whether it will do so (*Hutterian*).

Oakes, supra para 84 at para 70.
Canada (Human Rights Commission) v. Taylor, [1990] 3 SCR 892 at para 56, 75 DLR (4th) 577 [*Taylor*].
Hutterian, supra para 81 at para 48 [emphasis added].

[89] The impugned provision is intended to achieve its objective by providing physician-assisted suicide to terminal patients while safeguarding the vulnerability of individuals susceptible to pressure, coercion, abuse, and involuntary euthanasia. It is reasonable to suppose that the provision will achieve this purpose by restricting care to competent terminal patients through careful adherence to its requirements.

c) The means chosen minimally impair the right

[90] Section 241.1 is minimally intrusive and satisfies section 1 scrutiny. The question at this stage is "whether the limit on the right is reasonably tailored to its pressing and substantial goal put forward to justify the limit" (*Hutterian*). The constitutionality of a law under section 1 of the *Charter* is determined by whether the infringement of the claimant's rights is proportionately directed at an important objective and not by whether the measure "is responsive to the unique needs of every individual claimant" (*Hutterian*). The method chosen by the legislature to achieve its purpose need not be the least minimally impairing option; it must simply fall within a range of reasonable alternatives (*RJR-MacDonald*).

> *Hutterian, supra* para 81 at paras 53, 69.
> *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 2 SCR 1083 at para 160, 127 DLR (4th) 1 [*RJR-MacDonald*].

[91] The objective of the impugned provision is to provide physician-assisted suicide to competent, terminal patients while ensuring adequate protection for those vulnerable to involuntary euthanasia. The requirements that one be both terminal and competent are necessary to ensure this purpose is fulfilled. To broaden the scope of the provision, as Justice Wire proposes, would reduce the efficacy of the law in achieving its purpose. The restrictive requirements within section 241.1 are imperative to protecting vulnerable patients. To include the mentally ill within the purview of this provision would compromise the safeguards the legislature has enacted to further this objective.

> Official Problem, *supra* para 4 at 8-9.

[92] Section 241.1 is in effect an implementation of the remedy suggested by the dissenting opinion of Justice McLachlin, as she then was, in *Rodriguez*. In that case, it was suggested that an exception to the general prohibition on assisted suicide would be justifiable where a judge is satisfied that "consent is freely given with a full appreciation of all the circumstances". This

suggestion is embodied by the "competency" requirement of the new amendments. Justice McLachlin further noted that these "additional precautions are arguably justified by the peculiar vulnerability of the person who is physically unable to take her own life". It is clear that the exception Parliament has carved out with section 241.1 is in accordance with this general principle. Removal or modification of the "competency" requirement would greatly reduce the efficacy of the provision's safeguards.

Rodriguez, supra para 18 at 627-628.

[93] The impugned law further protects against involuntary euthanasia with the imposition of the "terminal" requirement. For the terminally ill, death is an imminent certainty, and consent to suicide is unlikely to be transitory or improperly induced. Conversely, for the mentally ill and the rest of Canada, there is significant danger that an individual not facing death may be counseled to suicide while in the throes of depression. In the past 15 years, 3600 people have committed suicide in Canada. According to the accepted facts of this case, a disproportionate 60 percent of these individuals suffered from depression, and another 30 percent suffered from some other mental disorder. In her expert testimony, Dr. Wolinski noted that suicidal ideation is a feature of many psychiatric illnesses. For these individuals, suicide is of greater consequence. The issue for them is not simply how to die, but the ultimate choice between life and death. Requiring that a patient be facing certain death is the safest way to ensure that an individual does not prematurely end their life due to a transitory period of pain and suffering.

Official Problem, *supra* para 4 at 7-8.

[94] The safeguards enumerated in section 241.1 demonstrate the legislature's careful navigation of the difficult issue of assisted suicide. In conducting a minimal impairment analysis, the courts ought to "accord the legislature a measure of deference, especially on complex social issues where the legislature may be better positioned than the courts to choose among a range of

alternatives" (*Hutterian*). The complexity of this issue necessitates deference to parliament. Parliament is better positioned to determine the most effective method to balance the countervailing social and political concerns. It has accomplished this by limiting physician-assisted suicide to terminally ill, competent individuals.

Hutterian, supra para 81 at 53.

[95] It is important to recognize that the role of this Court is not to second guess Parliament's decision in carving out an exception to assisted suicide. In *Rodriguez*, the majority of the Court was reluctant to suggest exceptions to the prohibition on assisted suicide because it was unable to "allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuses of the exception." The Court left the issue to Parliament, which has since carved out an exception. It would be contradictory to prior jurisprudence regarding section 241 to supplant Parliament's exception with a creation of this Court, when this Court has explicitly avoided doing so in the past.

Rodriguez, supra para 18 at 613-614.

[96] Ultimately, the objectives of section 241.1 would be greatly compromised were its conditions loosened or eliminated. Because there are no reasonable alternatives, the provision minimally impairs the rights of the claimant.

d) There is proportionality between the effects of section 241.1 and the impairment

[97] The rights infringed by section 241.1 are proportionate to the objective of protecting vulnerable patients from involuntary euthanasia. The danger of transitory or improperly induced consent to euthanasia must be balanced against the alleged infringement of rights by the claimant.

[98] The claimant belongs to two groups, the mentally ill and the incarcerated. The mentally ill suffer from no restriction on the ability to choose the manner and time they end their lives. Just like

any other Canadian citizen, the mentally ill are free and able to commit suicide without assistance. Disqualifying this group from access to physician-assisted suicide does not in any way limit their access to suicide.

[99] On the other hand, incarcerated individuals are not freely able to end their lives. However, this restriction on liberty is constitutionally justified. To challenge this infringement of liberty would challenge the legitimacy of all restrictions of liberty imposed on the incarcerated. Extending physician-assisted suicide to the incarcerated could be construed as creating an inadvertent death penalty. Incarcerated individuals may feel motivated to end their lives as a result of their imprisonment. The coercive effect of incarceration itself could become the very undue influence the conditions of section 241.1 are designed to prevent.

[100] Because the mentally ill are free and able to end their lives without assistance, and that a constraint on liberty of the incarcerated is justifiable, the restrictions imposed by section 241.1 are acceptable in light of the alternatives. To remove or modify the restrictions in section 241.1 would undermine the protection of life and will lead to abuses of the assisted suicide exception.

[101] This court must balance conferring a benefit upon the mentally ill or the incarcerated against the potential for inadvertent state sanctioned death. The daunting prospect that the state could permit the death of an unwilling individual is clearly overriding. It is therefore crucial that this Court find that, even if a breach of section 7 or section 15 rights can be established, any infringement is justified under section 1.

PART V – ORDER SOUGHT

[102] The Respondent respectfully requests an order dismissing this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 1st of February, 2013.

PART VI - TABLE OF AUTHORITIES

LEGISLATION **PARAGRAPH**

JURISPRUDENCE