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 RESPONDENT

Team Number: 1

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PART I – OVERVIEW

[1] The Government of Canada has a responsibility to protect vulnerable individuals from the risks of coerced suicide and involuntary euthanasia. This appeal concerns s. 241.1 of the *Criminal Code*, a newly-enacted provision that allows a limited exception to the prohibition on assisted suicide for individuals who are both competent and terminally ill. The provision establishes rigorous safeguards on physician-assisted suicide to ensure that more vulnerable individuals are protected from the tragic results of abuse and manipulation.

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

[2] By enacting s. 241.1, Parliament has appropriately balanced many competing interests: the sanctity of life, the dignity and autonomy of terminally ill patients, and the protection of vulnerable individuals from harm. Given the contentious nature of this issue, courts must be careful not to second guess the policy choices made by Parliament after weighing these competing interests.

[3] The Respondent opposes the Appellant's application for an order that s. 241.1 infringes ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The impugned provision is not discriminatory; it is an ameliorative program targeting a disadvantaged group and as such is constitutional under s. 15(2). The section also does not infringe ss. 15(1) or 7. Even if the Appellant was able to establish an infringement, the provision constitutes a reasonable limit, justifiable in a free and democratic society.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

PART II – STATEMENT OF FACTS

1. Legislation at issue

[4] Parliament enacted section 241.1 of the *Criminal Code* in the summer of 2011, following significant public attention on the issue of physician-assisted suicide. Several high-profile cases highlighted the suffering of competent, terminally ill individuals whose options were limited to committing suicide while they were still physically able, travelling abroad to obtain physician-assisted suicide, or dying in unbearable pain in Canada.

Wilson Moot Official Problem at para 8 [Official Problem].

[5] Section 241.1 provides a limited exception to the general prohibition on assisted suicide in s. 241. The provision states:

> 241.1 (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.

Section 241.1(2) provides for coroner notification procedures and ss. 241(3) and (4) define 'physician' and 'patient', respectively.

Official Problem, *supra* para 4 at 1-2.

2. The Appellant's history

[6] The Appellant was diagnosed with undifferentiated schizophrenia in 2000. During his frequent psychotic episodes, he becomes aggressive and sometimes violent. In 2007, during one such episode, the Appellant killed his father by stabbing him nineteen times. The Appellant was later found not criminally responsible for his father's death and was remanded to Oak Ridges Centre for Mental Health ("Oak Ridges") for treatment.

Official Problem, *supra* para 4 at paras 3, 4-6, 8-9.

[7] The Appellant spends most of his time in a psychotic state. While at Oak Ridges, he has experienced only four brief periods of lucidity, each lasting between three to five days. He has not been competent since his last lucid period in March 2011, prior to the enactment of s. 241.1.

Official Problem, *supra* para 4 at 1-2, para 11.

3. The risk of harm associated with mental illness and physician-assisted dying

[8] The field of psychiatric medicine is evolving and new treatments may emerge for mental illnesses that are currently difficult to treat. The Appellant's doctors agreed that "it can be more difficult to give a certain prognosis in cases of mental illness than in cases of terminal physical illness."

Official Problem, *supra* para 4 at para 22.

[9] Patients with serious psychiatric illnesses are at a higher risk of neglect or abuse than patients with other types of disabilities. Such individuals may be particularly vulnerable to involuntary or non-voluntary euthanasia.

Official Problem, *supra* para 4 at para 23c.

[10] An expressed wish to die by an individual with a psychiatric illness may reflect a symptom of his or her illness rather than a genuine conviction. This "suicidal ideation" is a feature of many psychiatric illnesses, including depression.

Official Problem, *supra* para 4 at para 25b.

[11] The federal government is committed to combatting the stigmatization of mental illness and encouraging people with mental health issues to seek medical attention. In the past three years, the federal and provincial governments have together spent approximately $180 million on mental health awareness and suicide prevention programs.

Official Problem, *supra* para 4 at paras 23a, 23b.

4. Procedural History

[12] Stephanie Jacob, acting as the Appellant's litigation guardian, brought an application in the Ontario Superior Court of Justice, seeking a declaration that s. 241.1(1) of the *Criminal Code* unjustifiably infringes ss. 7 and 15 of the *Charter* and that the requirements in s. 241.1(1) that the patient be competent and suffering from a terminal illness are of no force or effect.

Official Problem, *supra* para 4 at 2.

[13] Justice Wire held that the impugned provision violated s. 15(1) because the requirements of competence and terminal illness discriminated against individuals with mental illness, and could not be saved under s. 1 of the *Charter*. Justice Wire did not address s. 7. He held that the appropriate remedy was to read in the words "at the time of the patient's request that the physician assist the patient to end his or her life" to the end of s. 241.1(1)(a) and to strike the words "as a result of a terminal illness" from the end of s. 241.1(1)(b).

Official Problem, *supra* para 4 at 9.

[14] The Ontario Court of Appeal overturned Justice Wire's decision and held that the impugned provision does not infringe the *Charter*. Justice Rainfoot, writing for the majority, held that s. 241.1 should be viewed as an ameliorative program under s. 15(2), aimed at improving the situation of competent, terminally ill individuals who are unable to end their lives when they choose. She also held that s. 241.1 does not infringe s. 15(1) because the provision corresponds to the actual needs and circumstances of individuals with mental illness.

Official Problem, *supra* para 4 at 9.

[15] Additionally, Justice Rainfoot held that s. 241.1 does not violate s. 7 of the *Charter*. Even if a deprivation of security or liberty could be made out, "the restriction is anything but arbitrary." In her view, any possible restriction is "entirely consistent with the government's objective of protecting vulnerable patients from undue pressure or coercion to end their own lives, or from being euthanized against their will."

Official Problem, *supra* para 4 at 9.

PART III – STATEMENT OF POINTS IN ISSUE

1. Does s. 241.1 of the *Criminal Code* constitute an ameliorative law or program within the meaning of s. 15(2) of the *Charter*?
2. Does s. 241.1 of the *Criminal Code* infringe s. 15(1) of the *Charter*?
3. Does s. 241.1 of the *Criminal Code* infringe s. 7 of the *Charter*?
4. If the answer to questions 2 and/or 3 is "yes", is the infringement demonstrably justified in a free and democratic society, under s. 1 of the *Charter?*

PART IV – ARGUMENT

Issue 1: Section 241.1 is protected as an ameliorative program under s. 15(2) of the *Charter*

1. The s. 15 framework

[16] The purpose of s. 15 of the *Charter* is to combat discrimination and promote the goal of substantive equality. Substantive equality recognizes that not all distinctions are, in and of themselves, discriminatory. Instead, some distinctions may be necessary to accommodate differences between individuals and achieve true equality. Sections 15(1) and 15(2) serve complementary purposes. While s. 15(1) prevents governments from making discriminatory distinctions, s. 15(2) enables governments to proactively combat discrimination by targeting certain groups through ameliorative laws.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 168-169, 56 DLR (4th) 1 [*Andrews*].
> *R v Kapp*, 2008 SCC 41 at paras 25, 28, [2008] 2 SCR 483 [*Kapp*].

[17] The substantive equality analysis under s. 15 must be purposive and contextual, rather than rigid and formalistic. The focus of the inquiry is on the actual impact of the impugned provision on the claimant group and whether the provision perpetuates disadvantage. The Court must also take into consideration the full social, political, and legal context of the claim.

> *Andrews*, *supra* para 16 at 168, 171.
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 3, 6, 23-25, 170 DLR (4th) 1 [*Law*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 39-43, [2011] 1 SCR 396 [*Withler*].

[18] The s. 15 analysis has three stages. First, the claimant must establish that the provision creates a distinction that is based on an enumerated or analogous ground. Second, if the claimant establishes such a distinction, it is open to the government to show that the impugned provision

is an ameliorative law or program protected under s. 15(2). Third, if the government fails to demonstrate that the provision falls under s. 15(2), the claimant must establish that the provision is discriminatory under s. 15(1).

Kapp, *supra* para 16 at para 40.

2. Section 241.1 creates a distinction based on an enumerated ground

[19] The Respondent acknowledges that s. 241.1 of the *Criminal Code*, by limiting access to physician-assisted death to competent, terminally ill individuals, creates a distinction based on the enumerated ground of disability. Individuals who are either not competent or are not terminally ill, such as the Appellant, cannot access the provision.

Kapp, *supra* para 16 at para 40.

[20] The Supreme Court of Canada has emphasized the unique nature of disability as an enumerated ground. Unlike other enumerated grounds, there is considerable variation among the nature, severity, and duration of different disabilities. Individuals with disabilities may also have significant impairments and functional limitations. As a result, legislative distinctions between different types of disabilities may be required to avoid discrimination and to accommodate the widely divergent needs of individuals with disabilities.

> *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at paras 66-67, 141 DLR (4th) 385 [*Eaton*].
> *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paras 26-28, [2000] 1 SCR 703 [*Granovsky*].
> *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 81, [2003] 2 SCR 504 [*Martin*].

3. Section 241.1 is protected as an ameliorative program under s. 15(2) of the *Charter*

[21] Section 15(2) enables governments to use ameliorative laws to improve the situation of disadvantaged groups. Governments are thereby allowed to set priorities and assist certain groups by tailoring programs to enhance the benefits they confer. If governments are precluded from targeting certain groups to the exclusion of others, they may be paralyzed by the necessity of helping everyone simultaneously. Such a result would undermine substantive equality. As explained by the Court, "the cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice" (*Cunningham*).

> *Kapp*, *supra* para 16 at paras 37-38.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 41, 49, [2011] 2 SCR 670 [*Cunningham*].
> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 42, [2012] BCJ No 2460 [*Pratten*].

[22] In order to be protected under s. 15(2), the provision must: (1) have an ameliorative purpose; and (2) target a disadvantaged group identified by an enumerated ground. If these conditions are met, the law is protected against a claim of discrimination under s. 15(1).

> *Kapp*, *supra* para 16 at paras 39-41.

3.1 Section 241.1 has an ameliorative purpose

[23] To receive protection under s. 15(2), the impugned provision must have a genuinely ameliorative purpose aimed at improving the conditions of a disadvantaged group. The ameliorative purpose, however, does not have to be the sole objective of the law. Instead, the Court has acknowledged that s. 15(2) still provides protection for laws in which the ameliorative purpose is one of a number of goals of the provision.

> *Kapp*, *supra* para 16 at para 51.

(i) <u>Ameliorative purpose</u>

[24] One of the purposes of s. 241.1 is to give competent, terminally ill individuals who cannot or do not want to commit suicide the option of seeking physician assistance to end their lives. The provision seeks not only to alleviate their physical and psychological suffering, but also to give these individuals the ability to end their lives in a manner of their choosing.

Official Problem, *supra* para 4 at 9.

[25] Section 241.1 is carefully tailored to balance a range of competing concerns. The provision carves out a narrow exception to the general prohibition on assisted suicide to allow doctors to alleviate the suffering of terminally ill individuals, while the rigorous safeguards ensure that more vulnerable individuals are protected from harm. By focusing on competent, terminally ill individuals and imposing strict conditions on their ability to access a physician-assisted death, the provision seeks to ameliorate the position of those individuals on whom the general prohibition on assisted suicide placed a tremendous burden.

Official Problem, *supra* para 4 at para 26.

(ii) *Means chosen rationally relate to the purpose*

[26] To determine whether a provision has a genuinely ameliorative purpose, courts may also consider whether the means chosen by the government rationally relate to the purpose. There must be a nexus between the object of the provision and its form and implementation.

Kapp, *supra* para 16 at para 48.

[27] The means chosen in this case, namely allowing a narrow exception to the general prohibition on assisted suicide under stringent requirements, advance the goal of ameliorating the suffering of a disadvantaged group. Parliament has sought to alleviate the physical and psychological suffering of individuals facing the prospect of a painful and undignified death by allowing such individuals to choose the nature and timing of their deaths. Moreover, the strict

requirements ensure that only those individuals who are terminally ill and capable of making such critical end-of-life decisions are covered by the provision, protecting other more vulnerable individuals from harm.

> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 553-554, 557, 107 DLR (4th) 342, Lamer CJC, dissenting [*Rodriguez*].
> *Carter v Canada (Attorney General)*, 2012 BCSC 886 at paras 1155-1156, 287 CCC (3d) 1 [*Carter*].
> *Kapp*, *supra* para 16 at para 58.

[28] Section 241.1 has a genuinely ameliorative purpose and is supported by rationally chosen means, thus satisfying the first step of the test for s. 15(2).

3.2 Section 241.1 targets a disadvantaged group identified by the enumerated grounds

[29] In addition to having a genuinely ameliorative purpose, the impugned provision must target a disadvantaged group identified by one or more enumerated grounds. This second step of the s. 15(2) test requires a correlation between the provision and the actual disadvantage suffered. Moreover, the distinction made by the provision must serve and advance the ameliorative purpose.

> *Kapp*, *supra* para 16 at para 59.
> *Cunningham*, *supra* para 21 at paras 44-45.

(i) Correlation between the provision and the actual disadvantage suffered

[30] Competent, terminally ill individuals who cannot commit suicide or would prefer physician-assisted suicide experience particularly acute disadvantages given their unique circumstances. Despite having full cognitive capacity, prior to the enactment of s. 241.1 they had no control over the nature and timing of their imminent deaths. As a result, they were not able to exercise the "dignity of choice" to end their suffering through physician-assisted dying, but

rather faced the impossible choice of travelling abroad to find physician assistance or waiting for a painful death in Canada. This disadvantage is targeted and ameliorated by s. 241.1.

Official Problem, *supra* para 4 at para 26.
Carter, *supra* para 27 at paras 1159-1161.

(ii) The distinctions serve and are necessary to the ameliorative purpose

[31] In addition to a correlation between the provision and disadvantage, the distinctions in the impugned provision must serve and advance the ameliorative purpose. This step does not require proof that the exclusion is *essential* to realize the object of the ameliorative law. Instead, the impugned distinction must "in a general sense" serve or advance the object of the law.

Kapp, *supra* para 16 at para 52.
Cunningham, *supra* para 21 at para 45.

[32] In order to achieve the ameliorative purpose of s. 241.1, Parliament had to draw a distinction based on disability to ensure that only competent, terminally ill individuals are able to access the provision. Without strict safeguards, the government would have been unable to help this disadvantaged group without endangering the lives of more vulnerable individuals.

Official Problem, *supra* para 4 at 9.

[33] While other individuals suffering from severe pain, such as the Appellant, are also a disadvantaged group, this does not prevent s. 241.1 from receiving protection under s. 15(2). Section 15(2) protects ameliorative programs in which both the included and excluded groups have a shared history of disadvantage. As explained by Iacobucci J in *Lovelace v Ontario*, "the focus of the analysis is not the fact that the … groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society." Section

15(2) encourages governments to target certain groups with ameliorative laws without being forced to help all disadvantaged individuals simultaneously.

> *Cunningham*, *supra* para 21 at paras 49, 52-53, 86.
> *Lovelace v Ontario*, 2000 SCC 37, at paras 6, 84, 90, [2000] 1 SCR 950.
> *Pratten*, *supra* para 21 at para 42.

3.3 Summary of s. 15(2)

[34] Section 241.1 has a genuinely ameliorative purpose and targets a disadvantaged group. The distinctions drawn based on disability are fully protected by s. 15(2) of the *Charter*.

Issue 2: Section 241.1 is not discriminatory under s. 15(1) of the *Charter*

[35] Should this Court find that s. 15(2) does not protect the impugned provision, the Respondent submits that the provision does not infringe s. 15(1).

1. The test for s. 15(1)

[36] *Kapp* sets out the current test for determining whether the provision infringes the Appellant's right to equality: (1) Does the law create a distinction based on an enumerated or analogous ground?; (2) If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? For the second step the claimant must establish that "the distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group" (*Quebec v A*). Prejudice or stereotyping, though not separate requirements, are two indicia that may help determine whether the provision is discriminatory.

> *Kapp*, *supra* para 16 at para 17.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 324-331, Abella J, [2013] SCJ No 5 [*Quebec v A*].

(i) Contextual approach

[37] The focus of the analysis under s. 15(1) is on the actual situation of the Appellant and the potential for the impugned provision to worsen his situation. Careful consideration must be given to the Appellant's characteristics and circumstances, as well as the full social, legislative, and political context of the case. While reference to a mirror comparator group is no longer required, comparison is still useful to understand the Appellant's place within the legislative scheme and to determine whether the distinctions drawn by the provision are in fact discriminatory. The Court may also consider the factors developed in *Law* – pre-existing disadvantage, correspondence with actual characteristics of the claimant group, ameliorative impact or purpose of the law, and the nature of the interests affected – though these factors are not exhaustive and may not be equally relevant in every case.

Withler, *supra* para 17 at paras 2, 66.
Kapp, *supra* para 16 at para 23.
Quebec v A, *supra* para 36 at para 327, Abella J, and at para 418, McLachlin CJC.
Law, *supra* para 17 at para 89.

2. The provision does not perpetuate disadvantage

[38] Section 241.1 is not discriminatory because it does not perpetuate disadvantage against the Appellant based on disability. On the contrary, by imposing numerous safeguards, the provision protects vulnerable individuals from very serious harm.

Withler, *supra* para 17 at para 39.

[39] The requirements in s. 241.1(1) strike the appropriate balance between the desire to alleviate the suffering of terminally ill individuals and the duty of the state to protect the lives of the vulnerable. This balance is achieved by ensuring that only terminally ill individuals who are competent both at the time they request and at the time they obtain physician-assisted death are able to access the provision. The distinctions in this case are ameliorative, not discriminatory.

AC v Manitoba (Director of Child and Family Services), 2009 SCC 30 at paras 82, 108, 152, [2009] 2 SCR 181 [*AC*].
Law, *supra* para 17 at para 72.

2.1 The requirement of competence does not perpetuate disadvantage

[40] The requirement of competence is essential to ensure that only individuals capable of making informed, rational, and voluntary decisions are able to access physician-assisted dying. The Appellant is simply not in the position to be able to make critical end-of-life choices. On the contrary, he has only been lucid for a few days in the past several years.

[41] He has also not been lucid or repeated his wish to die since the enactment of s. 241.1. It is impossible to know whether he would want to access the provision or even if he would maintain his wish to die if he had more time to carefully consider the consequences of his decision. It is also difficult to determine whether he was expressing a genuine desire or simply exhibiting signs of his illness. The requirement of competency at the time of a physician-assisted death is a vital safeguard to protect vulnerable individuals such as the Appellant.

AC, *supra* para 39 at paras 144-145, 152.
Official Problem, *supra* para 4 at 2, para 25b.

[42] Section 241.1 does not make a distinction based on mental illness. Although the provision requires competence at the time an individual obtains physician-assisted death, this does not prohibit individuals with mental illnesses from accessing the provision if they are competent and terminally ill.

Official Problem, *supra* para 4 at 1-2.

[43] Section 241.1 also does not make a blanket distinction between physical and mental disabilities, but instead relies on an individualized assessment to ensure that only those patients capable of making voluntary and carefully considered decisions are able to access physician-assisted death. The requirement of competence both at the time of the request and at the time the

patient receives a physician-assisted death corresponds to the actual circumstances and characteristics of the Appellant. The distinctions made between different types of disabilities are appropriate and necessary given the profound implications of physician-assisted death.

> *Granovsky*, *supra* para 20 at paras 26, 61-63.
> *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 88, 175 DLR (4th) 193 [*Winko*].
> *Martin*, *supra* para 20 at para 81.
> *Eaton*, *supra* para 20 at para 66.

2.2 The requirement of terminal illness does not perpetuate disadvantage

[44] The requirement in s. 241.1(1) that an individual must be suffering from a terminal illness is an appropriate safeguard to protect the lives of the vulnerable. As explained by the Court in *AC*, society has a legitimate interest in protecting vulnerable individuals from harm.

> *AC*, *supra* para 39 at para 106.

[45] The stringent requirements in s. 241.1 promote the view that human life has a deep intrinsic value of its own by limiting physician-assisted death to those individuals facing an imminent death. If the provision permitted access to physician-assisted dying for individuals who are not terminally ill, the state would be condoning the view that life with a non-terminal illness is 'not worth living'. This stands in stark contrast to the situation of the terminally ill, for whom assisted dying is not a matter of life and death, but rather dignity in death. indicating

> *AC*, *supra* para 39 at para 106.
> *Rodriguez*, *supra* para 27 at 584-585.
> Official Problem*, supra* para 4 at 9.

[46] Individuals who suffer from non-terminal illnesses are also vulnerable to coercion or abuse. They may be persuaded to request physician-assisted dying not as the result of a carefully considered thought process, but rather because of the harmful influence of those around them. They may also be motivated primarily out of a desire not to burden their loved ones.

Official Problem, *supra* para 4 at para 25c.
Rodriguez, *supra* para 27 at 595.

[47] By limiting the scope of s. 241.1, individuals with non-terminal illnesses may benefit from future medical advances. This is particularly significant for the Appellant, given the evolving nature of psychiatric medicine and the potential for future treatments for his illness. The immediate disadvantages are more than offset by the long-term goals of the provision.

Gosselin v Quebec (Attorney General), 2002 SCC 84 at paras 65-66, [2002] 4 SCR 429.
Official Problem, *supra* para 4 at para 22.

2.3 Conclusion on s. 15(1)

[48] The distinctions in s. 241.1 do not perpetuate disadvantage against the Appellant. Nor do the requirements of competence and terminal illness promote pejorative views or attribute inaccurate characteristics to the Appellant. Instead, s. 241.1 protects vulnerable individuals from serious harm based on an individualized and appropriate assessment process. The distinctions in s. 241.1 represent an affirmation of the value of the Appellant's life, rather than the perpetuation of disadvantage. By imposing such strict safeguards, the provision promotes the goal of substantive equality for individuals with disabilities. Section 241.1 does not infringe s. 15(1).

Quebec v A, *supra* para 36 at paras 325, 332, Abella J.

Issue 3: Section 241.1 does not violate s. 7 of the *Charter*

[49] To find a violation of s. 7 of the *Charter*, the claimant must first demonstrate that the state has infringed his or her right to life, liberty, or security of the person. The claimant must then demonstrate that the infringement is not in accordance with the principles of fundamental justice. The Appellant does not meet either stage of this test.

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 at para 3, [2004] 1 SCR 76.

1. Section 241.1 is an exculpatory provision and thus cannot violate s. 7

[50] Section 241.1 is exculpatory in nature and therefore cannot deprive anyone of the rights protected by s. 7. The provision permits physician-assisted dying in a prescribed set of circumstances. The Appellant has only challenged s. 241.1, not the general prohibition on assisted suicide, and so the claim must fail.

[51] If the Court finds that ss. 241 and 241.1 should be considered together, the claim must still fail. Section 241.1 does not limit the Appellant's ability to take his own life, and therefore does not engage his s. 7 rights.

2. Section 241.1 does not engage the Appellant's s. 7 rights

[52] Section 241.1 does not engage the Appellant's s. 7 rights to life, liberty, or security of the person. The Appellant's situation can be differentiated from those of the claimants in *Rodriguez* and *Carter* because he has and will continue to have the physical ability to commit suicide. In *Rodriguez*, a challenge was brought to s. 241 because the claimant would, at the time she wished to end her life, be physically unable to do so. Neither s. 241 or s. 241.1 precludes the Appellant from being able to take his own life.

Rodriguez, *supra* para 27 at 531.
Carter, *supra* para 27 at para 17.

[53] The Appellant's ability to commit suicide is only limited because he is in custody at Oak Ridges. He is at Oak Ridges because his mental illness is so severe that he was found not criminally responsible for murdering his father and because he is a danger to the public. If the Appellant was not in custody, the choice to end his life would be available to him. Sections 241 and 241.1 do not prevent the Appellant from exercising this choice.

Official Problem, *supra* para at para 15.
Winko, *supra* para 53 at paras 71-73.

3. If s. 241.1 is found to limit the Appellant's ability to end his life, any s. 7 rights deprivation is in accordance with the principles of fundamental justice

[54] Should the Court find that ss. 241 and 241.1 together limit the Appellant's ability to end his life, the Respondent concedes that this is a deprivation of his s. 7 liberty and security interests. However, as found by Rainfoot JA, any deprivation is in accordance with the principles of fundamental justice.

Official Problem, *supra* para 4 at 9.

[55] Section 241.1 is a carefully crafted provision that balances the interest of protecting vulnerable individuals from harm with the desire to alleviate the physical and psychological suffering of those with terminal illnesses. It fulfills these objectives by imposing stringent requirements on access to physician-assisted death. This is a complex and morally laden social issue and Parliament must be accorded deference in the means chosen to address it.

Official Problem, *supra* para 4 at para 26.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 35, [2009] 2 SCR 567 [*Hutterian Brethren*].
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at 990, 58 DLR (4th) 577 [*Irwin Toy*].

[56] Laws that deprive individuals of their life, liberty, or security of the person in a way that is not in accordance with the principles of fundamental justice will infringe s. 7 of the *Charter.* The onus is on the claimant to demonstrate that s. 241.1 is not in accordance with these principles. There are three established principles of fundamental justice of relevance here. Laws must not be arbitrary, overbroad, or grossly disproportionate.

Rodriguez, *supra* para 27 at 594.
R v Heywood, [1994] 3 SCR 761 at 790, 120 DLR (4th) 348 [*Heywood*].
R v Malmo-Levine; *R v Caine* 2003 SCC 74 at para 143, [2003] 3 SCR 571 [*Malmo-Levine*].

2.1 Section 241.1 is not arbitrary

[57] To be in accordance with the principles of fundamental justice, a law cannot be arbitrary. The established test for arbitrariness is whether a law is inconsistent with its purpose. However, in *Chaoulli*, three justices opted to apply a new test – that the law is necessary to further its purpose. Since *Chaoulli,* the Supreme Court has not decided which of these tests should be followed.

> *Rodriguez*, *supra* para 27 at 594-595.
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 131-132, 232, [2005] 1 SCR 791 [*Chaoulli*].
> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 132, [2011] 3 SCR 134.
> *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at paras 145-147, [2012] OJ No 1296 [*Bedford*].

[58] Lower courts have continued to follow the test of inconsistency and the Respondent submits that this is the correct test to be used. Necessity is the test used for overbreadth and to use the same test in an arbitrariness analysis would collapse these two principles of fundamental justice. However, section 241.1 is not arbitrary under either test.

> *Bedford*, *supra* para 57 at para 147.
> *AC*, *supra* para 39 at para 103.
> *Heywood*, *supra* para 56 at 790.

[59] To apply either test, the state objective must be identified, so that the relationship between the state objective and the provision can be examined.

> *Rodriguez*, *supra* para 27 at 594.

(i) The objective of section 241.1

[60] The objective of s. 241.1 is to balance the state's interest in protecting vulnerable individuals while also alleviating the suffering of competent, terminally ill individuals. It does this by carving out a narrow exception to the general prohibition on assisted suicide.

[61] Protecting the lives of vulnerable individuals was accepted as a valid objective by the Supreme Court of Canada, and was also accepted by both Wire J and Rainfoot JA.

Rodriguez, *supra* para 27 at 595.
Official problem, *supra* para 4 at 9.

(ii) The connection between the objective and s. 241.1 is not arbitrary

[62] A complete prohibition on assisted suicide was found not to be arbitrary in *Rodriguez*, because it furthered the objective of protecting human life.

Rodriguez, *supra* para 27 at 608.
Carter, *supra* para 27 at para 1337.

[63] In *AC*, the Court held that a provision that carefully balances the competing interests of autonomy and protecting vulnerable individuals from harm is not arbitrary. In that case, the Court had to balance the rights of adolescents to make their own medical decisions against the need to protect them from harm by ensuring that treatment decisions were in their best interests.

AC, *supra* para 39 at para 108.

(iii) The requirement that patients be competent is not arbitrary

[64] The competency requirement in s. 241.1(1) is necessary to achieve the objective of protecting vulnerable individuals.

[65] The competency requirement protects individuals who are not competent from the risk of involuntary euthanasia. A decision as final as death requires that an individual have the ability to say 'no' prior to being administered a lethal dose of medication. Extending the reach of s. 241.1

to individuals who are not competent at the time of physician-assisted death would deny them this important safeguard. Far from offering additional protection of their interests, it would *deprive* them of the most basic rights of life and security. The requirement is especially critical for mentally ill individuals, in light of evidence from medical experts that patients with serious psychiatric illnesses are at a higher risk of neglect or abuse than patients with other types of disabilities.

Official Problem, *supra* para 4 at para 23c.

[66] In *AC,* the Court held that for vulnerable individuals, medical decisions that have a greater impact on life or health should be given more scrutiny. This balances their autonomy and best interests.

AC, *supra* para 39 at para 22.

[67] Choosing death is fundamentally different than other medical treatment decisions. Whereas other treatments serve to alleviate pain, assisted suicide is only to causedeath. It is the most final and fundamental decision an individual can make, and should receive the highest degree of scrutiny.

Rodriguez, *supra* para 27 at 607.

[68] The requirement that a patient be competent to access section 241.1 reflects this distinction and appropriately balances the autonomy rights of incompetent individuals with the interest in protecting them from harm.

[69] The Appellant's personal circumstances illustrate the necessity of competence at the time of a physician-assisted death. His last lucid period, during which he expressed a wish to die, was almost two years ago and lasted only a few short days. This period was prior to the enactment of section 241.1. He was unable to even contemplate the possibility of accessing the provision at

the time. No one knows if this is his wish. When the consequence is death, any doubt as to the person's wishes is unacceptable.

Official Problem, *supra* para 4 at paras 13-14.

[70] If the Appellant succeeds in this application, his sister will choose when he dies. Even with his best interests at heart, she may make a decision that does not accurately reflect his wishes, because there is no way of ascertaining what they are now – he has not been lucid since March 2011.

Official Problem, *supra* para 4 at para 13.

(iv) The requirement that patients be suffering from a terminal illness is not arbitrary

[71] Limiting s. 241.1 to individuals with terminal illness furthers the state objective of protecting vulnerable individuals from harm. Broadening s. 241.1(1) to allow individuals without a terminal illness to access the provision would send a troubling message that the lives of those who suffer from a non-terminal physical or mental illness are not worth living. Indeed, it would be inconsistent with the stated objectives – and hence arbitrary – to remove the requirement of terminal illness.

Official Problem, *supra* para 4 at 9.

[72] Limiting physician-assisted suicide to those with terminal illness prevents premature and unnecessary deaths. Medical science is constantly advancing, and there is always the possibility of new treatments. It is particularly difficult to give a definite prognosis for those who are mentally ill.

Official Problem, *supra* para 4 at para 22.

[73] For individuals with a non-terminal mental illness, there is an additional risk that an expressed wish to die may be a symptom of their illness.

Official Problem, *supra* para 4 at para 25.

2.2 Section 241.1 is not overbroad

[74] The test for whether a legislative provision is overbroad was established in *Heywood*. If the law is broader than necessary to fulfill its objective, this will amount to a s. 7 violation.

Heywood, *supra* para 56 at 792-793.

[75] Section 241.1 is not overbroad. The Appellant seeks to broaden, not limit, the application of the provision. Sections 241 and 241.1 considered together are also not an overbroad restriction on physician-assisted dying. The requirements of competency and terminal illness to access the provision have satisfied the test of necessity, as set out above.

2.3 Section 241.1 is proportionate to its purpose

[76] *Malmo-Levine* established the test for determining whether a law is grossly disproportionate, such that it violates the principles of fundamental justice. It must be determined whether the law pursues a "legitimate state interest", and if so, whether the law is "grossly disproportionate" to that state interest. This is a high standard that must be met by the claimant.

Malmo-Levine, *supra* para 56 at para 143.

[77] As established above, the objective of s. 241.1 is to balance the state's interest in protecting vulnerable individuals from harm with alleviating the suffering of those with terminal illnesses.

[78] Section 241.1 is proportionate to this objective. Any limits on the autonomy of those who do not fulfill the criteria of s. 241.1(1) are far outweighed by the protection of "the young, the innocent, the mentally incompetent, the depressed, and all those other individuals in our society who at a particular moment in time, decide that the termination of their life is a course they should follow for whatever reason" (*Rodriguez*).

Official Problem, *supra* para 4 at 9, para 27.
Rodriguez, *supra* para 27 at 558, Lamer CJC dissenting but not on this point, citing *Rodriguez v British Columbia (Attorney General)*, 18 WCB (2d) 279, 1992 CLB 2374 (BCSC).

2.4 Conclusion on s. 7

[79] If section 241.1 deprives the liberty or security rights of the Appellant, it does so in accordance with the principles of fundamental justice. As such, s. 241.1 does not infringe s. 7 of the *Charter*.

Issue 4: If s. 241.1 infringes the Appellant's s. 7 or s. 15(1) *Charter* rights, the infringement is justified under s. 1

[80] Provisions that limit *Charter* rights can be saved if the Crown can demonstrate that the limitations are justified under s. 1:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[81] The Court should be deferential to Parliament in its s. 1 analysis of s. 241.1 as the provision deals with a range of competing interests. Parliament must weigh the interests of those who are suffering and want to end their lives; a broad societal interest in protecting life; the interests of physicians, whose role is to heal and uphold the Hippocratic Oath; the interests of those vulnerable to harm; and the interests of hospitals, prisons, and other state facilities to protect those in their care. In *Irwin Toy*, the Supreme Court of Canada recognized that when there are competing societal interests, the legislature is entitled to make a reasonable assessment as to where to draw the line and courts should not second guess this decision.

Hutterian Brethren, *supra* para 55 at para 35.
Irwin Toy, *supra* para 51 at 990.

[82] Other factors that militate for deference in the context of assisted suicide provisions were identified in *Carter*. First, assisted suicide involves a fundamental and complex policy choice with conflicting views. Second, the choice involves weighing the suffering of known individuals against potential harm to unknown individuals and broader societal values. Third, potential harms and benefits to society cannot easily be proven with scientific evidence.

Carter, *supra* para 27 at para 1179.
Irwin Toy, *supra* para 51 at 989.
Hutterian Brethren, *supra* para 55 at para 35.

[83] By enacting s. 241.1, Parliament has taken a proactive and incremental approach to a complex problem. The effects of the provision remain to be seen. With respect, the Court should show deference to the legislature in its choice among reasonable alternatives.

Hutterian Brethren, *supra* para 55 at para 53.
Martin, *supra* para 20 at para 112.

1. Section 241.1 addresses a pressing and substantial objective

[84] The dual purposes of s. 241.1 go to fundamental societal values. Protecting vulnerable patients from harm is a well-established principle of our society and was recognized as a pressing and substantial objective by the Supreme Court of Canada in *Rodriguez*.

Rodriguez, *supra* para 27 at 613.
R v Oakes, [1986] 1 SCR 103 at 138-139, 26 DLR (4th) 200 [*Oakes*].

[85] Alleviating the pain and suffering of those who are terminally ill has also gained growing acceptance. Section 241.1 was enacted as a legislative solution to public concern around those with terminal illnesses travelling abroad to seek physician-assisted suicide or passing away in terrible pain.

Official Problem, *supra* para 4 at para 26.

2. Section 241.1 is proportional to the objective

2.1 There is a rational connection between the state objective and s. 241.1

[86] The Crown need only demonstrate a causal connection between the government's objective in implementing the law and the means by which the law seeks to achieve that objective. This is a low threshold for the Crown to meet.

> *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 1999 at para 153, 127 DLR (4th) 1.
> *Oakes*, *supra* para 84 at 139.

[87] There is a rational connection between allowing physician-assisted dying only for competent, terminally ill individuals and protecting the lives of vulnerable individuals. If physician-assisted dying was more widely available, vulnerable individuals would be at risk of serious harm. There is also a rational connection between alleviating the suffering of individuals who are terminally ill and in severe pain and allowing them to access physician-assisted dying.

[88] The rational connection between protecting the lives of vulnerable individuals and a prohibition on assisted suicide was recognized by the Supreme Court of Canada in *Rodriguez.*

> *Rodriguez*, *supra* para 27 at 613.
> *Carter*, *supra* para 27 at para 1209.

2.2 Minimal impairment

[89] At the minimal impairment stage, the question is "whether the limit goes too far, *in relation to what the legislature seeks to achieve*" (*Quebec v A*). Less drastic means that do not achieve the state's objective are not to be considered at this stage. The legislature should be accorded deference at this stage – the standard is not perfection.

> *Quebec v A*, *supra* para at para 442 [emphasis in original].
> *Hutterian Brethren*, *supra* para 55 at paras 53, 54 .
> *Irwin Toy*, *supra* para 51 at 990.

[90] The Supreme Court of Canada in *Rodriguez* acknowledged that assisted suicide is a contentious and morally laden issue, and thus Parliament must be accorded some flexibility. Accordingly, deference should be shown when assessing whether section 241.1 is minimally impairing. Section 241.1 is not a blanket prohibition. It is exactly the kind of tailored provision that the Supreme Court of Canada identified in *Hutterian Brethren* as attracting considerable deference.

Rodriguez, *supra* para 27 at 614.
Hutterian Brethren, *supra* para 55 at para 56.

[91] The Court should be particularly deferential as s. 241.1 is a new provision aimed at addressing a complex social issue. With respect, it would be inappropriate for the Court to prematurely decide the matter without allowing Parliament time to examine the effects of the provision.

Ontario v Fraser, 2011 SCC 20 at para 116, [2011] 2 SCR.

[92] Minimal impairment does not require the law to be tailored to every individual circumstance. As explained by the Supreme Court of Canada, "a law's constitutionality under s. 1 is determined not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact" (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 55 at para 69.

[93] The objective of protecting the lives of vulnerable individuals could not be met with less stringent requirements under s. 241.1. While other suffering individuals might have their pain alleviated if access to physician-assisted dying was broadened, many vulnerable individuals would have their lives placed at risk.

[94] While the state generally seeks to prevent individuals from committing suicide, we accept that most people can exercise this option if they so choose. Section 241.1 minimally infringes their ability to exercise this option by only preventing access to state-facilitated suicide.

Official Problem, *supra* para 4 at 1.

2.3 Proportionality of the Effects

[95] The last step of the proportionality analysis considers whether the overall beneficial effects of the impugned provision outweigh the deleterious effect of the limitation on rights. Both the actual and intended effects will be considered in making this assessment.

> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 125, 159 DLR (4th) 385.
> *Hutterian Brethren*, *supra* para 55 at para 73.
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887-88, 120 DLR (4th) 12.
> *Oakes*, *supra* para 84 at 139.

[96] The value of protecting the lives of vulnerable patients and upholding the proposition that the lives of those with physical or mental disabilities are worth living cannot be overstated. The state must protect the life, liberty, and security interests of its most vulnerable members rather than jeopardize them by broadening access to physician-assisted suicide or euthanasia.

Official Problem, *supra* para 4 at 9.

[97] The primary deleterious effect of s. 241.1 is that a small subset of individuals who are suffering and may wish to end their lives with physician assistance are not able to do so. Specifically, the Appellant in this case is not able to access physician-assisted dying.

[98] With respect, the Appellant is one of the individuals this provision seeks to protect. His wishes are unclear. No one can say for certain whether he desires a physician-assisted death, or what his future may look like. Section 241.1 prevents him from being euthanized against his wishes.

[99] The benefits of s. 241.1 are worth the costs. The carefully tailored requirements in s. 241.1(1) strike an appropriate balance and the legislation is proportionate in its effects. The deleterious effects on the Appellant and the rest of those whose rights may be infringed by s. 241.1 are far outweighed by the salutary effects of the provision.

Hutterian Brethren, *supra* para 55 at para 1246.

[100] The Respondent has demonstrated that any violation of the Appellant's *Charter* rights is saved by s. 1. As such, the Court should uphold s. 241.1.

PART V – ORDER SOUGHT

[101] The Respondent respectfully requests for the appeal to be dismissed and the ruling of the Ontario Court of Appeal to be affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated February 1, 2013

Counsel for the Attorney General of Canada
Team #1

PART VI – LIST OF AUTHORITIES AND STATUTES

Legislation	Paragraph
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.	3
Criminal Code, RSC 1985, c C-46.	1

Jurisprudence	Paragraph
AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 SCR 181.	39, 41, 44, 45, 58, 63, 66
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670.	21, 29, 31, 33
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	55, 81, 82, 83, 89, 90, 92, 99
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.	16, 17
Canada (Attorney General) v Bedford, 2012 ONCA 186, [2012] OJ No 1296.	57, 58
Canada (Attorney General) v PHS Community, 2011 SCC 44, [2011] 3 SCR 134.	57
Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4, [2004] 1 SCR 76.	49
Carter v Canada (Attorney General), 2012 BCSC 886, 287 CCC (3d) 1.	27, 30, 52, 82, 88
Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791.	57
Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835, 120 DLR (4th) 12.	95
Eaton v Brant County Board of Education, [1997] 1 SCR 241, 141 DLR (4th) 385.	20, 43

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625, 175 DLR (4th) 193.	43, 53