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

The Attorney General of Canada

Respondent

FACTUM OF THE APPELLANT

TEAM 5

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PART I – OVERVIEW

1. The Appellant, through his Litigation Guardian, claims that section 241.1 of the *Criminal Code* discriminates on the basis of mental disability, contrary to section 15 of the *Charter*. He also submits that the law deprives him of his liberty and security of the person, and that neither deprivation accords with the principles of fundamental justice as required by section 7 of the *Charter*. Finally, he argues that neither infringement is justified under section 1 of the *Charter*.

> Official Problem, the Wilson Moot 2013, at 1-2 [Official Problem].
> *Canadian Charter of Rights and Freedoms*, ss 1, 7, 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

2. Section 241 of the *Code* defines the prohibited acts of counselling a suicide and abetting a suicide, and sets a maximum penalty of fourteen years' imprisonment for either offence. Section 241.1 provides a complete defence to a charge under section 241 for a licensed physician who "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 five of the following criteria are satisfied:

(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, s 241 [*Code*].
> Official Problem, *supra* para 1 at 1-2.

3. This appeal is limited to the first and third criteria, specifically the terms "competent" and "terminal illness" ("impugned criteria") which deny the Appellant the benefit of section 241.1.

PART II – STATEMENT OF FACTS

4. The Litigation Guardian adopts the facts as stated by Wire J in the trial court. She wishes to emphasize three points before the High Court.

5. First, the Appellant Dylan Jacob ("Mr. Jacob") is intermittently lucid. During his lucid intervals he understands his situation and has the capacity to make informed decisions about his medical treatment.

Official Problem, *supra* para 1 at 5.

6. Second, during his most recent lucid periods Mr. Jacob has expressed a fixed and consistent wish to end his life. He did so in the full knowledge and understanding of his situation, his prognosis, and the consequences of his decision to commit suicide. His sister and Litigation Guardian Stephanie supports his decision, as does his primary physician. Both believe his choice to commit suicide to be fixed and enduring.

Official Problem, *supra* para 1 at 5.

7. Finally, Mr. Jacob's suffering is "incredibly severe". When lucid, he is appalled by reports of his psychotic behaviour. He finds the use of physical restraints "barbaric." He feels he has no quality of life, but he knows that he may live for at least another forty years. According to the expert testimony adduced by both sides at trial, Mr. Jacob's condition is very unlikely to improve despite receiving the "gold standard" of medical care. Thus, in his lucid states, Mr. Jacob satisfies all of the criteria in section 241.1(1) except for a terminal diagnosis.

Official Problem, *supra* para 1 at 5-7.

PART III – STATEMENT OF POINTS IN ISSUE

8. The present appeal raises the following issues:

i) Does section 241.1 of the *Criminal Code* constitute an ameliorative law or program within the meaning of section 15(2) of the *Charter*?

ii) If the answer to question 1 is "no", does section 241.1 of the *Criminal Code* infringe section 15(1) of the *Charter*?

iii) Does section 241.1 of the *Criminal Code* infringe section 7 of the *Charter*?

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

PART IV– ARGUMENT

Issue 1: Section 241.1 is not an ameliorative law under section 15(2)

9. Rainfoot JA erred in suggesting, without analysis, that section 241.1 is an ameliorative program. The jurisprudence establishes that the impugned criteria cannot be protected by section 15(2) of the *Charter*.

Official Problem, *supra* para 1 at 9.

1. The analytical framework under section 15(2)

A. The purpose of section 15(2) is to maximize substantive equality, not to circumvent it

10. The goal of section 15 of the *Charter*, taken as a whole, is to promote substantive equality. Section 15(1) prohibits discriminatory distinctions which are based on certain personal characteristics. Section 15(2) allows governments to remedy the situation of disadvantaged groups, by shielding "reverse discrimination" from attack based on formal equality – i.e. the notion that everyone must be treated the same regardless of pre-existing disadvantage.

R v Kapp, 2008 SCC 41 at para 16, [2008] 2 SCR 483 [*Kapp*].

11. But what if an ameliorative law itself discriminates against another disadvantaged group? The Supreme Court of Canada held in *Kapp* and *Cunningham* that section 15(2) only shields distinctions that "serve or advance the ameliorative purpose" of the challenged law. In this way substantive equality is maximized. In other words, the government can provide an exclusive benefit to disadvantaged group A as long as it can show that extending the benefit to group B would impede the law's purpose.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at para 46, [2011] 2 SCR 670 [*Cunningham*].
Kapp, *supra* para 10 at para 52.

12. The overall purpose of section 15 requires a narrow construction of section 15(2). Otherwise "little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group."

> *R v Hess; R v Nguyen*, [1990] 2 SCR 906 at 945-46, 6 WWR 289.
> *M(N) v British Columbia (Superintendent of Family and Child Services)*, (sub nom *Re MacVicar and Superintendent of Family and Child Services*) (1986) 34 DLR (4th) 388 at 502-03, [1987] 3 WWR 176.

B. The purpose of the challenged law is to assist persons suffering unbearably from incurable illnesses

13. In *Cunningham*, the Supreme Court stated that the purpose of the impugned law "must be determined as a matter of statutory interpretation, having regard to the words of the enactment, the legislative intent, the legislative history, and the history and social situation of the affected groups". As explained more fully at paragraphs 74,75, 81-85 *infra*, the purpose of section 241.1 is to assist persons suffering unbearably from incurable illnesses by allowing them to obtain medical assistance in Canada to end their lives at a time of their own choosing. The words of the provision and the legislative context support this interpretation.

> *Cunningham, supra* para 11 at para 61.

14. As McLachlin J (as she then was) observed in *Miron,* including the targeted group in the purpose of the section distorts the discrimination analysis. Doing so leads to circular logic: the impugned law must by definition exclude Group B, because its purpose is restricted to Group A. For the sake of the section 15 analysis, the government cannot include the targeted group in its purpose because to do so would subvert the evaluation of substantive equality.

> *Miron v Trudel*, [1995] 2 SCR 418 at para LIV, 23 OR (3d) 160.

C. The Court of Appeal did not follow the proper analytic framework

(i) Section 15 test

15. When a court determines whether a law infringes section 15 of the *Charter*, "there is only one question: Does the challenged law violate the norm of substantive equality"?

Withler v. Canada (Attorney General), 2011 SCC 12 at para 2, [2011] 1 SCR 396.

16. In *Kapp*, the Supreme Court of Canada refined the infringement test for section 15: **First**, the claimant must demonstrate that the law creates a distinction based on an enumerated or analogous ground. **Second**, the state may establish that the impugned distinction is part of an ameliorative law, program, or activity that targets a disadvantaged group and is thus shielded by section 15(2). If the state successfully does so, the section 15 claim is dismissed. **Third,** the burden shifts back to the claimant who must prove that the distinction perpetuates disadvantage and is therefore discriminatory.

Kapp, supra para 10 at para 40.

17. In this appeal, the lower courts agreed that the law distinguishes on the enumerated ground of mental disability and passes the first stage of the *Kapp* test (a brief analysis follows under Issue 2). The Litigation Guardian defines the **excluded group** as **individuals who suffer severe pain from an incurable mental illness which renders them intermittently incompetent.**

Official Problem, *supra* para 1 at 8-9.

(ii) Section 15(2) Test

18. The second stage of the *Kapp* test requires two determinations. **First**, the government must demonstrate that the impugned law **i)** has a genuine ameliorative purpose which **ii)** targets a disadvantaged group. This stage determines if the law qualifies for protection in a general sense.

Second, the impugned distinction which excludes the disadvantaged group challenging the law is only permitted so far as it serves or advances the genuine purpose found at the first part of the section 15(2) analysis.

Kapp, supra para 10 at paras 42, 52.

2. Section 241.1 is an incomplete remediation of a penal law, not an ameliorative law

19. The Litigation Guardian accepts Rainfoot JA's description of the group targeted for benefit under section 241.1 as "**severely disabled individuals who are unable, by reason of their physical disabilities, to end their lives when they choose"** which falls under the enumerated ground of "physical disability". She also accepts that this purpose is "genuine". However, the law is not "ameliorative" in a way that is consistent with the overall purpose of section 15.

Official Problem, *supra* para 1 at 9 **[emphasis added]**.
Kapp, *supra* para 10 at para 48.

A. Section 241.1 is part of a punitive scheme, not an ameliorative program

20. Section 241.1 is part of the *Criminal Code*. It modifies but does not repeal section 241, which provides a penalty of imprisonment for up to 14 years. In *Kapp* the Supreme Court stated that "laws designed to restrict or punish behaviour would not qualify for s.15(2) protection".

Kapp, *supra* para 10 at para 54.

B. Incomplete remediation of legislated discrimination does not ensure substantive equality

21. Section 241 of the *Code* infringes section 15(1), according to the 2012 Carter ruling from the Supreme Court of British Columbia. Therefore section 241.1 does not combat pre-existing disadvantage; it merely provides partial relief from a legislated violation of equality.

Carter v Canada (AG), 2012 BCSC 886 at para 1162, 101 WCB (2d) 601 [*Carter*].

22. The law cannot justify burdening a large group of people by benefiting a select few. Allowing a law which does not satisfy the purpose of section 15(2) to preclude a full section 15(1) analysis conflicts with the goal of substantive equality.

3. Denying access to the excluded group does not serve or advance the purpose of the law

23. Section 15(2) cannot shield a distinction that does not serve or advance the purpose of the impugned law. The government must show that extending section 241.1 to the excluded group would defeat the goal of assisting the targeted group.

24. Amending the impugned criteria in section 241.1 to include Mr. Jacob would have no effect whatsoever on those currently benefited by the law. The law does not allocate limited resources, and there is no inherent conflict between the two disadvantaged groups.

25. First, laws which allocate limited public resources will generally be advanced by excluding one group in favour of another (*Cunningham*), but not in every case (*Martin*). The limited resource does not have to be financial (*Kapp* concerned the allocation of sockeye salmon). Second, *Cunningham* recognized that an ameliorative program could be justified where two disadvantaged groups had differing legal standing. In that case the inclusion of status Indians would thwart the promotion and protection of Métis culture, which was expressly defined (in *Powley*) as non-Indian. No evidence has been led here, and no plausible argument exists, that Mr. Jacob's case matches any of these recognized circumstances.

Cunningham, *supra* para 11 at paras 49, 71.
Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur, 2003 SCC 54 at 102, [2003] 2 SCR 504.
Kapp, supra para 10.

R v Powley, 2003 SCC 43, [2003] 2 SCR 207.

26. The exclusion does not serve or advance the purpose of section 241.1, even in a general sense. Consequently, the impugned criteria are not shielded by section 15(2). If either breaches section 15(1), the infringement must be justified under section 1 or a remedy granted.

Issue 2: The impugned criteria infringe section 15(1) of the *Charter*

27. The majority of the Court of Appeal erred in finding that the impugned criteria do not discriminate on the basis of mental disability. First, it failed to consider all relevant contextual factors, which support a finding of discrimination. Second, its finding of correspondence with actual need is itself stereotypical, whereas an appreciation of Mr. Jacob's actual circumstances points to a discriminatory impact.

1. The analytical framework under s.15 (1)

A. Section 15(1) Test

28. The Supreme Court of Canada has established a two-part test to determine whether a law infringes section 15(1): "(1) does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"

Kapp, *supra* para 10 at paras 3, 17.

29. The claimant must "show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage". As McIntyre J explained in *Andrews*, "any consideration of factors which could justify the discrimination and support the constitutionality of the enactment would take place under s.1". In *Québec (AG) v A* a majority of the Supreme Court reaffirmed the

McIntyre position, overruling prior jurisprudence (such as *Walsh*) which placed an undue burden on the claimant to disprove the government's justification in order to establish discrimination.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 182, 56 DLR (4th) 1 [*Andrews*].
> *Québec (AG) v A*, 2013 SCC 5 at paras 323, 340, 2013 CarswellQue 114.
> *Nova Scotia (AG) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325.

30. *Québec (AG) v A* also established that prejudice and stereotype are strong indicia of discrimination, rather than additional requirements to be proved. This is consistent with the recent trend of simplifying the section 15 analysis.

> *Québec (AG) v A*, *supra* para 29 at para 329.
> *Kapp*, *supra* para 10 at para 22.

B. Scope of analysis

31. In *Turpin*, Wilson J stated that we must look not only at the impugned legislation "but also to the larger social, political and legal context." An appreciation of the full context of this claim, including comparisons with other groups, favours a finding of discrimination.

> *R v Turpin*, [1989] 1 SCR 1296 at 1331, 48 CCC (3d) 8.

2. The impugned criteria differentiates on the enumerated ground of mental disability

33. Individuals with mental disabilities are disproportionately unable to satisfy the impugned criteria. Mental disabilities, such as the undifferentiated schizophrenia which afflicts Mr. Jacob, are disproportionately likely to cause severe pain, be incurable, but not satisfy the additional "terminal illness" requirement that they "cause the person's death within two years." Thus, the "terminal illness" criterion unequally denies individuals who suffer from a mental disability the benefit of s.241.1. Implicitly, Wire J's remedy of reading in "at the time of the patient's request that the physician assist the patient to end his or her life" to the end of section 241.1(a)

demonstrates that the provision excludes those who are intermittently competent, regardless of whether they were competent at the time of the request.

> Official Problem, *supra* para 1 at 8.
> Clarifications, the Wilson Moot 2013.
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 77-78, 170 DLR (4th) 1 [*Law*].

3. The impugned criteria discriminate by perpetuating disadvantage and stereotyping

34. In *Law*, the Supreme Court set out a list of contextual factors which aid in the determination of discrimination. The list is not exhaustive, nor is it necessary to address all of these factors in every case. What is required is that all relevant factors are considered. The following contextual factors militate conclusively towards a finding of discrimination: 1) perpetuation of pre-existing disadvantage or stereotyping; 2) nature of interest and severity and locality of differential impact; and 3) correspondence between distinction and actual characteristics.

> *Law, supra* para 33 at para 88.
> *Withler*, *supra* para 15 at para 66.

A. The distinctions perpetuate pre-existing disadvantage and stereotyping

35. Persons with mental disabilities have been historically disadvantaged and stigmatized in society. To take the most obvious example, Mr. Jacob possesses above–average intelligence. During his lucid periods, when he has repeatedly expressed his wish for assistance to end his life, he is a rational person capable of making important life decisions based on relevant circumstances. The Supreme Court has held that "[m]ental illness without more does not remove capacity and autonomy." To assume that Mr. Jacob is never competent, within the meaning of section 241.1, is to apply a **stereotype** based on his pre-existing disadvantage.

Official Problem, *supra* para 1 at 3.
Starson v Swayze, 2003 SCC 32 at para 10, [2003] 1 SCR 722.

36. The distinction also perpetuates disadvantage, because it deprives the Appellant of the benefit which section 241.1 provides to the "competent" and those who suffer from a "terminal illness"– i.e. the legal assistance of a physician to help him escape his terrible suffering.

B. The affected interest is serious and the differential impact is severe and localized

(i) The differential impact is severe because it denies autonomy and increases severe pain

37. Mr. Jacob's exclusion from section 241.1 denies him a right of fundamental importance: autonomy over his own body. It also condemns him to decades of psychotic terror, likely with brief intermissions of lucid guilt and horror, until his "natural" life ends.

(ii) The differential impact is localized

38. The effect of the impugned criteria is to deprive Mr. Jacob (and others in his situation) of the assistance they need to do a legal act which others can do unassisted: commit suicide. Because of his mental illness, and his resulting confinement in Oak Ridges, Mr. Jacob is under constant supervision and restraint. Furthermore, an individual with a terminal illness may receive assistance whether she can die unassisted or not.

39. Importantly, the beneficiaries of section 241.1 were better situated than Mr. Jacob even **before** the provision was enacted: they could travel outside Canada to obtain help to end their own lives. Mr. Jacob cannot do so because of his mental disability.

C. The impugned criteria are based on stereotype and do not correspond to actual needs or characteristics

40. In a laudable attempt to protect vulnerable persons from involuntary euthanasia, the framers of section 241.1 went too far. The impugned criteria do not correspond to the actual

needs of some individuals with mental disabilities. Discrimination against disabled individuals often arises from a failure to appreciate their unique needs and characteristics.

Law, *supra* para 33 at para 69.
Eaton v Brant County Board of Education, [1997] 1 SCR 241, 31 OR (3d) 574.

41. The majority of the Court of Appeal found that "the very nature of serious psychiatric illness is that patients have diminished capacity to make rational decisions." This finding contradicts the *Starson* ruling from the Supreme Court, referred to above. It also contradicts the factual findings of the trial judge, who found that Mr. Jacob is an intelligent man who was competent at the time when he decided to end his life – i.e., capable of understanding all relevant information and appreciating the consequences of his decision.

Official Problem, *supra* para 1 at 5.

42. Additionally, the Court of Appeal erred in considering this justification during the section 15 analysis, not in its proper place within the analytic framework under section 1 of the *Charter*.

43. The remedy imposed by Wire J required an assessment of the patient's competence at the time of the decision to end his life, not at the time when the actual assistance was provided. Coupled with the remaining safeguards in section 241.1, this approach would better reflect the actual characteristics of people like Mr. Jacob. It would also be more consistent with the status of such patients under Ontario law (see para 54, *infra*).

Health Care Consent Act, SO 1996, c 2, Sch A, s 1(c)(iii), 4(2), 5(1) [*HCCA*].

44. The criterion of "terminal illness", which requires that individuals suffer severe pain as a result of an illness which is likely to cause death within two years, does not reflect the actual circumstances of persons suffering acute and unrelieved pain from incurable but not terminal conditions. Nor does it respect the autonomy of the individual.

45. Imagine a man suffering from an excruciating and incurable physical disability which rendered him physically incapable of ending his own life, but was not expected to result in death for at least five years. He would have to endure an additional three years of agony before he came within the scope of section 241.1. Similarly, Mr. Jacob is denied the medical assistance he needs to end his own life. He will suffer for years, likely decades, while someone else who would naturally die within a short span can obtain medical assistance to hasten their death without fear of prosecution. As written, therefore, section 241.1 denies assisted suicide to those who will suffer for the longest time while granting it to those who suffer for a shorter time.

D. Contextual factors militate strongly towards a finding of discrimination

46. A comparative, contextual analysis of the law clearly demonstrates that the distinction created by the impugned criteria perpetuates the suffering of Mr. Jacob and others in similar situations. As a result of the stereotyping of his condition, and a failure to accommodate his needs, he is condemned to suffer severe and incurable pain with no chance for relief.

3. Summary of section 15 infringement

47. In sum, section 241.1 makes a distinction based on the prohibited ground of mental disability, adversely impacting the Appellant and those like him. The impugned criteria are not shielded by section 15(2). The law is discriminatory because it perpetuates the disadvantage of the excluded group and stereotypes them according to perceived rather than actual characteristics. Thus section 241.1 violates the norm of substantive equality and infringes section 15 of the *Charter*.

Issue 3: The impugned criteria in section 241.1 of the *Criminal Code* infringe section 7 of the *Charter*

48. Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Litigation Guardian argues that both of the impugned criteria ("competence" and "terminal illness"), in concert with section 241 and the conditions of her brother's incarceration, deprive him of his liberty and security of the person. These deprivations conflict with at least two principles of fundamental justice: the rules against illusory defences and arbitrariness.

49. Read together, sections 241 and 241.1 of the *Code* are similar to the provision which was struck down in *Morgentaler*. Former *Code* sections 251(1) and 251(2) defined the offences of "procuring a miscarriage" (by the person carrying out the procedure and the pregnant woman respectively). Section 4 explicitly exempted "therapeutic abortions" from those offences, while the remaining sections defined and provided for such procedures. Here the Litigation Guardian does not challenge the constitutionality of the offence itself, as the appellant did in *Morgentaler*; rather, she argues that section 241 should not apply to her brother, and that it only does so because of the unconstitutional narrowness of the impugned criteria.

> *R v Morgentaler*, [1988] 1 SCR 30, 1988 CarswellOnt 45 [*Morgentaler* cited to WL Can].
> *Code*, *supra* para 2 at ss .251(1) & (2)

50. It might appear that section 241.1 cannot infringe legal rights because it creates a **defence** rather than an **offence**. But if the benefit of that defence is unavailable to persons who should be able to bring themselves within its terms, or if the law is arbitrary, then section 7 is infringed.

1. The law deprives Mr. Jacob of his liberty and security of the person

A. In concert with his incarceration, section 241.1 constrains Mr. Jacob's autonomy to make profound personal choices

51. In the jurisprudence on section 7, "liberty" usually refers to physical freedom – specifically, the absence of state control or incarceration. Most *Code* offences automatically engage the liberty interest because the risk of imprisonment attaches to a conviction.

> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 90, [2011] 3 SCR 134 [*Insite*].
> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 84, [2003] 3 SCR 571 [*Malmo-Levine*].

52. But the liberty guarantee in section 7 protects more than physical freedom. It also shields "an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference." That "irreducible sphere" includes "only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."

> *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 1997 CarswellQue 883 at para 66 [*Godbout* cited to WL Can].

53. Under section 7, "an individual has the right to make fundamental personal choices free from state interference". The liberty guarantee does not protect "lifestyle choices" like smoking cannabis. But it does shield profound personal decisions from state control or restriction, unless such state activity is found to be in accordance with the principles of fundamental justice.

> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54, [2000] 2 SCR 307 [*Blencoe*].
> *Malmo-Levine*, *supra* para 51 at para 86.
> *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 137, [2009] 2 SCR 181.

54. The autonomy to make profound personal decisions is a core principle of Canadian law. It is enshrined in Ontario's *Health Care Consent Act*, which applies to all persons in the province whose capacity to make decisions concerning their own medical treatment is in question. One purpose of the *HCCA* is "to **enhance the autonomy of persons for whom treatment is proposed** ... by ... requiring that wishes with respect to treatment ... expressed by persons **while capable** and after attaining 16 years of age, be adhered to...". The definition of "capacity" in section 4(1) of the *HCCA* is identical to the definition of "competence" which Wire J adopted at paragraph 16 of his reasons. A person is presumptively capable of making decisions affecting his or her own treatment until proven otherwise (s. 4(2)). The *HCCA* recognizes that a person may be intermittently incapacitated, but this does not vitiate decisions made during "capable" periods. This shows that the law can respect the autonomy of persons with mental illness and allow them to make profound personal choices, without placing them at undue risk of harm.

HCCA, *supra* para 43, s 1(c)(iii), 4(2), 5(1) **[emphasis added]**.

55. The Litigation Guardian does not challenge the constitutionality of Mr. Jacob's detention. She accepts the Supreme Court ruling in *Winko*, which found that the NCR regime is consistent with section 7. However, she submits that the impugned criteria act in concert with the conditions of his incarceration to deprive him of autonomy. She relies on the analysis of Himel J, who found in *Bedford* that three *Criminal Code* provisions infringed section 7 of the *Charter* when considered "in concert," even though two were constitutional when considered separately.

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625 at paras 64-73, (sub nom *Winko v British Columbia (Forensic Psychiatric Institute)*) 175 DLR (4th) 193.
Bedford v Canada, 2010 ONSC 4264 at paras 385-388, 102 OR (3d) 321.

56. Mr. Jacob has already tried twice to commit suicide during periods of lucidity. On both occasions hospital staff intervened. He is now subject to strict measures to prevent further attempts. Mr. Jacob requires a doctor's assistance to end his life, not because of physical incapacity, but because his movements are controlled by the state. However, the denial of that assistance infringes his autonomy – just as it did for a patient with amyotrophic lateral sclerosis (ALS).

Carter, *supra* para 21 at para 1304.

57. Suicide is not a criminal offence. If he were free to kill himself during a future lucid spell, or had either of his previous attempts succeeded, Mr. Jacob's death would not engage the criminal justice system. It is only because of his indefinite incarceration that he requires medical assistance to end his own life, but no such assistance is available because the impugned criteria prevent his physician from using the exculpatory provisions in section 241.1. Under these circumstances, the impugned criteria deprive Mr. Jacob of his autonomy.

58. Mr. Jacob's decision to end his life – with or without medical assistance – is an "important and fundamental life choice." Because they deny him the only means available to carry out that choice, the impugned criteria deprive him of his liberty.

B. In concert with his incarceration, the law impairs Mr. Jacob's security of the person by inflicting serious psychological prejudice

59. Just as "liberty" means more than mere freedom from physical constraint, "security of the person" protects the mind as well as the body. In *Morgentaler*, Dickson CJC held that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person." In *Rodriguez*, Sopinka J

added that a criminal law which "deprives the appellant of autonomy over her person and causes her physical pain and psychological stress" may infringe her security of the person.

> *Morgentaler*, *supra* para 49 at para 25.
> *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 1993 CarswellBC 228 at para 22 [*Rodriguez* cited to WL Can].

60. More recently, the Supreme Court has extended the scope of section 7 beyond the criminal context: any "state action implicating the administration of justice" which has "a serious and profound effect on a person's psychological integrity" can deprive him or her of security of the person. The claimant must show that the state is responsible for the psychological suffering, which must be sufficiently severe to merit a remedy.

> *Blencoe*, *supra* para 53 at paras 45-46 and 57.
> *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 77, [2002] 4 SCR 429.
> *New Brunswick (Minister of Health & Community Services) v G (J)*, [1999] 3 SCR 46 at para 60, 216 NBR (2d) 25.

61. Both requirements are met in Mr. Jacob's case. As noted *supra*, his state-imposed incarceration makes it impossible for him to end his own life without assistance. Meanwhile, the impugned criteria exclude his physicians from the exculpatory effect of section 241.1 and thus prevent them from granting his request. The state exacerbates his suffering by denying him the only certain relief from his acute mental distress. As for serious psychological prejudice: when Mr. Jacob is psychotic, he experiences extreme terror; during his brief and infrequent spells of lucidity, he is overwhelmed with guilt for killing his father. He suffers intense psychological pain which will almost certainly persist for the rest of his life.

62. If "security of the person" were limited to physical safety, Mr. Jacob's situation would not infringe the guarantee. The government could argue that by taking all necessary steps to

prevent him from committing suicide, the staff at Oak Ridges are defending his rights to life and security of the person. However, the recognition of state-imposed psychological anguish as a deprivation of security brings his situation within the ambit of section 7.

63. In summary, the impugned criteria, in concert with the conditions of his confinement in Oak Ridges, deprive Mr. Jacob of both liberty and security of the person. Unless the law accords with the principles of fundamental justice, it infringes section 7.

2. The deprivations of liberty and security of the person are not in accordance with the principles of fundamental justice

64. A principle of fundamental justice is "a legal principle" which is generally perceived as "fundamental to the way in which the legal system ought fairly to operate." It must be defined "with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." The Supreme Court of Canada has identified several principles of fundamental justice, two of which are particularly relevant to this case. First, a defence to a criminal charge should be available to every person who can bring himself within its purpose. Second, criminal laws must not be arbitrary in their application. If section 241.1 conflicts with either or both principles, the infringement of section 7 will be established.

> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 31, 24 DLR (4th) 536.
> *R v DB*, 2008 SCC 25 at para 46, [2008] 2 SCR 3.

A. Section 241.1 provides an illusory defence to a charge under section 241

(i) It is a principle of fundamental justice that criminal defences must not be illusory

65. In *Morgentaler*, Dickson CJC wrote that "[o]ne of the basic tenets of our system of criminal justice is that, when Parliament creates a defence to a criminal charge, the defence

should not be illusory or so difficult to attain as to be practically illusory." This is particularly applicable to "a specifically-tailored defence to a particular charge".

Morgentaler, *supra* para 49 at para 51.

66. Dickson concluded that the therapeutic abortion committee (TAC) system – which, as explained *supra*, afforded a complete defence to anyone who "procured a miscarriage" under the circumstances spelled out in section 251 of the *Code* – was so cumbersome and impractical that it prevented many women from obtaining legal abortions and delayed countless others (thus imperiling their health). While Dickson acknowledged that "Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability", he concluded that the TAC regime "contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence..."

Morgentaler, *supra* para 49 at para 55.

67. The Ontario Court of Appeal applied this principle of fundamental justice in a 2000 case involving the use of marijuana for medical purposes. Although possession of marijuana is prohibited by section 4(1) of the *Controlled Drugs and Substances Act*, the government argued that a person who needed the drug for medicinal purposes could seek a ministerial exemption. In rejecting this claim, Rosenberg JA summarized the rule in *Morgentaler* as follows: "If a statutory defence contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to persons who would *prima facie* qualify for the defence, it will be found to violate the principles of fundamental justice." The same principle of

fundamental justice was recently invoked by the Ontario Superior Court in a subsequent case concerning medical marijuana.

> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 4(1).
> *R v Parker*, 49 OR (3d) 481, 2000 CarswellOnt 2627 (ONCA) at paras 117 and 163 (cited to WL Can).
> *R v Mernagh*, 2011 ONSC 2121, 2011 CarswellOnt 2441 at para 230 (cited to WL Can).

(ii) The defence in section 241.1 is "practically unavailable" to some physicians

68. During his lucid periods, Mr. Jacob satisfies all of the criteria in section 241.1(1) apart from a diagnosis of terminal illness. As amended by the remedial order of Wire J, the provision would provide a full defence to any physician who helped the Appellant to end his life by either providing or administering a lethal dose of medication. But in its unamended form, section 241.1 provides an illusory defence to physician and prevents Mr. Jacob from carrying out his decision.

69. The competence criterion bars intermittently competent patients from the operation of the law. This is despite his doctor's belief that Mr. Jacob fully understood the consequences when he lucidly and repeatedly expressed his firm intention to end his own life. The blanket exclusion of all but the continuously "competent" patients renders the defence "practically unavailable to persons who would *prima facie* qualify."

70. The "terminal illness" criterion raises two additional problems. First, it can be difficult to distinguish a terminal illness from an incurable chronic illness. Some chronic conditions, such as diabetes, can have fatal complications. HIV infection used to kill patients within a year or two (and still does in much of the developing world), but today it is a manageable chronic condition with which properly treated patients can live for many years. As these examples illustrate, there is no bright line between a terminal and a non-terminal illness. Second, doctors cannot predict

with certainty when a terminal patient will die. The Canadian Association of Physicians implicitly acknowledged as much in their 2011 survey question, which asked whether physician-assisted suicide was ethical "where the patient will **likely** otherwise die within two years".

Official Problem, *supra* para 1 at 8.

71. Because the word "terminal" is so imprecise, a physician may, in good faith, help a patient to end his or her life only to be charged with an offence under section 241. Similarly, Dickson CJC held in *Morgentaler* that the word "health" in section 251 of the *Code* was too ambiguous to ground a genuine statutory defence to a charge of abortion. The defence in section 241.1 is therefore illusory, and not in accordance with the principles of fundamental justice.

Morgentaler, *supra* para 49 at paras 48-51.

B. The deprivations of liberty and security of the person are arbitrary

72. It is settled law that "interference with life, liberty and security of the person is impermissibly arbitrary if the interference lacks a real connection on the facts to the purpose the interference is said to serve." To determine whether section 241.1 is arbitrary, "the first step is to identify the law's objectives... The second step is to identify the relationship between the state interest and the impugned law... the burden is on the claimants to establish that the limit imposed by the law is not in accordance with the principles of fundamental justice."

Chaoulli v Quebec (Attorney General), 2005 SCC 35 at para 134, [2005] 1 SCR 791.
Insite, supra para 51 at paras 129-130.

73. The majority at the Court of Appeal held that any deprivation of liberty or security of the person was not arbitrary, because it was "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." The Litigation Guardian willingly acknowledges that it is not arbitrary to protect a mentally ill person from acting on a momentary impulse to kill himself. However, she submits that her brother satisfies the key elements of section 241.1 despite being only intermittently competent. In his lucid intervals he has "repeatedly and explicitly expressed" a fixed and irrevocable desire to die; he suffers incurable agony; and there are no realistic prospects of a cure or more effective treatment.

Official Problem, *supra* para 1 at 9.

74. We have very little information about Parliament's objective in adopting section 241.1, except that it was enacted in response to "a series of high-profile cases [involving] patients suffering from Lou Gehrig's disease or terminal cancers". This suggests that the terminal illness criterion was intended to limit the section to patients who would die soon even without assisted suicide. If so, the objective itself is arbitrary and the infringement of section 7 is made out.

Official Problem, *supra* para 1 at 8.

75. Like its objective, the "state interest" protected by section 241.1 eludes identification. One might argue that the law protects vulnerable persons by regulating the underground practice of "terminal sedation". Protecting the vulnerable is a vital "state interest," but it does not require the complete exclusion of the intermittently competent or the non-terminally ill from the scope of section 241.1 where all of the other criteria are satisfied. The exemption from section 241 should be available whenever a patient suffers from an incurable disease, experiences constant untreatable pain, and is sometimes capable of forming and repeatedly expressing an irrevocable wish to die. Because the impugned criteria exclude such persons, the law is arbitrary.

Carter, supra para 21 at para 1282.

76. The Litigation Guardian also submits that it is arbitrary to force her brother and others like him to suffer unbearable anguish because of concerns that changing the law might put others at greater risk of harm. McLachlin J (as she then was) wrote of Sue Rodriguez that the courts denied her assistance to end her life "because of the danger that other people may wrongfully abuse the power they have over the weak and ill, and may end the lives of these persons against their consent." In effect, section 241 made her "a scapegoat". The impugned criteria treat Mr. Jacob in an equally arbitrary manner.

Rodriguez, *supra* para 59 at para 97.

77. Finally, the impugned law is arbitrary because, as explained at paragraph 68 *supra*, the "terminal illness" criterion cannot be precisely applied. One physician may consider a given patient to be terminally ill, whereas another may not. A patient confidently expected to live for five years may suddenly worsen and die within a year of diagnosis. Another patient, expected to die in eighteen months, might linger in severe pain for four or five years. Because it purports to draw a bright line where none exists, the "terminal illness" criterion is impermissibly arbitrary.

78. In conclusion, the Appellant argues that section 241.1 deprives him of his liberty and his security of the person and that this deprivation is not in accordance with two principles of fundamental justice. The infringement is established on a balance of probabilities.

Issue 4: The infringements of section 7 and section 15(1) are not demonstrably justified in a free and democratic society

79. If the Appellant succeeds in demonstrating an infringement of one or both *Charter* guarantees, the onus shifts to the federal government to prove that the infringement is justified under section 1. Because the other side bears the onus at the justification stage, this part of the Appellant's analysis is less extensive than the foregoing discussion of infringement.

80. The Supreme Court of Canada has questioned "whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies." Similarly, the Ontario Court of Appeal recently remarked that "While non-compliance with section 7 can theoretically be justified under s. 1 of the *Charter*, in reality s. 1 will rarely, if ever, trump a section 7 infringement". Indeed, in more than three decades of *Charter* jurisprudence, the highest court has never upheld a law which was found to infringe section 7.

> *R v Heywood*, [1994] 3 SCR 761 at para 71, 120 DLR (4th).
> *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 89, 109 OR (3d) 1.
> Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 289-291 [Stewart].

1. Section 241.1 serves a "pressing and substantial objective"

81. In general, courts defer to the legislature at this stage. The only exception arises when the government frames the objective in such "vague and symbolic" terms that a court cannot "assess the precision with which the means have been crafted to fulfil that objective."

> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 22-23, [2002] 3 SCR 519.
> *K Mart Canada Ltd v UFCW, Local 1518*, [1999] 2 SCR 1083 at para 59, 176 DLR (4th) 607.

82. In this case, the wording of the impugned provision provides little insight into the purpose which Parliament intended it to serve. The best evidence available is in a passage of the trial judge's reasons, referred to *supra*, which referred to highly-publicized cases of people suffering from ALS and terminal cancers. This passage implies that the objective of section 241.1 is to assist persons with terminal illnesses by allowing them to obtain medical assistance in Canada to end their lives at a time of their own choosing.

Official Problem, *supra* para 1 at 9.

83. As mentioned at paragraph 13 *supra*, the Litigation Guardian characterizes the objective of the law as follows: "to assist persons suffering unbearably from incurable illnesses by allowing them to obtain medical assistance in Canada to end their lives at a time of their own choosing, while protecting mentally ill individuals against involuntary euthanasia". This objective is pressing and substantial in a free and democratic society.

2. The impugned criteria are not "rationally connected" to that objective

84. To succeed at this stage, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic". The Crown must establish "that it is reasonable to suppose that the limit may further the goal, not that it will do so."

> *RJR- MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1 [*RJR-MacDonald*].
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian*].

85. On the surface, section 241.1 appears to be "rationally connected" to the purpose of permitting physician-assisted suicide under carefully delimited conditions. It applies to doctors, but not to persons without medical training. It requires a second expert opinion, the "repeated and explicit" expression of a wish to die, and the exhaustion of alternative treatment options. If, as suggested above, the real purpose of section 241.1 is to strike a balance between the needs of competent, suffering patients and the safety of the mentally ill, it is "reasonable to suppose that the limit may further [that] goal".

86. On the other hand, if the court finds that the impugned criteria are arbitrary within the meaning of section 7, they cannot survive this stage of *Oakes*: "An arbitrary law will not be rationally connected to its objective."

Stewart, *supra* para 80 at 155.

87. Moreover, "reason and logic" suggest that the "competence" criterion is not required to obtain the full benefit of the law. In particular, as argued above, there is no logical connection between denying Mr. Jacob the help he needs to end his suffering and protecting others from involuntary euthanasia. Finally, forcing him to suffer just because "other people in other situations may act criminally to kill others" is difficult to justify "on the basis of reason or logic".

Rodriguez, *supra* para 59 at para 97.

3. The impugned criteria do not "minimally impair" section 7 or section 15(1) of the *Charter*

88. At this third stage of *Oakes*, "the government must show that the measures at issue impair the [*Charter* guarantee] as little as reasonably possible in order to achieve the legislative objective." In practice, "[t]he test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."

RJR-MacDonald, *supra* para 84 at para 160.
Hutterian, *supra* para 84 at para 55.

89. In this case, the remedy imposed by Wire J provides just such an alternative. He read in language to permit a person who was competent "at the time of [his] request that the physician assist the patient" to commit suicide to take advantage of the defence in section 241.1; he also struck "the words 'as a result of a terminal illness' from the end of section 241.1(1)(c)."

Official Problem, *supra* para 1 at 9.

90. The effect of this order, which was subsequently quashed by a majority at the Ontario Court of Appeal, was to bring some mentally ill persons and those who suffer severe pain from chronic but not fatal illnesses within the scope of section 241.1. The remedy did not leave

mentally ill persons more vulnerable to involuntary euthanasia, because competence is still a prerequisite (albeit intermittent rather than constant); there must be proof of a fixed and irrevocable decision to die; all other treatment options must be ruled out; and a second opinion must be provided. In short, the amended section 241.1 satisfied the objectives of the law with less impact on sections 7 and 15 of the *Charter*. On this basis, the High Court could conclude that the impugned law is not minimally impairing.

4. The benefits of section 241.1 are outweighed by its deleterious effects

91. While "the first three stages of *Oakes* are anchored in an assessment of the law's purpose", the fourth branch focuses on effects. It "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."

Hutterian, *supra* para 84 at paras 46-47.

92. The most obvious benefit of section 241.1 is to allow patients who can bring themselves within the criteria to obtain medical help to die peacefully and with dignity. It does so by exempting physicians from the effect of section 241 when all five criteria are satisfied.

93. However, section 241.1 indirectly harms those excluded by the impugned criteria. In particular, it harms people who are: 1) capable of expressing a repeated and explicit wish to die, but who are not always "competent"; 2) incurably ill with excruciating chronic diseases, but who are not diagnosed as "terminal"; and 3) unable to commit suicide without medical assistance.

94. The impugned law condemns Mr. Jacob, and other mentally ill persons without terminal illnesses, to years of unimaginable anguish by denying them legal physician-assisted suicide. In order to succeed at the High Court, the government must establish that the benefits of section 241.1 genuinely (not just notionally) outweigh this harm.

5. The *Charter* violations are not justifiable under section 1 of the *Charter*

95. The impugned criteria cannot pass the rational connection, minimal impairment, or proportionality stages of the *Oakes* test. The infringements of sections 7 and 15 of the *Charter* are not justified under section 1, and Mr. Jacob is entitled to a remedy.

PART V – ORDER SOUGHT

96. The Appellant requests that this Honourable Court order:

1) That the appeal of the decision from the Ontario Court of Appeal be allowed;

2) That the decision of Wire J be restored;

3) Costs of this appeal and in the Courts below; and

4) Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PART VI – LIST OF AUTHORITIES AND STATUTES

Paragraph #

LEGISLATION

JURISPRUDENCE

SECONDARY SOURCES

OTHER SOURCES