IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

BETWEEN:

DYLAN JACOB (BY HIS LITIGATION GUARDIAN STEPHANIE JACOB)

Appellant

-and-

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANT

Team Number: 1

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Part I – Overview

[1] Dylan Jacob was diagnosed with undifferentiated schizophrenia thirteen years ago. His condition has deteriorated for more than a decade. Mr. Jacob has repeatedly expressed that he wants to end his life. While most people look forward to the future, all that Mr. Jacob has to look forward to is decades of intolerable pain and being confined to a psychiatric institution. His doctor supports him in this decision. His sister supports him in this decision. However, the law does not. The law denies him the exercise of personal autonomy to end his suffering with dignity.

Wilson Moot Official Problem at 3-5.

[2] While Mr. Jacob has previously tried to commit suicide by cutting his wrists with shards of a broken mirror and strangling himself with a bed sheet, this should not be the accepted option in Canadian society for suffering individuals to end their lives. It is inhumane to subject those who are already hurting to even more pain.

Wilson Moot Official Problem at 4, 7.

[3] Criminal sanctions surrounding suicide have evolved considerably over the last century. Until 1972, attempted suicide was punishable by imprisonment. Decriminalizing attempted suicide was an important step in recognizing personal autonomy and human dignity. Counselling or aiding suicide in all situations continued to be punishable by up to fourteen years imprisonment until 2011 when s 241.1 was enacted. As the law currently stands, more individuals now have the ability to exercise their personal autonomy by deciding when and how their to end their suffering with dignity.

Carter v Canada (Attorney General), 2012 BCSC 886 at paras 102-105, 287 CCC (3d) 1 [*Carter*].

[4] The Appellant seeks for those with incurable suffering to have the same autonomy and dignity available to them that individuals with terminal illness are afforded. To find otherwise would sentence him to decades of pain contrary to his express wishes.

Wilson Moot Official Problem at 1.

Part II – Statement of Facts

[5] Mr. Jacob has suffered from undifferentiated schizophrenia for more than a decade. When Mr. Jacob is psychotic, the symptoms he endures are horrifying and painful. He hallucinates and frequently experiences a recurring delusion that he will be kidnapped and handed over to government doctors who will perform medical experiments on him.

Wilson Moot Official Problem at 1, 3.

[6] When Mr. Jacob is psychotic, he is aggressive and often has to be restrained to his bed. In a period of psychosis, following threats made by his father that he would be committed, Mr. Jacob stabbed his father. His father died as a result. Mr. Jacob was found not criminally responsible and has been at Oak Ridges Centre for Mental Health ("Oak Ridges") ever since.

Wilson Moot Official Problem at 4.

[7] Despite the excellent care Mr. Jacob has received at Oak Ridges, his condition has worsened. Mr. Jacob is now psychotic nearly all of the time. In his four lucid periods at Oak Ridges, Mr. Jacob was "competent" for the purpose of s 241.1. He displays above average intelligence and has previously consented, when competent, to electroconvulsive therapy.

Wilson Moot Official Problem at 3-5.

[8] In his last three lucid periods, Mr. Jacob has expressed the desire to end his life. Dr. Lee's medical opinion is that this request is "well-informed and enduring." In two of these periods, he attempted to commit suicide, first by strangling himself with a bed sheet, and then by cutting his wrists with a broken mirror. Barriers have been put in place to prevent another attempt.

Wilson Moot Official Problem at 5.

[9] Mr. Jacob believes that his quality of life is basically non-existent, and that the measures used on him are "barbaric". He is appalled that he may live another forty years in such conditions.

Wilson Moot Official Problem at 5.

[10] According to Dr. Lee, Mr. Jacob's lead physician and a widely respected authority on undifferentiated schizophrenia, he will never "recover to a point where he will be released from Oak Ridges." She has attempted all known treatments to relieve Mr. Jacob's condition.

Wilson Moot Official Problem at 4-6.

[11] Dr. Grimshaw, a psychiatrist at the Centre for Addiction and Mental Health in Toronto, concurs regarding Mr. Jacob's poor prognosis. In his opinion, patients suffering from an incurable mental illness experience intolerable mental suffering and are subject to conditions that are "an assault on their independence and dignity as human beings".

Wilson Moot Official Problem at 6.

[12] While Dr. Lee is willing to assist Mr. Jacob in ending his life and Dr. Grimshaw is willing to provide the second medical opinion, they are concerned that they would be prosecuted under s 241 because Mr. Jacob is not suffering from a terminal illness and is not competent.

Wilson Moot Official Problem at 2, 5.

Expert Evidence

[13] Dr. Illario, a professor in sociology and mental health, provided evidence on behalf of the Respondent. His opinion was that Mr. Jacob is receiving the "gold standard" of treatment and he could not think of any additional treatment that was likely to be successful.

Wilson Moot Official Problem at 6-7.

[14] Dr. Petra Wolinski, a psychiatrist affiliated with Physicians for Death with Dignity, provided evidence for the Appellant and stated that an express wish to die is not necessarily a manifestation of illness. Based on evidence from jurisdictions where physician-assisted death has been legal for at least ten years, Dr. Wolinski observed that the primary motivations of those

seeking a physician-assisted death are loss of independence, loss of dignity, and a desire not to be a burden on loved ones. In jurisdictions where physician-assisted death is also permitted for persons with mental illness, she found that in 80% of cases the physician declined to end the patient's life because the physician identified depression that could be treated by other means.

Wilson Moot Official Problem at 7-8.

Section 241.1

[15] Section 241.1, "Physician-assisted dying", includes the following provisions:

> (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.
>
> *Criminal Code*, RSC 1985, c C-46, ss 14, 241.
> Wilson Moot Official Problem at 1-2.

[16] The term "competent" is defined as "having the ability to understand the information relevant to making a decision about a medical treatment, and the ability to appreciate the consequences of that decision." The term "terminal illness" is defined as "an incurable disease that will, as a matter of reasonable medical judgment, cause the person's death within two years."

> Wilson Moot Official Problem at 5.
> Wilson Moot Clarifications at 1.

Procedural History

[17] At trial, Justice Wire found that the requirements of competence and terminal illness discriminated against people with mental illness, stating, "[M]entally ill patients may find themselves in equally unbearable pain." Justice Wire held that s 241.1 violated Mr. Jacob's s 15(1) right and that the infringement was not justified under s 1. He did not address s 7.

Wilson Moot Official Problem at 8-9.

[18] Justice Rainfoot, writing for the majority of the Ontario Court of Appeal, allowed the appeal on the ground that s 241.1 was an ameliorative program under s 15(2), and found no violation under s 7. Justice Singh, in dissent, largely adopted the reasons of Wire J.

Wilson Moot Official Problem at 9.

Part III – Statement of Points in Issue

1. Section 241.1 of the *Criminal Code* is not an ameliorative law or program within the meaning of section 15(2) of the *Charter*.
2. Section 241.1 of the *Criminal Code* infringes section 15(1) of the *Charter*.
3. Section 241.1 of the *Criminal Code* infringes section 7 of the *Charter*.
4. The infringement of sections 15(1) and 7 by section 241.1 cannot be justified under section 1.

Part IV – Argument

Issue 1: Section 241.1 of the *Criminal Code* is not an Ameliorative Law or Program within the Meaning of Section 15(2) of the *Charter*

[19] The Appellant submits, with respect, that Rainfoot J of the Ontario Court of Appeal erred in law by finding that s 241.1 is an ameliorative program under s 15(2) of the *Charter*.

Wilson Moot Official Problem at 9.
Canadian Charter of Rights and Freedoms, Part I of the *Constitutional Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11, s 15(2) [*Charter*].

1.1 Section 15 of the Charter: A General Framework

[20] The overall framework for a s 15 analysis is set out in *Kapp*. First, it is necessary for the claimant to show that the law "creates a distinction based on an enumerated or analogous ground". The government can then show that the distinction is protected as an ameliorative program under s 15(2). If the government is unsuccessful, the claimant then must demonstrate that the distinction infringes s 15(1).

> *R v Kapp*, 2008 SCC 41 at paras 40, 48, [2008] 2 SCR 483 [*Kapp*].

1.1.1 Substantive Equality

[21] The guiding principle informing s 15 of the *Charter* is substantive equality. Substantive equality "is founded on the principle that all human beings are of equal worth and possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance" (McLachlin). Justice L'Heureux-Dubé states, "[S]ection 15 has enabled courts…to requir[e] that laws treat individuals as substantive equals, recognizing and accommodating their underlying differences." While s 15(1) ensures the government cannot discriminate against a particular group, s 15(2) allows the government to target a particular disadvantaged group in order to improve its current circumstances in Canadian society without having to confront a claim of reverse discrimination.

> Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 SCLR (2d) 183 at 191.
> The Right Honourable Beverley McLachlin, PC, "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17 at 20.
> The Honourable Claire L'Heureux-Dubé, "Preface" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 3 at 4.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 38, 41, [2011] 2 SCR 670 [*Cunningham*].
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165, 56 DLR (4th) 1, McIntyre J [*Andrews*].

1.2 Section 241.1 Creates a Distinction on Enumerated or Analogous Grounds

[22] Section 241.1 creates a distinction on the enumerated ground of mental disability. Subsection 241.1(1)(c) creates a distinction by excluding those without a terminal illness. Subsection 241.1(1)(a) also creates a distinction by excluding those who are not competent when the lethal dose is taken or administered.

> Wilson Moot Official Problem at 1.
> *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at paras 78-79, 174 DLR (4th) 193 [*Winko*].

[23] Both distinctions are examples of "'adverse effects' discrimination" because they have the effect of disproportionately excluding persons with incurable mental illness. The effect of the terminal illness requirement is that those who are in the same amount of incurable pain as persons with terminal illness are excluded because their illness will not cause their death within two years. The effect of the competency provision is that those who are competent at the time they make the request are excluded because they may not be competent later.

> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 60, 64, 151 DLR (4th) 577 [*Eldridge*].
> Wilson Moot Clarifications at 1.

[24] Mr. Jacob falls within the enumerated ground of mental disability because he suffers from undifferentiated schizophrenia. It does not matter, for the purpose of establishing a distinction, that not everyone who falls within the enumerated ground of mental disability is adversely affected by this provision. Rather, it matters that Mr. Jacob is excluded because he falls within that enumerated ground.

> *Winko*, *supra* para 22 at paras 78-79.
> Wilson Moot Official Problem at 2.
> Wilson Moot Clarifications at 1.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 354, 355 (available on CanLII), Abella J [*Quebec*].

1.3 Section 241.1 is not an Ameliorative Program Protected by Section 15(2)

1.3.1 The *Kapp* Test Lacks the Necessary Specificity

[25] As currently formulated, the s 15(2) test created in *Kapp* and reformulated in *Cunningham* requires that the government show, "(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds" (*Kapp*). In addition, "there must be a correlation between the program and the disadvantage suffered by the target group" (*Kapp*). As held in *Cunningham*, "[i]f these conditions are met, s 15(2) protects all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose".

> *Kapp*, *supra* para 20 at paras 41, 49.
> *Cunningham*, *supra* para 21 at para 45.

[26] In the Appellant's submission, this test is not sufficiently narrow to accurately distinguish between a true ameliorative law, program, or activity ("ameliorative program") and what can be termed a targeted law. It is not enough for the purpose of s 15(2) for a law to intend to help a certain segment of society. The *Mental Health Act*, the *Adoption Act*, and the *Child, Family and Community Service Act* are all examples of targeted laws that only apply to one segment of society. Many of the persons who benefit from these Acts may also be historically disadvantaged and the aim of all of these Acts is to improve their situation in Canadian society. However, while these Acts might satisfy the *Kapp* test, none is an ameliorative law or program for the purposes of s 15(2).

> *Mental Health Act*, RSO 1990, c M.7.
> *Adoption Act*, RSBC 1996, c 5.
> *Child, Family and Community Service Act*, RSBC 1996, c 46.

1.3.2 A New Approach is Warranted

[27] Section 15(2) is integral to ensure substantive equality. It was added to s 15(1) "out of 'excessive caution', intending to bolster the substantive equality approach in s 15(1), since, at the

time the *Charter* was being drafted, there was a worry that affirmative action programs would be over-turned on the basis of reverse discrimination" (*Lovelace*). *Bakke* is an example of the type of reverse discrimination claim that Canada was trying to avoid; the United States Supreme Court held that an affirmative action program that reserved a certain number of admission placements in medical school for racial minorities was unconstitutional under the Fourteenth Amendment.

> *Cunningham*, *supra* para 21 at para 37.
> *Lovelace v Ontario*, 2000 SCC 37 at para 105, [2000] 1 SCR 950 [*Lovelace*].
> *University of California Regents v Bakke*, 438 US 265 at 319-20 (US Sup Ct 1978) [*Bakke*].

[28] *Kapp* is an example of s 15(2) allowing the government to make ameliorative laws that successfully pre-empt reverse discrimination claims. This case demonstrates an instance where the protection under s 15(2) furthered substantive equality.

> *Kapp*, *supra* para 20 at para 3.

[29] However, while the test in *Kapp* was effective on the facts of the case, that test does not adequately address the risk of mischaracterizing a targeted law as an ameliorative program. The result of such a mischaracterization has led to troubling results, as seen in *Pratten*, where the *Adoption Act* of British Columbia was found to be an ameliorative program. *Pratten* is a s 15 challenge to the provisions of the *Adoption Act* that detail disclosure of biological parent information. Adoptees are not adversely affected by the possibility of children of sperm donors accessing the same sort of information about their biological parents that adoptees are given the right to access. In protecting the *Adoption Act* as an ameliorative program, s 15(2) frustrates substantive equality by denying the children of sperm donors the ability to make their equality claim under s 15(1).

> *Kapp*, *supra* para 20 at para 59.
> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, at paras 4-5, 43 (available on CanLII) [*Pratten*].

1.3.3 A New Test

[30] To ensure substantive equality, s 15(2) must be applied narrowly. This does not preclude the government from passing any number of laws that assist different populations in Canadian society. It simply ensures that the protection that s 15(2) provides to the government against s 15(1) claims only protects those programs where the result furthers substantive equality.

[31] This approach to s 15(2) is consistent with Iacobucci J's reasoning in *Law*. Justice Iacobucci states, "The fact that the impugned legislation may achieve a valid social purpose for *one group* of individuals *cannot function to deny an equality claim* where the effect of the legislation upon *another person or group* conflicts with the purpose of the s 15(1) guarantee." He defines this purpose to include "promot[ing] a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." In addition,

> [a]n ameliorative purpose or effect which accords with the purpose of s 15(1) of the *Charter* will likely *not violate the human dignity of more advantaged individuals* where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

While these comments were made before s 15(2) had an independent role in equality rights claims, the principles are equally relevant to the formulation of a separate test under s 15(2).

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 70, 72, 170 DLR (4th) 1 [emphasis added] [*Law*].

[32] Together, these observations of Iacobucci J clearly delineate the necessary parameters of what should be protected under s 15(2). They result in the following test: (1) Is there an ameliorative purpose designed to benefit a disadvantaged group? (current *Kapp* analysis), *and* (2) Would the inclusion of the claimant group frustrate the ameliorative purpose?

> *Kapp*, *supra* para 20 at para 41.

[33] A court must answer both questions in the affirmative in order to protect the law under s 15(2) and preclude a s 15(1) challenge. In addressing the second question, the government must explain why it made the distinction in the way it did and the court can then assess whether that distinction is consistent with substantive equality. If the government fails at either stage of this test, the court must then consider the s 15(1) claim.

[34] This test appropriately limits which laws and programs s 15(2) protects. For example, the *Mental Health Act* would fail at the second step because the inclusion of others in the targeted group does not frustrate the ameliorative purpose. In contrast, programs regulating access to a limited resource are more likely to pass both steps.

[35] Section 241.1 is an example of a targeted law and *not* an ameliorative program. Characterizing s 241.1 as an ameliorative program would have the same harmful effect as seen above in *Pratten* of perpetuating inequality without advancing substantive equality. The Appellant submits that this is a clear case where the government cannot show that s 241.1 is an ameliorative program.

1.3.4 Section 241.1 is not Protected by Section 15(2) under the New Test

[36] Section 241.1 fails at the second step of the reformulated test—Would the inclusion of the claimant group frustrate the ameliorative purpose?—because those with terminal illness would not in any way be adversely affected if others could also access this provision.

1.3.5 Section 241.1 is not Protected by Section 15(2) under the *Kapp* Test

[37] Section 241.1 also fails the existing s 15(2) protection under *Kapp* because the distinction neither serves nor is necessary to the ameliorative purpose. The exclusion of persons with

incurable mental illness is irrelevant to the ameliorative purpose of protecting vulnerable patients.

Kapp, *supra* para 20 at para 52.
Wilson Moot Official Problem at 9.
Cunningham, *supra* para 21 at paras 45, 53-54.

[38] Whether the Court applies the new test or the *Kapp* test, the result in both is to proceed to s 15(1).

Issue 2: Section 241.1 of the *Criminal Code* Infringes Section 15(1) of the *Charter*

[39] Section 241.1 infringes s 15(1) by perpetuating disadvantage against persons with incurable mental illness. The provision imposes a burden on Mr. Jacob and others who experience severe incurable pain by forcing them to live in such pain, potentially for many years. The cumulative effect of the requirement of competency at the administration of the lethal dose and the requirement of a terminal illness disproportionately affects persons with incurable mental illness because incompetency is a frequent, albeit not exclusive, symptom of mental illness and most mental illnesses are not terminal. Mr. Jacob is forced to live in severe pain without any hope of recovery, contrary to his express wishes, while others in severe pain can alleviate that pain by accessing s 241.1.

Wilson Moot Official Problem at 1-2, 5.
Andrews, *supra* para 21 at 174, McIntyre J.

2.1 The Proper Approach for Section 15(1)

[40] The analysis of s 15(1) requires a purposive and contextual approach. Speaking for the majority in *Quebec*, Abella J states that the purpose of s 15 is "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available." In addition, "*Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary

disadvantage on the claimant because of his or her membership in an enumerated or analogous group." Contextual factors from *Law* that assist the Court in determining whether or not a s 15(1) infringement exists include, but are not limited to, pre-existing disadvantage, correspondence between the law and the claimant's circumstances and the nature of the interest affected.

> *Lovelace*, *supra* para 27 at para 54.
> *Quebec*, *supra* para 24 at paras 319, 331.
> Young, *supra* para 21 at 196.
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 66, [2011] 1 SCR 396 [*Withler*].
> *Law*, *supra* para 31 at paras 63, 69, 72, 74.

2.1.1 Values Underlying Section 15(1)

[41] Like s 15(2), substantive equality informs the s 15(1) analysis through a "consideration of the actual impact of the law on the person it affects" (*Carter*). Additionally, "this value of substantive equality at the heart of s. 15 is closely tied to the concept of human dignity" (*Quebec*). In *Law*, human dignity was central to the s 15(1) test. While human dignity is no longer part of the formal test, it remains "an essential value underlying the s. 15 equality guarantee" (*Kapp*). Related to these principles is personal autonomy. As stated by LeBel J in *Quebec*, "[t]he principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee." The principles of substantive equality, human dignity, and personal autonomy are central to Mr. Jacob's s 15 equality right.

> *Carter*, *supra* para 3 at para 1033.
> *Quebec*, *supra* para 24 at para 138, 139, LeBel J (dissenting on s 15 but not on this point).
> *Law*, *supra* para 31 at para 51.
> *Kapp*, *supra* para 20 at paras 21, 22.

2.1.2 Personal Autonomy as a Fundamental Interest

[42] The nature of the interest at stake in this case is central to Mr. Jacob's autonomy as an individual in Canadian society. It determines whether Mr. Jacob will be forced to live for

decades in excruciating psychological pain or if he can choose to end that pain. As stated in *Carter*,

> Autonomy with respect to physical integrity is a value of fundamental importance in the Canadian Constitution. Its place in the constitutional order is paralleled by its place in the common law. The starting point in our law—the default position—is that persons control their own physical integrity. Instances when other persons *or the state* are permitted to usurp that control are the exception, not the rule.

The Appellant submits that this is a case where an exception to personal autonomy is inappropriate.

> *Law*, *supra* para 31 at para 74.
> *Carter*, *supra* para 3 at para 1149.

2.2 The Test in *Quebec*

[43] The analysis required under s 15(1) was recently clarified and refocused by the Supreme Court of Canada in *Quebec* by returning to the test laid out in *Andrews*. Therefore, the claimant need only show that there is a distinction on an enumerated or analogous ground and that the distinction is discriminatory, or "has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society" (*Quebec*). The focus is on the impact of the law rather than "whether a discriminatory *attitude* exists" (*Quebec*), such as prejudice or stereotyping, which claimants are no longer required to demonstrate.

> *Quebec*, *supra* para 24 at para 319 citing *Andrews*, supra at 165.
> *Quebec*, *supra* para 24 at para 321.
> *Quebec*, *supra* para 24 at para 322 citing *Andrews*, supra at 174 [emphasis removed].
> *Quebec*, *supra* para 24 at para 327 [emphasis in original].

[44] The Appellant has shown prior to the s 15(2) analysis that s 241.1 creates a distinction on the enumerated ground of mental disability, which includes persons with incurable mental illness.

2.3 Section 241.1 Perpetuates Disadvantage by Imposing the Burden of Living with Severe Pain on Persons with Mental Illness

2.3.1 Underinclusiveness

[45] Section 241.1 is an underinclusive provision. In *Vriend*, the Court stated that an underinclusive provision could be subject to *Charter* scrutiny. Otherwise, as stated by Dickson CJC, "[u]nderinclusion may simply be a backhanded way of permitting discrimination."

> *Vriend v Alberta*, [1998] 1 SCR 493 at para 61, 156 DLR (4th) 385 [*Vriend*].
> *Vriend*, *supra* para 45 at para 80 citing *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1240, 59 DLR (4th) 321.

2.3.2 Section 241.1 Perpetuates the Historical Disadvantage Experienced by Persons with Mental Illness

[46] The disadvantage experienced by persons with mental illness, including Mr. Jacob and those with incurable mental illness, is not unique to s 241.1. Chief Justice Lamer in *Swain* states, "There is no question but that the mentally ill in our society have suffered from historical disadvantage." He also affirms the following statement: "For centuries, persons with a mental disability have been systematically isolated, segregated from the mainstream of society, devalued, ridiculed, and excluded from participation in ordinary social and political processes." This is significant in a s 15 analysis because "probably the most prevalent reason that a given legislative provision may be found to infringe s. 15(1) is that it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group with Canadian society" (*Law*). The pain that Mr. Jacob suffers is devalued by s 241.1 in the same way that it has been historically diminished and ignored.

> *R v Swain* [1991] 1 SCR 933 at 973, 994, 63 CCC (3d) 481 [*Swain*].
> *Law*, *supra* para 31 at para 64.

2.3.3 Section 241.1 Recognizes Only One Source of Severe Pain

[47] A discussion of equality under s 15(1) inevitably engages a comparison between those claiming discrimination and other groups. While it is not necessary for the claimant to specify a

mirror comparator group—someone who is the same in all ways except for the different treatment under the law—it is helpful in the discussion of Mr. Jacob to reference competent persons with terminal illness, the group which currently has access to s 241.1.

Withler, *supra* para 40 at paras 60, 62, 64.

[48] Section 241.1 perpetuates disadvantage by imposing the burden of living in severe, incurable pain on persons with incurable mental illness. The Appellant submits that persons experiencing severe psychological pain are suffering equally or more than persons experiencing severe pain as the result of a terminal illness. In the case of terminal illness, the end to the pain can be foreseen. However, in the case of mental illness, Mr. Jacob experiences this pain with no hope of recovery because he is excluded solely on the source of his suffering.

Wilson Moot Official Problem at 8.
Wilson Moot Clarification at 1.

[49] Section 241.1(1)(c) perpetuates society's historical ignorance of the pain associated with incurable mental illness. In effect, the provision asserts that severe pain as a result of a terminal illness warrants access to physician-assisted death while other sources of severe pain do not. The parties agree that pain in s 241.1(1)(c) could include mental pain and the government has also conceded "that individuals with some terminal illnesses experience unbearable psychological distress due to their conditions, even if they are not in significant physical pain." Therefore, the discrimination lies not in the possibility of mental pain but in the pre-requisite that the pain, either mental or physical, be "a result of a terminal illness."

Wilson Moot Official Problem at 1-3.

2.3.4 Section 241.1 Imposes a Burden by Requiring Competency at Administration

[50] The Appellant interprets the requirement that the patient is competent in s 241.1(1)(a) as a requirement for competency at the time the legal dose is taken or administered. The modern approach to statutory interpretation states that "the words of an Act are to be read in their entire

context and in their grammatical and ordinary sense". Here, the provision states, "where the physician provides and/or administers a lethal dose...where...the patient is competent." This is consistent with the interpretations of Dr. Lee and Wire J.

> *Canada (Attorney General) v JTI-McDonald Corp*, 2007 SCC 30 at para 55, [2007] 2 SCR 610, citing Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87.
> Wilson Moot Official Problem at 1-2, 9.

2.3.5 Section 241.1 Does Not Correspond to the Claimant's Circumstances

[51] The competency requirement in s 241.1 does not take into account the circumstances of Mr. Jacob. Section 241.1(1)(a) forces patients who have expressed their wish to end their lives during a period of competency to continue to live in severe, incurable pain if they subsequently become incompetent before the lethal dose is administered. Considering the uncertainty surrounding the duration of periods of competency, the provision effectively requires that patients who are seeking a physician-assisted death may receive the lethal dose sooner than they wish in order to ensure that they are still competent. If they wait, they could lose the ability to access physician-assisted death at the point they cease being competent and must remain in pain. In this way, s 241.1 frustrates personal autonomy. Although Mr. Jacob's request is "well-informed and enduring," he must live in pain *because of a symptom of the same condition that causes his pain.* This is analogous to someone with Lou Gehrig's disease *not* being able to access physician-assisted death *because they cannot physically take their own life*. This is inconsistent with personal autonomy and violates human dignity.

> Wilson Moot Official Problem at 1, 5, 9.
> *Carter*, *supra* para 3 at para 15.

[52] The Appellant submits that s 241.1 infringes Mr. Jacob's equality rights under s 15(1) of the *Charter*.

Issue 3: Section 241.1 of the *Criminal Code* Infringes the Appellant's Section 7 *Charter* Rights

3.1 The Scope of Section 7

[53] Section 241.1 deprives Mr. Jacob of his s 7 rights to life, liberty, and security of the person and the deprivation is not in accordance with the principles of fundamental justice.

> *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 501, 24 DLR (4th) 536 [*BC MVA*].

[54] Section 7 must be read purposively, "in the light of the interests it is meant to protect" (*Big M*). The underlying interests of s 7 encompass a "sphere" of autonomy rights that permeate one's life, personal decisions, integrity, and human dignity.

> *R v Big M Drug Mart*, [1985] 1 SCR 295 at 344, 60 AR 161 [*Big M*].

[55] Although the protection afforded to the rights in s 7 is not absolute, the fact that the impact of the prohibitive effects of s 241.1 goes to the core of Mr. Jacob's s 7 rights—his personal decision to die humanely and with dignity—necessitates that the level of protection be at its highest. To deny "a mentally competent, incurably ill individual's ability to make end-of-life decisions and forc[e] that person against his will to suffer a prolonged and excruciating deterioration is, at its core, *a blatant and untenable violation* of the person's fundamental right of human dignity" (*Baxter*).

> *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 339, 21 OR (3d) 479.
> *Baxter v Montana*, 2009 MT 449 at paras 86, 92 (Mont Sup Ct 2009) [*Baxter*] [emphasis added].

[56] While s 241.1 on its face is exculpatory, its restrictive effects bring it within *Charter* scrutiny. When combined with s 241, s 241.1 isolates a small group of persons—primarily those suffering from severe incurable pain who are not terminally ill—and says that they are not entitled to choose to end their lives with dignity, while allowing those with a terminal illness to

do so. Put another way, the effect of s. 241.1 is to *prohibit* individuals like Mr. Jacob from ending their lives with dignity. This clearly engages the interests protected by s 7 of the *Charter*.

[57] Justice Arbour's statement in *Gosselin* that "the concept of deprivation is sufficiently broad to embrace *withholdings that have the effect of erecting barriers*" aptly captures s 241.1. By enacting s 241.1, the state is acting in a "non-inclusive manner" that substantially deprives Mr. Jacob of his ability to enjoy his s 7 rights.

> *Gosselin v Québec (Attorney General),* 2002 SCC 84 at paras 321, 328, [2002] 4 SCR 429 [*Gosselin*] [emphasis added].

3.2 Section 241.1 Interacts with Section 241 to Deprive the Appellant of his Rights to Life, Liberty, and Security of the Person

[58] Mr. Jacob's rights to life, liberty, and security of the person are infringed by the underinclusiveness of s 241.1. A law that interferes with any one of these rights constitutes a deprivation under s 7.

> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 85, 3 SCR 134 [*PHS*].
> *R v Morgentaler*, [1988] 1 SCR 30 at 53, 63 OR (2d) 281[*Morgentaler*].

3.2.1 Life

[59] Section 241.1 violates Mr. Jacob's right to life. The right to life is inextricably linked to death, as explained by Cory J, dissenting, in *Rodriguez*:

> The life of an individual must include dying. Dying is the final act in the drama of life. If, as I believe, *dying is an integral part of living*, then as a part of life it is entitled to the constitutional protection provided by s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life.
>
> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 630, 107 DLR (4th) 342 (Cory J, dissenting) [*Rodriguez*] [emphasis added].

[60] Justice Cory's reasoning should now be followed, given the shift in government policy marked by the enactment of s 241.1 that has occurred since the *Rodriguez* decision. This change in policy, from a complete ban on counselling or aiding suicide under s 241 to physician-assisted

death under s 241.1, indicates the state's endorsement, in certain circumstances, of the right to make one's own medical decisions that will result in death, and makes this right a higher priority than the policies supporting the absolute preservation of life which the majority of the Court relied upon in *Rodriguez*.

Rodriguez, *supra* para 59 at 606, Sopinka J.

[61] Section 241.1 excludes Mr. Jacob and prevents him from choosing to end his life with dignity through a physician-assisted death; therefore, his right to life is infringed.

3.2.2 Liberty

[62] Section 241.1 violates Mr. Jacob's right to liberty because it prevents him from having a physician-assisted death—"an important and fundamental life choice[]" (*Blencoe*). The right to liberty not only applies to freedom from physical restraint, but also includes "the right to non-interference by the state with fundamentally important and personal medical decision-making" (*Carter*).

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 49, [2000] 2 SCR 307 [*Blencoe*].
Carter, *supra* para 3 at para 1302 (referring to *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 [*AC*]).
Morgentaler, *supra* para 58 at 166, Wilson J.
Rodriguez, *supra* para 59 at 583.

[63] This fundamental life choice should be respected by the state. In *Morgentaler*, Wilson J stated, "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them." This is precisely the type of decision that the state should respect, as it goes to the core of Mr. Jacob's personal autonomy.

Morgentaler, *supra* para 58 at 168.

3.2.3 Security of the Person

[64] The security of Mr. Jacob's person is infringed through the enactment of s 241.1 because it interferes with Mr. Jacob's personal autonomy.

> *Rodriguez*, *supra* para 59 at 588-89.
> *Morgentaler*, *supra* para 58 at 174-75.

[65] Section 241.1 interferes with Mr. Jacob's autonomy because it prevents him from carrying out his desire to end his life with dignity. The fact that Mr. Jacob is in a psychiatric facility does not mean that his "right to self-determination" is forfeited.

> Wilson Moot Official Problem at 5.
> *Fleming v Reid* (1991), 4 OR (3d) 74 at 86, 82 DLR (4th) 298 (Ont CA) [*Fleming*].

[66] As a result, s 241.1 violates Mr. Jacob's right to security of the person.

3.3 The Deprivation of Life, Liberty, and Security of the Person is not in Accordance with the Principles of Fundamental Justice under Section 7

[67] The Appellant submits that s 241.1 is not enacted in accordance with the principles of fundamental justice because the law is arbitrary, overbroad, and grossly disproportionate to any legitimate public interest.

3.3.1 Arbitrariness

[68] The requirements under s 241.1 are arbitrary under both standards applied by the Court in *Chaoulli*. The Court was equally divided on the definition of arbitrariness, with three judges stating that a law is arbitrary when it is *not necessary* to further the state objective, and three judges stating that a law is arbitrary when it is *inconsistent* with the state objective.

> *PHS*, *supra* para 58 at para 132, citing *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 131-32, 232, [2005] 1 SCR 791 [*Chaoulli*].

[69] The Appellant submits that the former standard should be the prevailing principle. Because s 7 rights serve to protect the most fundamental personal values, decisions, and circumstances that are at the heart of human dignity and integrity, it is imperative that there be not just "a

theoretical connection between the limit and the legislative goal, but a real connection on the facts" (*Chaoulli*). Requiring that a law be *necessary* to further the state objective will help ensure that only legitimate and justified infringements by the state are permitted.

Chaoulli, *supra* para 68 at para 131.

[70] The first step in the arbitrariness analysis is to determine the objectives of the law. Section 241.1 has two primary objectives: first, to protect vulnerable individuals from being coerced into physician-assisted death against their will; second, to allow certain individuals suffering from severe incurable pain to end their lives through physician-assisted death.

PHS, *supra* para 58 at para 129.

[71] The next step in the analysis is to determine the relationship between the state's objectives and the law in question. The relationship between the impugned restrictions of s 241.1 and the law's objectives is tenuous at best and grounded in theory rather than fact.

PHS, *supra* para 58 at para 130.
Chaoulli, *supra* para 68 at para 131.

3.3.1.1 The Terminal Illness Requirement under Section 241.1 is Arbitrary

[72] Rather than protecting the vulnerable, requiring that a patient be terminally ill to access s 241.1 endorses the view that the "less time the individual has left to live, the lesser the state interest in protecting her [or his] life." How can it be that a patient with a two-year life expectancy is less vulnerable than a patient with a forty-year life expectancy?

Rachel D Kleinberg & Toshiro M Mochizuki, "The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases" (1997) 32:1 Harv CR-CLL Rev 197 at 212.

[73] According to studies performed in jurisdictions where physician-assisted suicide has been legal for at least ten years, the primary motivations for requesting a physician-assisted death are loss of independence (86%), loss of dignity (82%), and a desire not to be a burden on loved ones (73%). These motivating factors demonstrate the vulnerability of *all* patients requesting

physician-assisted death. The distinction between terminal and non-terminal patients bears no relation to the vulnerability of those persons.

Wilson Moot Official Problem at 7.

[74] The requirement that a patient have a terminal illness is also not necessary because of the protective safeguards found in s 241.1. The safeguards require the approval of two doctors, severe pain, the exhaustion of all treatment options, and that it must be in the patient's *best interest* to end their life. This creates a high threshold and is sufficient to ensure that vulnerable persons will not be coerced against their will into having a physician-assisted death.

Wilson Moot Official Problem at 1-2.

[75] Additionally, there is no factual basis to suggest that an individual with a terminal illness suffers more than an individual without one. Mr. Jacob's suffering is just as severe as the suffering experienced by a person with a terminal illness, as acknowledged by Wire J. This is supported by the evidence of Dr. Lee and Dr. Grimshaw who state that Mr. Jacob has a "poor prognosis" and there is a "low likelihood that his condition will improve"; the result of this is that Mr. Jacob will likely live for decades with "intolerable mental suffering".

Wilson Moot Official Problem at 5, 6, 8.

[76] Regardless of whether a person is terminally ill, he or she can experience severe suffering. Therefore, the distinction between the two types of patients is arbitrary; there is no relationship between the provision and the state's objective of relieving those in severe pain of their suffering.

3.3.1.2 The Requirement that a Patient be Competent under Section 241.1 is Arbitrary

[77] The requirement of competency at the time of administration of the lethal dose is arbitrary. Section 241.1(a) fails to recognize Dr. Wolinski's point that while a wish to die may merely be a

symptom of a mental illness, this is not always the case. There is no factual nexus between the expansiveness of the competency provision and the objective of protecting the vulnerable.

Wilson Moot Official Problem at 1, 7.

[78] The above paragraphs have shown that both of the impugned requirements are inconsistent with the state's objectives of (1) protecting vulnerable persons, and (2) relieving suffering.

3.3.2 Overbreadth

[79] The means selected by s 241.1 are "broader than necessary to achieve the state objective" (*Khawaja*) of protecting vulnerable individuals from being coerced into physician-assisted death against their will.

R v Khawaja, 2012 SCC 69 at para 40 (available on CanLII) [*Khawaja*].
R v Heywood, [1994] 3 SCR 761 at 792-93, 120 DLR (4th) 348 [*Heywood*].

[80] The requirement of competency at the administration of the legal dose is overbroad because it is not necessary to ensure that vulnerable persons are protected. Competency at the time of consent is sufficient to protect vulnerable persons from being coerced into physician-assisted death.

[81] Physician-assisted death is viewed by Mr. Jacob and his doctors as akin to other types of medical treatment. Justice Wire and Rainfoot J refer to physician-assisted death as a "treatment". Mr. Jacob has been allowed to make other medical treatment decisions in his competent periods that impact his health during the time when he is incompetent, such as consenting to electroconvulsive therapy; therefore, his decision to end his life should also be respected.

Wilson Moot Official Problem at 4, 8, 9.

[82] This is consistent with the decision in *AC*, in which a minor who was a Jehovah's Witness wanted her decision not to have a life-saving blood transfusion to be respected. The Court held

that even advanced directives pertaining directly to life itself should be upheld provided that the patient is competent when they make the decision.

AC, *supra* para 62 at para 5-6, 114.

[83] Further, in *Fleming*, the court held, specifically regarding patients in a psychiatric institution, that "[a] patient, in anticipation of a circumstance wherein he or she may be…incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment" may specify advance directives regarding such treatment.

Fleming, *supra* para 65 at 85-86.

[84] To allow a physician-assisted death only in cases where the patient is competent at the time of administration of the lethal dose not only disregards the wishes of the patient, but is even overbroad in respect of a terminally ill patient.

[85] In cases of terminal illness, it is possible that, as a patient's condition progresses, the patient will become incompetent; this could be through events such as a stroke or a seizure. The terminally ill person would likely become more vulnerable to coercion as their competency diminishes because of the fear that they may lose access to physician-assisted death. This could result in terminally ill patients ending their lives before they would otherwise wish to do so.

[86] Although a "measure of deference must be paid to the means selected by the legislature", in this case it should be very minimal because of the nature of the infringement. Section 241.1 infringes not just one, but all three of Mr. Jacob's s 7 rights. It goes right to the core of s 7 and therefore the degree of constitutional protection accorded must be at its highest.

Heywood, *supra* para 79 at 793.
Thomson Newspapers v Canada (Attorney General), [1998] 1 SCR 877 at para 91, 38 OR (3d) 735 [*Thomson*].

3.3.3 Gross Disproportionality

[87] The impact of the prohibition left in place by s 241.1 is grossly disproportionate to its objective. In this stage of the analysis, the court asks whether legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest".

> *PHS*, *supra* para 58 at para 133, citing *R v Malmo-Levine*, 2003 SCC 74 at para 143, [2003] 3 SCR 571.

[88] The burden imposed on individuals excluded from the ambit of s 241.1 is harsh and inhumane. It forces these individuals, like Mr. Jacob, to live in severe suffering with no hope of relief, and no way to conclude their lives with dignity.

[89] There is no evidence that mentally ill persons need more protection than terminally ill persons from being coerced into death, provided the decision is made in a period of competency. In jurisdictions where physician-assisted death is available for mentally ill persons, in 80% of cases the physician did not assist the patient because their mental illness could be managed in alternate ways; this indicates that a competency requirement at the time of consent and physician examinations would be sufficient to protect mentally ill persons.

> Wilson Moot Official Problem at 8.

[90] For the above reasons, the infringement of Mr. Jacob's rights to life, liberty, and security of the person is not in accordance with the principles of fundamental justice.

Issue 4: Section 241.1 of the *Criminal Code* cannot be Justified under Section 1

[91] Section 241.1 of the *Criminal Code* cannot be justified under s 1 of the *Charter*. This is because s 241.1 does not reflect the values and principles essential to a free and democratic society, particularly "respect for the inherent dignity of the human person".

> *R v Oakes*, [1986] 1 SCR 103 at 136-38, 26 DLR (4th) 200.

[92] Regarding the violation of s 15, the onus is on the state to "demonstrate that an infringement on a *Charter* right is demonstrably justified in a free and democratic country" (*Rodriguez*). With respect to s 7, because the Appellant has established that the violation resulting from s 241.1 is not in accordance with the principles of fundamental justice, no justification of the violation is possible under s 1.

Rodriguez, *supra* para 59 at 558.
BC MVA, *supra* para 53 at 518.

4.1 Pressing and Substantial Objective

[93] The Appellant concedes that the objectives of (1) protecting vulnerable persons from being coerced into physician-assisted death, and (2) relieving persons from severe incurable suffering are pressing and substantial.

Oakes, *supra* para 91 at 138-39.

[94] However, s 241.1 is not saved under the proportionality test of s 1.

Wilson Moot Official Problem at 1-2.

4.2 Proportionality Test

4.2.1 Rational Connection

[95] The objective of protecting vulnerable persons is not rationally connected to s 241.1. The rational connection requirement helps ensure that limits to a *Charter* right by the government are not arbitrary. The government must show that the limit placed on the right may further its objectives.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian*].

[96] The Appellant above has demonstrated that the restrictions on physician-assisted death imposed by s 241.1 are arbitrary, and submits therefore that there is no rational connection between the government's objective and the law.

[97] Furthermore, Wire J found that there is no evidence that mentally ill persons, during the times they are deemed competent, are at a greater risk of being coerced into physician-assisted death than competent terminally ill persons. Additionally, he found no evidence that terminally ill persons suffer more significantly or to a greater degree than mentally ill persons.

Wilson Moot Official Problem at 8-9.

[98] As a result, s 241.1 is not rationally connected to the state's objective.

4.2.2 Minimal Impairment

[99] In assessing whether the law minimally impairs, "[t]he question is whether there is 'an alternative, less drastic, means of achieving the objective in a real and substantial manner'" (*Carter*).

Carter, *supra* para 3 at para 1226, citing *Hutterian*, *supra* at para 55.
Oakes, *supra* para 91 at 139.

[100] In this case, minimal deference should be accorded to Parliament with respect to the infringement of s 15(1) resulting from s 241.1. Although "the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make" (*M v H*), this does not mean that the government has free rein to enact provisions under the guise of a "policy decision" to immunize itself from *Charter* scrutiny. In this case, given that s 241.1 strikes at the core of human dignity, a value that underlies both s 7 and s 15, as well as the *Charter* as a whole, it is imperative that this right be preserved to the maximum extent possible.

M v H, [1999] 2 SCR 3 at para 78, 43 OR (3d) 254.
Vriend, *supra* para 45 at para 54.
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at 999, 58 DLR (4th) 577.

[101] The Appellant above has demonstrated that the restrictions imposed by s 241.1 to access physician-assisted death are overbroad and thus submits that s 241.1 is not minimally impairing.

[102] In addition, the experience of other jurisdictions proves that less impairing alternatives exist. Other jurisdictions have physician-assisted death legislation that does not effectively exclude persons with mental illness. Both Belgium and Luxembourg include provisions stating that the person needs only to be competent at the time of the request; those countries also do not require a person to have a terminal illness. The Netherlands has legislation that does not require having a terminal illness; the patient's decision must be "voluntary and carefully considered", and advance directives for physician-assisted death are permitted. These examples show that s 241.1 is not minimally impairing, as governments in other democratic societies have enacted provisions that would not violate the s 15 and s 7 rights of Mr. Jacob. Further, the government failed to lead any evidence at trial that it had considered any of these less impairing alternatives.

> *28 May 2002 Act on Euthanasia* (Belg), BS 22 June 2002, s 3(1).
> *Law of 16 March 2009 on Euthanasia and Assisted Suicide,* Mémorial (Lux) A-No 46, 16 March 2009, art 2.1.
> *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* (Neth), *2002, Stb* 2001, 194, art 2.

4.2.3 Proportional Effect

[103] This stage of the proportionality analysis provides an opportunity "for broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation" (*Hutterian*) according to the values that underlie the *Charter*.

> *Hutterian*, *supra* para 95 at para 77.
> *Thomson*, *supra* para 86 at para 125.
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887-88, 120 DLR (4th) 12.

[104] The Appellant above has demonstrated that the restrictions to access physician-assisted death imposed by s 241.1 are grossly disproportionate to the government's objective and submits therefore that it not proportional in its effect.

[105] The deleterious effect on the Appellant is clearly "disproportionate to the government's objective" of protecting vulnerable persons and relieving patients who are suffering severe incurable pain. By denying Mr. Jacob his rights to equality and personal autonomy in determining his death, Mr. Jacob can only foresee indefinite suffering in his life. The indignity with which he must live is unfathomable; he is terrified by his hallucinations and restrained to his bed—conditions he considers "barbaric".

Dagenais, *supra* para 103 at 888.
Hutterian, *supra* para 95 at para 73.
Wilson Moot Official Problem at 3-5.

[106] By not including persons with mental illness in s 241.1, the state is essentially saying that the most fundamental decisions made by mentally ill persons when they are competent are of no value. This attitude must be rejected. Section 241.1 does not facilitate the engagement of mentally ill persons in making their own medical decisions. Indeed, this provision is likely to contribute to the creation of generalizations and assumptions about the vulnerabilities of persons with mental illness.

[107] The Appellant submits that the overall impact of the law is not proportionate, and that the s 1 justification fails.

Hutterian, *supra* para 95 at paras 77, 100.

Part V – Orders Sought

[108] The Appellant respectfully requests that the High Court of the Dominion of Canada allow the appeal and restore the order of the trial judge, Justice Wire.

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

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Counsel for Dylan Jacob

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SECONDARY SOURCES	**PARA #**
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Rachel D Kleinberg & Toshiro M Mochizuki, "The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases" (1997) 32:1 Harv CR-CLL Rev 197 at 212.	72
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