ARTICLE

A MINOR ISSUE? THE SHORTCOMINGS OF THE ELIGIBILITY REQUIREMENTS FOR MEDICALLY ASSISTED DEATH IN CANADA

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INTRODUCTION

In Canada, it is illegal to assist a person under 18 years of age in ending their own life,[1] meaning minors are prohibited from receiving medical assistance in dying ("MAID"). This prohibition is based on already accepted (and applied) arguments related to the protection of children, "who are particularly vulnerable both by virtue of their age and their disability, disease or illness"; and arguments that children cannot make MAID decisions because of their inexperience and immaturity.[2]

However, while minors are prohibited from making MAID decisions, this does not mean they are also immune from the disabilities and diseases that lead to intense, intolerable pain, or that they are against obtaining MAID.[3] The Canadian Paediatric Surveillance Program recently reported minors are already approaching doctors about MAID.[4] Though these conversations with minors about assistance in dying are still "relatively rare,"[5] the possibility of such scenarios (and the prospect of paediatric illness) requires a reconsideration of those accepted arguments; they also require a review of arguments regarding bodily autonomy and mature minors.[6]

Responding to the Supreme Court of Canada's ("SCC") decision in *Carter v Canada (Attorney General)* ("*Carter*"),[7] Parliament was required to balance Canadians' interests in protecting children, vulnerable because of their inexperience and immaturity, and their interests in respecting mature minors' right to request or refuse medical treatment. However, Parliament did not balance those interests in its minimally more permissive MAID regulatory regime, because that MAID regulatory regime restricts MAID to adults "at least 18 years of age and capable of making decisions with respect to their health."[8]

Again, the prospect of paediatric disease and disability is disheartening—and the prospect of children with a "persistent and rational wish to end their own lives" is deeply distressing. As the External Panel on Options for a Legislative Response to *Carter v Canada* ("External Panel") concluded: "[a]ccess for mature minors [to MAID] was perhaps one of the most emotionally charged questions the Panel encountered in its investigations of assisted dying."[9] The External Panel continued: "[n]o one who appeared before the Panel in Canada

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1 *Criminal Code*, RSC 1985, c C-46, ss 14, 241 – 241.3 [*Criminal Code*].

2 "Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016) Part 4 – Statement of Legislative Impacts" (23 January 2017), online: Government of Canada <http://www.justice.gc.ca/eng/rp-pr/other-autre/adra-amsr/p4.html#p4> archived at <https://perma.cc/UNR2-UB2F> [Canada, "Legislative Background"]; *AC v Manitoba (Child and Family Services)*, 2009 SCC 30 at para 108 [*AC*].

3 Maija Kappler, "Canadian pediatricians 'increasingly' being asked about assisted death for children," *Global News* (26 October 2017) online: <globalnews.ca/news/3826108/assisted-death-canada-children/> archived at <https://perma.cc/X724-ZPQ3>. Canada, Public Health Agency of Canada & Canadian Pediatric Society, Canadian Paediatric Surveillance Program*, 2016 Results* (Ottawa: Canadian Paediatric Surveillance Program, 2017) at 34-35, online: <cpsp.cps.ca/uploads/publications/CPSP-2016-Results.pdf> archived at <https://perma.cc/KS8S-QZMQ> [Canadian Paediatric Surveillance Program].

4 Canadian Paediatric Surveillance Program, *supra* note 3 at 35.

5 *Ibid.*

6 *AC, supra* note 2; *Van Mol v Ashmore*, 1999 BCCA 6 [*Van Mol*].

7 *Carter v Canada (Attorney General)* 2015 SCC 5 [*Carter* SCC].

8 *Criminal Code, supra* note 1, s 241.2(1)(b).

9 Canada, Department of Justice, *Consultations on Physician-Assisted Dying–Summary of Results and Key Findings,* External Panel on Options for a Legislative Response to *Carter v Canada*, (Ottawa: MediaMiser, 2015) at 55-56, online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/pad.pdf> archived at <https://perma.cc/JQ2E-23NV> at 55 [*External Panel*].

openly advocated children's access."[10] This paper is also not advocating for children's access to MAID.

But there have been constitutional challenges from mature minors seeking the rights to make medical decisions for themselves and refuse the medical treatments that might save their lives; and it is possible a mature minor could challenge the constitutionality of section 241.2(1)(b) of the *Criminal Code*. If a mature minor were to argue that the MAID prohibition for persons under the age of 18 infringed their rights to life, liberty, or security of the person—and that the MAID prohibition was overbroad or disproportionate to the objective of the MAID regulatory regime, it is probable that the courts would consider section 241.2(1)(b) of the *Criminal Code* unconstitutional.

In Part I, the paper reviews the SCC's decision in *Carter*, including the SCC's "section 7 analysis," its approach to determining whether laws do or do not contravene Canadians' rights to life, liberty, and security of the person (and whether laws are or are not contrary to the principles of fundamental justice) under section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[11]

In Part II and Part III, the paper reviews Parliament's response to the SCC's decision in *Carter*. The paper analyzes Canada's MAID regulatory regime: the paper argues that this regulatory regime is incompatible with the rules, regulations, and laws related to mature minors (and their rights to their autonomy and ability to make medical decisions)—and, after applying the SCC's "section 7 analysis," acknowledges it is inconsistent with the principles of fundamental justice and mature minors' rights to life, liberty, and security of the person.

I. *CARTER* AND CANADIANS' RIGHTS TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

Before *Carter*, Canada's MAID regulatory regime was straightforward: MAID was wholly illegal. The *Criminal Code* prohibited MAID through two provisions: sections 14 and 241(b). Section 14 of the *Criminal Code* read:

> No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.[12]

Section 241(b) of the *Criminal Code* made aiding or abetting a person to commit suicide an indictable offence punishable with imprisonment for a term of not more than 14 years.[13] And at the Supreme Court of British Columbia,[14] then the British Columbia Court of Appeal,[15] and finally the SCC, Gloria Taylor argued that this MAID prohibition contravened her rights under section 7 of the *Charter*.

In Part I, this paper reviews the SCC's "section 7 analysis" in *Carter*, as the approach applied to Taylor's argument that a complete prohibition on MAID for adults is unconstitutional also applies to arguments that a complete prohibition on MAID for minors is unconstitutional.

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10 *Ibid* at 55.

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

12 *Criminal Code, supra* note 1, s 14.

13 *Ibid*, s 241(b).

14 *Carter v Canada (Attorney General)*, 2012 BCSC 886 [*Carter* BCSC].

15 *Carter v Canada (Attorney General)*, 2013 BCCA 435 [*Carter* BCCA].

A. Decision of the Supreme Court of British Columbia

In 2012, Taylor—joined by Lee Carter, Hollis Johnson, William Shoichet, and the British Columbia Civil Liberties Association ("BCCLA")[16]—brought an action against the Attorney General of Canada for a declaration that Canada's MAID prohibition in sections 14 and 241 of the *Criminal Code* was unconstitutional.[17]

Taylor had amyotrophic lateral sclerosis ("ALS").[18] By the time she testified to the Supreme Court of British Columbia, she was experiencing muscular atrophy in her hands, wrists, and feet.[19] She said she required a wheelchair, but because her ALS made fine motor tasks difficult, she was unable to control one on her own.[20] Taylor said she required assistance from strangers for daily personal tasks; and she said that this assistance was an "assault on her privacy, dignity and self-esteem."[21] She stressed:

> I, myself, will be greatly distressed by living in a state where I have no function or functionality that requires others to attend to all of my needs and thereby effectively oblige my family to bear witness to the final steps of the process of my dying with the indignity a slow death from ALS will entail.[22]

Taylor wanted to avoid (what she anticipated as) a slow and painful death, and she wanted to ensure that her death was not undignified; as she told the trial judge: "I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by."[23]

Taylor told the Supreme Court of British Columbia that palliative care and suicide were not necessarily acceptable alternatives to MAID.[24] She said palliative care could not prevent the slow and painful death she feared—and suicide left her with a "cruel choice between killing herself while she was still physically capable to do so or giving up the ability to exercise any control of the manner and timing of her death."[25] The plaintiffs also argued, because the *Criminal Code*'s sections 14 and 241 subjected them to this choice, it had the effect

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16 Carter and Johnson were the daughter and son-in-law, respectively, of Kay Carter (who, at age 89, attained MAID in Switzerland after a diagnosis of spinal stenosis); Carter and Johnson assisted Kay Carter to arrange that MAID, though their planning assistance and actions were illegal in Canada and opened them to prosecution (*Carter* BCSC, *supra* note 14 at paras 57-71). Shoichet, a physician practicing in Canada, was "willing to assist a patient who requested such end-of-life care where he was satisfied that it constituted appropriate medical care in the circumstances" (*Ibid* at para 76). The BCCLA "has had a longstanding interest in matters of patients' rights and health policy, and has conducted advocacy and education with respect to end-of-life choices, including assisted suicide and voluntary euthanasia" (*Ibid* at para 45). This paper concentrates on the testimony of Taylor, as it is possible to most effectively and efficiently compare the experiences of that plaintiff to the experiences of the weighted hypothetical of "Adolescent" introduced in Part III.

17 The original claim brought forth by the plaintiffs was that sections 14, 21, 22, 222 and 241 of the *Criminal Code* were unconstitutional (*Carter* BCSC, *supra* note 14 at para 100). However, the SCC determined that sections 241(b) and 14 were the most relevant provisions for the purpose of the constitutional challenge (*Carter* SCC, *supra* note 7 at para 20).

18 ALS is alternatively known as motor-neuron disease; those diagnosed with ALS live through gradual paralysis and gradual muscular deterioration, and they "lose the ability to walk, talk, eat, swallow, and eventually breathe" (Amyotrophic Lateral Sclerosis Society of Canada, "What is ALS?" online: <https://www.als.ca/about-als/what-is-als/> archived at <https://perma.cc/6NYG-AH78>).

19 *Carter* BCSC, *supra* note 14 at para 49.

20 *Ibid* at para 50.

21 *Ibid*.

22 *Ibid* at para 52.

23 *Ibid* at para 54.

24 *Ibid* at para 55.

25 *Carter* SCC, *supra* note 7 at para 13.

of "forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable."[26] These choices, Taylor concluded, infringed her rights under section 7 of the *Charter*.[27]

Section 7 of the *Charter* states that "[e]veryone 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."[28] Taylor argued sections 14 and 241(b) of the *Criminal Code* constituted a "state interference with the right of grievously and irremediably ill individuals to a protected sphere of autonomy over decisions of fundamental personal importance."[29] Additionally, she argued this interference by the state was not in accordance with the principles of fundamental justice since the MAID prohibition was overbroad and disproportionate to the objectives of the prohibition (the protection of the vulnerable).[30]

The Supreme Court of British Columbia also addressed arguments under section 1 of the *Charter*, and concluded that the "benefits of the impugned laws are not worth the costs of the rights limitation they create."[31]

The Supreme Court of British Columbia concluded that the *Criminal Code* provisions prohibiting physician-assisted dying infringed section 7 (and section 15) of the *Charter*, making them of no force and effect.[32] Though those declarations were suspended for six months, Taylor was granted a constitutional exemption to permit physician assistance to die (under certain conditions).[33]

B. Decision of the Supreme Court of Canada

The British Columbia Court of Appeal reversed the Supreme Court of British Columbia's conclusion, so the case was appealed to the SCC.[34]

The SCC held the voided sections of the *Criminal Code* violated Taylor's rights to life, liberty, and security of the person by subjecting competent adults to premature death (by forcing them to take their own lives while still physically capable out of fear they would be

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26 *Ibid* at para 57. This "cruel choice" was also addressed by another woman: "One woman noted that the conventional methods of suicide, such as carbon monoxide asphyxiation, slitting of the wrists or overdosing on street drugs, would require that she end her life 'while I am still able bodied and capable of taking my life, well ahead of when I actually need to leave this life" (*Ibid* at para 15).

27 *Ibid* at para 40.

28 *Charter, supra* note 11, s 7.

29 *Carter* BCSC*, supra* note 14 at para 1295.

30 *Ibid* at para 25.

31 *Ibid* at para 1285. Though these section 1 (of the *Charter*) arguments were actually addressed as a justification to the MAID prohibition's section 15 (of the *Charter*) infringement, the Supreme Court of British Columbia concluded it would reach "the identical conclusion" if instead, those arguments were addressed as a justification to the section 7 infringement (*Ibid* at para 1385; *Charter*, *supra* note 11, ss 1, 15). The plaintiffs also argued that this "section 1 analysis" was not required, referencing *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, after a determination that the MAID prohibition infringed section 7. Though a section 1 justification of a section 7 infringement "may not be impossible," the Supreme Court of British Columbia declined to reassess section 1 in the context of "a deprivation of life, liberty, or security of the person" (*Carter* BCSC, *supra* note 14 at paras 1379-1383).

32 *Carter* BCSC, *supra* note 14 at para 1393.

33 *Ibid* at para 1414.

34 The British Columbia Court of Appeal concluded "neither the change in legislation and social facts nor the new legal issues relied on by the trial judge permitted a departure from *Rodriguez v British Columbia (Attorney General)*, 1993 3 SCR 519" (*Carter* SCC*, supra* note 7 at para 34).

unable to do so when pain and suffering became intolerable),[35] reducing their autonomy over their bodies, and instilling a fear of prolonged pain and suffering.[36]

i. Application of Section 7 of the *Charter*

The rights set out in section 7 of the *Charter* are not absolute. Rather, section 7 states that "[e]veryone 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.*"[37] Any legislation (or rules or regulations) limiting section 7 rights must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to the (impugned) law's objective.[38] In instances where limiting legislation is overbroad, arbitrary, or grossly disproportionate, that law will be found to infringe section 7 rights not in accordance with the principles of fundamental justice, and therefore, they can only be upheld as constitutional through an application of section 1 of the *Charter* (see below).[39]

In *Carter,* the SCC found that the prohibitions contained in sections 14 and 241(b) of the *Criminal Code* infringed Taylor's right to *life*.[40] The SCC accepted that the impugned laws had the potential effect of forcing persons with such illnesses to "take their own lives prematurely for fear that they would be incapable of doing so when they reached the point where suffering was intolerable".[41] The SCC also adopted the trial judge's reasoning that the complete prohibition on MAID had the effect of shortening the lives of individuals with grievous and irremediable illnesses (in cases where individuals took their lives prematurely).[42] So—a regulatory regime that prohibited MAID shortened the lifespan of certain people while a regime that allowed MAID enabled people to choose to die only when they reached the point of intolerable suffering.[43]

The SCC also held that the prohibition engaged the plaintiff's rights to *liberty* and *security of the person*.[44] The SCC accepted the trial judge's conclusion that the MAID prohibition engaged security of the person interests by subjecting those persons who were unable to obtain MAID to "suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying."[45] Additionally, the SCC acknowledged that the

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35 *Carter* SCC, *supra* note 7 at para 57.

36 *Ibid* at paras 57, 58, 65, 66, 126.

37 *Charter, supra* note 11, s 7 [emphasis added].

38 *Carter* SCC, *supra* note 7 at para 72.

39 *Ibid*.

40 *Ibid* at para 58.

41 *Ibid* at para 57.

42 *Ibid* at paras 57-58.

43 *Carter* BCSC, *supra* note 14 at para 1325.

44 The SCC references *Blencoe v British Columbia (Human Rights Commission)* to define liberty: "the right to make fundamental personal choices free from state interference" (*Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at para 54 [*Blencoe*], as cited in *Carter* SCC, *supra* note 7 at para 64). And the SCC references *Rodriguez v British Columbia (Attorney General)* to define security of the person: "a notion of personal autonomy involving […] control over one's bodily integrity free from state interference" (*Rodriguez v British Columbia (Attorney General)*, 1993 3 SCR 519 at 587-588, referring to *R v Morgentaler*, [1988] 1 SCR 30, as cited in *Carter* SCC, *supra* note at 7 para 64). Security of the person rights are assailed "by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering" (*Carter* SCC, *supra* note 7 at para 64, referring to *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 58 [*G(J)*]; *Blencoe, supra* note 44 at paras 55-57; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 43, 119, 191, 200).

45 *Carter* SCC, *supra* note 7 at 65.

MAID prohibition engaged liberty interests by interfering with a person's bodily integrity, personal autonomy, and right to make decisions about their medical care.[46]

The SCC's reasoning reapplies the established principles underlying an individual's right to refuse life-saving treatment, and it analogizes the right to refuse life-saving treatment with the right to request MAID.[47] The SCC referred to *AC v Manitoba (Director of Child and Family Services)* ("*AC*"):

> where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, [Justice Binnie] noted that we may 'instinctively recoil' from the decision to seek death because of our belief in the sanctity of human life […]. *But his response is equally relevant here*: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition 'does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live' […].[48]

The SCC also referred to *Fleming v Reid*[49] and acknowledged that the right to make personal and fundamental life choices "is not vitiated by the fact that serious consequences, including death, may flow from the patient's decision."[50] Then the SCC concluded that the principles underlying the cases concerning the "right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued" also support the right to choose MAID.[51]

The SCC held that all three interests protected by section 7 of the *Charter* were engaged by the prohibition on MAID.[52] This compelled the SCC to then determine whether the impugned provisions did so in accordance with the principles of fundamental justice. The SCC determined that the prohibition was not arbitrary,[53] but did find that it was overbroad.[54] (This paper concentrates on the overbreadth analysis, as the MAID prohibition for persons under 18 years of age is also overbroad; and if a mature minor makes a constitutional challenge to the MAID prohibition for persons under 18 years of age, it is probable that the court would approach that case the way the SCC approached this case.)

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46 *Ibid* at para 68. In deciding that the prohibition of MAID infringed individuals right to liberty and security of the person, the SCC cited the trial judge's reasons:

> The trial judge, too, described this as a decision that, for some people, is 'very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience'. This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person [citations omitted] (*Ibid*).

47 *Carter* SCC, *supra* note 7 at para 66.

48 *AC, supra* note 2, as cited in *Carter* SCC, *supra* note 7 at para 68 [citations omitted] [emphasis added].

49 *Fleming v Reid* (1991), 1991 CanLII 2728 (ONCA) [*Fleming*].

50 *Carter* SCC, *supra* note 7 at para 56.

51 *Ibid* at paras 66-67. The SCC reached that conclusion citing *Ciarlariello v Schacter*, [1993] 2 SCR 119; *Malette v Schulman*, 1990 CanLII 6868 (ONCA); and *Nancy B v Hôtel-Dieu de Québec*, 1992 CanLII 8511 (QCCS).

52 *Carter* SCC, *supra* note 7 at para 56.

53 *Ibid* at paras 83-84.

54 *Ibid* at para 90. Upon finding the prohibition overbroad, the SCC determined it was unnecessary to consider whether it was also grossly disproportionate to its purpose.

a. Overbreadth

In *Bedford v Canada (Attorney General),* the SCC stated overbroad laws "may violate our basic values"—where overbreadth means "the law goes too far and interferes with some conduct that bears no connection to its objective."[55] In determining whether a law is overbroad, the court is not obligated to contend "with competing social interests or ancillary benefits to the general population."[56]

The overbreadth inquiry has two steps. First, the court must determine the objective of the impugned law; second, the court must determine whether the law deprives individuals of life, liberty, or security of the person in cases that do not further that objective.[57] Where the second step is answered affirmatively, the law deprives persons of section 7 rights under the *Charter* in a manner that is not in accordance with the principles of fundamental justice.[58]

In *Carter*, the SCC determined that the *Criminal Code* prohibition on MAID was overbroad.[59] The Attorney General of Canada argued sections 14 and 241 were aimed at preventing "vulnerable persons from being induced to commit suicide at a moment of weakness," and the SCC accepted that this was the objective of those provisions.[60] However, the SCC also accepted "that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives."[61] Accordingly, the SCC concluded an absolute prohibition on MAID was overbroad: sections 14 and 241 protected the vulnerable, but also barred persons with a "rational and persistent wish to end their own lives" from MAID.[62]

ii. Application of Section 1 of the Charter

Section 1 of the *Charter* both guarantees the rights and freedoms set out within the *Charter* and permits limitations on those rights, so long as they are prescribed by law and demonstrably justified in a free and democratic society.[63]

The SCC has repeatedly noted that a law that infringes section 7 *Charter* rights can only be saved by section 1 in extraordinary circumstances.[64] There is yet to be a case where the

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55 *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 101 [*Bedford*].

56 *Carter* SCC, *supra* note 7 at para 85. Instead, the court's focus is on the law's effect on the individual who is challenging the impugned law. Furthermore, the determination as to whether a law is overbroad must be based on whether there is a rational connection between its effect on that specific individual and the object of the law.

57 *R v Appulonappa*, 2015 SCC 59 at 27. Even if a law is drawn broadly to make enforcement more practical, such practicality does not remedy the absence of connection between the purpose of the law and its effect on the individual. See *Carter* SCC, *supra* note 7 at paras 85-86; see *Bedford, supra* note 55 at paras 101, 112-113.

58 *Ibid*.

59 *Carter* SCC*, supra* note 7 at para 86.

60 *Ibid* at para 29.

61 *Carter* BCSC, *supra* note 14 at para 1136, as cited in *Carter* SCC, *supra* note 7 at para 86.

62 *Carter* SCC, *supra* note 7 at para 86. It was the barring of this larger class of individuals which was "not connected to the objective of protecting *vulnerable* persons" (*Ibid*).

63 *Charter, supra* note 11, s 1.

64 *Carter* SCC, *supra* note 7 at para 95; *Reference re s 94(2) of Motor Vehicle Act (BC),* [1985] 2 SCR 486 at para 111; *G(J)*, *supra* note 44 at para 99. The government may only be able to do so where it is able to demonstrate that the public good justifies the deprivation of an individual person's right to life, liberty or security of the person; the SCC's approach to section 1 of the *Charter is able to address that public good in ways the SCC's approach to section 7 of the Charter cannot, as the 'section 7 analysis' addresses the individual's rights (Carter SCC, supra* note 7 at para 95).

government has been able to demonstrate such a public good (or proven section 7 rights have been justifiably infringed under section 1 of the *Charter*).[65]

To justify an infringement of section 7, the law must have a pressing and substantial objective and the means chosen to obtain that objective must be rationally connected to that objective.[66] In *Carter*, the SCC accepted the British Columbia Court of Appeal's conclusion on the pressing and substantial objective behind the MAID prohibition: "where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks."[67] But the courts will also assess whether any infringement to those section 7 rights is minimally impairing. The minimal impairment analysis ensures deprivations of *Charter* rights are confined to what is reasonably necessary to achieve the state's objective; and in *Carter*, despite the reasonableness of the MAID prohibition as a means of achieving the state's objective, section 14 and 241 of the *Criminal Code* infringed the claimants' section 7 rights more than was necessary.[68]

iii. Demonstrating (or Not Demonstrating) Deference to Parliament

The SCC accepted the trial judge's conclusion: "a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying."[69] The SCC also adopted the trial judge's conclusion that there are ways to accurately appraise the competency and capacity of persons requesting MAID to ensure that those persons were not being compelled or coerced into suicide.[70] Though the SCC (referring to *Alberta v Hutterian Brethren of Wilson Colony*)[71] had held a "complex regulatory response" to some social issues should be accorded "a high degree of deference,"[72] the SCC found that there was a limited amount of deference owed to the prohibition on MAID, as the *Criminal Code*'s MAID provisions were not necessarily complex.[73]

In *Carter*, the SCC found section 1 of the *Charter*[74] did not justify the complete prohibition on MAID. Accordingly, the law was not upheld as constitutional—or "saved."[75] The Attorney General of Canada failed to meet the burden of proving there were no alternative,

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65 Constance MacIntosh, "Carter, Medical Aid in Dying, and Mature Minors" (2016) 10 McGill JL & Health (QL).

66 *R v Oakes*, [1986] 1 SCR 103 at paras 73-75 [*Oakes*]. A law is proportionate when: (i) there is a rational connection between the law's objective and the means adopted to achieve that objective; (ii) the chosen means minimally impair the *Charter* right in question; and (iii) the deleterious and salutary effects of the law are proportionate to one another (*Ibid*).

67 *Carter* SCC, *supra* note 7 at para 100. The SCC is referring to the decision of Finch CJBC (*Carter* BCCA, *supra* note 15 at para 175).

68 *Carter* SCC, *supra* note 7 at para 102.

69 *Ibid* at para 103.

70 *Ibid* at para 107.

71 *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37.

72 *Ibid* at para 37; *Carter* SCC, *supra* note 7 at paras 97-98.

73 *Carter* SCC, *supra* note 7 at para 98.

74 *Charter, supra* note 11.

75 Despite the SCC's ruling that the prohibition was prescribed by law and had a pressing and substantial objective, it held that it was disproportionate and not minimally impairing (*Carter* SCC, *supra* note 7 at paras 119, 121, 123).

less drastic means to achieve the objective of protecting the vulnerable.[76] Instead, the SCC held vulnerability could be assessed on an individual basis using the procedure physicians apply in their assessment of informed consent and capacity in the context of the medical decision-making generally.[77]

In *Carter*, the SCC decided that the MAID prohibition (in sections 14 and 241(b) of the *Criminal Code*) infringed Taylor's "[section] 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under [section] 1 of the *Charter*."[78] The SCC ruled that the *Criminal Code*'s MAID prohibitions were void:[79]

> insofar as they prohibit physician-assisted death for a competent adult person who [i] clearly consents to the termination of life; and [ii] has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[80]

The SCC turned the MAID regulatory regime issue back to Parliament.

II. PARLIAMENT'S RESPONSE TO *CARTER V CANADA (ATTORNEY GENERAL)*

Parliament's response to the SCC's decision in *Carter*, Bill C-14, came into force on June 17, 2016.[81] Bill C-14 added sections 241.1, 241.2, 241.3, 241.31, 241.4 and 227—and amended sections 14, 241, and 245—of the *Criminal Code*.[82]

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76 *Ibid* at paras 107, 109, 121. This conclusion was informed by evidence from ethicists, scientists, medical experts, and others who were familiar with end of life practices as well as the impact of other jurisdictions' permissive regimes on vulnerable persons (*Ibid* at paras 104, 107); this included evidence by 12 medical practitioners who stated that "based on their clinical experience and their understanding of medical ethics, they would consider it ethical in some circumstances to assist a patient who wishes to hasten death" (*Carter* BCSC, *supra* note 14 at para 254). Additionally, Professor Sumner (Department of Philosophy, University of Toronto) told the Supreme Court of British Columbia that "there is simply no way to show that, of the four treatment options (treatment cessation, pain management, terminal sedation and assisted death), assisted death is uniquely ethically impermissible" (*Ibid* at para 235); Professor Sumner's belief that allowing MAID would not be unethical was supported by other ethicists (*Ibid* at paras 238-243). Additionally, it was found that there was no evidence from permissive jurisdictions that vulnerable populations (such as elderly and disabled persons) were at a heightened risk for accessing MAID (*Carter* SCC, *supra* note 7 at para 107).

77 *Ibid* at para 106.

78 *Ibid* at para 126.

79 *Ibid* at para 126-127. Parliament was granted one year to devise an acceptably constitutional legislative scheme for MAID before the existing *Criminal Code* provisions ruled invalid in *Carter* became of no force and effect, but the SCC granted a motion for a four-month extension in 2016 (Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-14*, (Ottawa: Library of Parliament, 2016) [Canada, *Legislative Summary of Bill C-14*]; *Carter v Canada (Attorney General)*, 2016 SCC 4.

80 *Carter* SCC, *supra* note 7 at para 127.

81 Canada, *Legislative Summary of Bill C-14*, *supra* note 79.

82 *Ibid*.

Parliament developed a *marginally more permissive* MAID regulatory regime, closely connected to the SCC's "minimalist decision" in *Carter,* as demonstrated through that regulatory regime's relatively restrictive eligibility requirements and significant safeguards.[83]

Section 241.2(1) establishes eligibility requirements for MAID, with the provision reading:

> 241.2(1) A person may receive medical assistance in dying *only if they meet all of the following criteria*:
>
> (a) they are eligible—or, but for any applicable minimum period of residence or waiting period, would be eligible—for health services funding by a government in Canada;
>
> (b) *they are at least 18 years of age* and capable of making decisions with respect to their health;
>
> (c) they have a grievous and irremediable medical condition [[84]];
>
> (d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
>
> (e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.[85]

There are also significant safeguards to protect persons requesting MAID. Those safeguards are aimed at protecting vulnerable persons from compulsion, coercion, error, and abuse, and they are set out in section 241.2(3) of the *Criminal Code*. Among those safeguards, there are requirements that the medical or nurse practitioner ensure that the request for MAID was made in writing—and that the request for MAID be signed by two independent witnesses; the person requesting MAID must be able to withdraw their request, and they must wait at least ten days between the day of their request and the day of their MAID.[86] Section 241.3 of the *Criminal Code* applies a deterrent to coercion, compulsion, and abuse: medical practitioners and nurse practitioners who fail to comply with all the relevant requirements in section 241.2(3) are liable to a term of imprisonment of not more than five years (on conviction of an indictable offence) or a term of imprisonment of not more than 18 months (on summary conviction).[87]

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83 Doug Surtees suggests that *Carter* is a "minimalist decision": "the SCC decided no more than it had to (and some will say less than it ought to have) in order to resolve the matter before it" (Doug Surtees, "The Authorizing of Physician Assisted Death in *Carter v Canada (Attorney General)*", (2015) 78 Sask L Rev 225).

84 A "grievous and irremediable medical condition" is defined in section 241.2(2) of the *Criminal Code*:

> (2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:
>
> (a) they have a serious and incurable illness, disease or disability;
>
> (b) they are in an advanced state of irreversible decline in capability;
>
> (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
>
> (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining (*Criminal Code*, *supra* note 1).

85 *Ibid,* s 241.2(1) [emphasis added].

86 *Ibid,* s 241.2(3).

87 *Ibid,* s 241.2(3)(a)-(b).

III. SECTION 241.2(1)(B) OF THE *CRIMINAL CODE* IS UNCONSTITUTIONAL AND UNRESPONSIVE TO THE JURISPRUDENCE ON MATURE MINORS

Instead of asking *how* section 241.2(1)(b) balances mature minors' rights to life, liberty, and bodily autonomy against Parliament's interests in protecting children (vulnerable to compulsion and coercion by virtue of their illness or inexperience), it could be asked *whether* section 241.2(1)(b) balance those things at all.

In Part III, the paper surveys the substantial jurisprudence on mature minors' rights to bodily autonomy, including their rights to request and refuse life-saving medical treatment. The paper reviews those rights because they are not incorporated into Parliament's MAID regulatory regime, and could constitute a more complex alternative to a complete prohibition. The SCC holds that those rights must be incorporated into legislation respecting the medical decision-making rights of mature minors.[88] Mature minors are able to request and refuse life-saving medical treatment, those courts have held, because those actions align with their rights under section 7 of the *Charter*.[89] The paper suggests that these criteria could also be applied to MAID decisions for minors and would be sufficiently rigorous to screen out minors who are incapable of making these decisions. This paper argues that the existing "mature minor principle" and the "best interests standard" are less restricting than an age-based criterion; they could protect vulnerable minors while upholding autonomy of minors in rare situations of paediatric irremediable and grievous disease. This argument is supported by the recommendations and findings of independent groups, who studied eligibility requirements for MAID before the new *Criminal Code* provisions were implemented.

This paper then analyzes the constitutionality of section 241.2(1)(b) of the *Criminal Code*. After analyzing Parliament's MAID regulatory regime through the same structure the SCC used to assess Parliament's prohibition on MAID in *Carter*, the paper concludes section 241.2(1)(b) of the *Criminal Code* contravenes mature minors' rights to life, liberty, and security of the person. Additionally, this paper concludes that this infringement cannot be justified under section 1 of the *Charter*. This paper suggests that the total prohibition on MAID for persons under the age of 18 is likely unconstitutional; but Parliament could, conceivably, still save that regulatory regime by removing the arbitrary age restriction—and by implementing standards similar to the criteria currently used to measure minors' capacity to make medical decisions.

A. Parliament's Response to *Carter* Ignores Jurisprudence on Mature Minors' Bodily Autonomy

The SCC and provincial and territorial trial and appellate courts have held age restrictions are an arbitrary way to determine minors' capacity to request or refuse medical treatment; instead, those courts maintain minors must be assessed individually (through the "mature minor rule" and "best interests standard").[90] These individual assessments are accepted as an effective, efficient, and accurate way to assess those minors' capacities, and Parliament's response to *Carter* ignored jurisprudence on mature minors' right to bodily autonomy.

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88 *AC, supra* note 2 at paras 3-4, 21.

89 *Ibid* at para 101.

90 See *AC, supra* note 2 at paras 107-108.

i. The "Mature Minor Rule"

The "mature minor rule" was first articulated in 1985 in the United Kingdom in *Gillick v West Norfolk and Wisbech AHA* ("*Gillick*").[91] The issue in this case was whether doctors could provide contraceptive advice and prescriptions to a girl under the age of 16 without parental consent.[92] The House of Lords recognized that, although parental rights and duties of custody did not completely disappear until the age of majority, the line between childhood and adulthood was not rigid but gradual.[93] The "mature minor rule" was affirmed by the Supreme Court of British Columbia in *Ney v Canada (Attorney General)* ("*Ney*"), in 1993, and the SCC in *AC*, in 2009.[94]

As detailed below, both the SCC and Legislative Assembly of British Columbia have stated that it is arbitrary to use age as a definitive restriction on minors' ability to consent. *AC* sets out the common law "mature minor rule" in Canada.[95] In this case, the SCC upheld impugned provisions of Manitoba's *Child and Family Services Act* ("*CFSA*"),[96] which allowed the court to intervene in minors' medical decisions, despite those minors' right to autonomy over their bodies. The SCC found that, when interpreted appropriately, the scheme achieved the requisite balance between the public's interests in protecting vulnerable children and respecting the autonomy of minors[97]—and that it did not violate section *7* of the *Charter*.[98] In *AC*,[99] Justice Abella insisted it would be "inherently arbitrary to deprive an adolescent under the age of 16 of the opportunity to demonstrate sufficient maturity when he or she is under the care of the state,"[100] and she generally accepted that there is no constitutional justification to deprive a minor of that opportunity.[101]

Further, the SCC found that, with proper interpretation, the *CFSA*[102] did not arbitrarily restrict minors under 16 years of age from proving they were capable medical decision-makers.[103] Rather, the *CFSA* only precluded them from a rebuttable presumption of

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91 *Gillick v West Norfolk and Wisbech AHA*, 1986 AC 112, as cited in *AC, supra* note 2 at para 48.

92 *AC, supra* note 2 at para 48.

93 *Ibid* at paras 48-51.

94 *Ney v Canada (Attorney General)*, 1993 CanLII 1301 (BCSC) [*Ney*]. It is important to note that the Manitoba Law Reform Commission concluded the 'mature minor rule' is "a well-known, well-accepted and workable principle which [...] raise[s] few difficulties on a day-to-day basis" (*Minors' Consent to Health Care* (1995), Report 91, at 33), as cited in *AC*, supra note 2 at para 46.

95 *AC, supra* note 2.

96 *The Child and Family Services Act,* CCSM 1985 c C80 [*CFSA*].

97 *AC, supra* note 2 at para 108.

98 *Charter, supra* note 11.

99 In *AC*, *supra* note 2, a 14-year-old-girl received a blood transfusion despite her refusal on religious grounds. The transfusion was ordered by the trial court because it was determined to be in the child's best interest. The authority to do so came from Manitoba's *CFSA*. Although the plaintiff had been found to have capacity to consent to treatment, the trial court found it was in her best interests to order the blood transfusion, despite her refusal of it. The plaintiff challenged the constitutionality of the legislative scheme on the grounds that it violated her section 7 rights. However, the SCC held that because the scheme provided a thorough assessment of maturity of the minor to determine whether the treatment was in their best interest, the scheme achieved the requisite balance between the protection of the vulnerable and autonomy of minors and that it did not violate section *7* of the *Charter*.

100 *Ibid* at para 114.

101 *Ibid* at para 29.

102 *CFSA*, *supra* note 96, ss 25(8), 25(9).

103 *AC, supra* note 2 at para 108.

capacity—a presumption that persons 16 years of age and older were afforded.[104] The *CFSA* required courts to consider the maturity (and corresponding self-determination) of a minor under 16 years of age when deciding whether a self-elected medical decision was or was not in their "best interests" (see below).[105] Therefore, their ability to make treatment decisions was "ultimately calibrated in accordance with *maturity, not age*."[106] This finding by Justice Abella is important when deciding whether the current age restriction for MAID is constitutional, as the current provisions do not provide an opportunity for anyone under the age of 18 to prove their capacity to request MAID.

The Legislative Assembly of British Columbia has also acknowledged that age is an arbitrary measurement of a minor's capability to consent to medical procedures. In 1992, British Columbia's *Infants Act*[107] was amended. The previous version required persons between 16 and 18 years of age to satisfy a test before being deemed to have the capacity to consent.[108] Colin Gabelmann, then the Attorney General of British Columbia, acknowledged that this previous provision was vulnerable to a constitutional challenge, and he held "[t]he amendment removes arbitrary distinctions between minors of different ages, and makes the requirements for consent to health care uniform for all minors."[109] The current version of the *Infants Act*[110] does not include an age requirement and instead provides a uniform test to determine the medical decision-making capacity of minors.[111]

This paper contends that, in certain circumstances, medical decision-making by minors is analogous to their ability to request MAID, and a complete prohibition on MAID based solely on age is arguably arbitrary.

ii. The "Best Interests Standard"

Canadian jurisprudence has considered how the "mature minor rule" applies in cases where minors *refuse* life-saving treatment. In certain cases, a minor's decision to refuse life-saving treatment can be overridden if a court determines it to be in the child's best interests. When it comes to a minor's refusal of treatment (including life-saving treatment), the mature judgement and capacity of a minor to make medical decisions are important considerations when deciding whether the courts can override the wishes of a minor.[112] As Justice Abella accepted:

> It is a sliding scale of scrutiny, with the adolescent's views becoming increasingly determinative depending on his or her ability to exercise mature,

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104 *Ibid* at para 24. This is consistent with the arguments advanced in *Informed Consent: Legal Theory and Clinical Practice*, referenced in *AC*:

> Authors in this area agree that age cut-offs should not be used as automatic determinants of de facto capacity for any type of decision but may function as an indicator to shift presumptions. Thus, individuals below the age of consent are presumed to lack capacity unless shown otherwise, and those above the age of consent are presumed to have capacity until shown otherwise (Jessica W Berg, et al, *Informed Consent: Legal Theory and Critical Practice*, 2nd ed (Oxford, Oxford University Press, 2001), as cited in *AC, supra* note 2 at para 111).

105 *AC, supra* note 2 at para 116.

106 *Ibid* at para 111 [emphasis added].

107 *Infants Act*, RSBC 1979 c 196 s 16.

108 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard*), 35th Parl, 1st Sess, Vol 5, No 4 (24 June 1992) at 3056 (Hon C Gablemann). [BC *Hansard*].

109 *Ibid*.

110 *Infants Act*, RSBC 1996 c.223 s.17 [*Infants Act*].

111 BC *Hansard, supra* note 108 at 3056.

112 *AC*, *supra* note 2 at para 96. Considerations made in this determination of decisional capacity include: the influence of parents on the child's wishes; the likelihood that the treatment would be successful; and the child's developmental experience, intelligence, and understanding of the nature of their condition (*Ibid*).

> independent judgment. The more serious the nature of the decision, and the more severe its potential impact on the life or health of the child, the greater the degree of scrutiny that will be required.[113]

Applying such scrutiny, a court can interfere with a minor's right to autonomy, and this interference does not violate section 7 of the *Charter*.[114]

The "best interests standard"[115] comes from the provincial statutory schemes that govern mature minors' ability to consent to treatment.[116] The SCC has held that such a standard does not violate section 7 when its application balances a minor's right to medical decision-making autonomy with the state's interest in protecting vulnerable minors, which was the case in *AC*.[117] To achieve this balance, "a thorough assessment of maturity, however difficult, is required in determining their best interests."[118]

That statutory scheme refers to the considerations applied when determining whether a minor's medical decisions are or are not in their best interests. This includes factors like "the mental, emotional and physical needs of the child; his or her mental, emotional and physical stage of development; the child's views and preferences; and the child's religious heritage."[119] The court considers the complete circumstances of the minor making the medical decision when assessing best interest.

However, as minors move from childhood to adolescence, the "distinction between promoting autonomy and protecting welfare" starts to collapse. In *W(A Minor), Re* (which was referenced with approval in *AC*), Lord Balcombe addressed that collapse:

> [A]s children approach the age of majority, they are increasingly able to make their own decisions concerning their medical treatment. [...] Accordingly the older the child concerned the greater the weight the court should give to its wishes, certainly in the field of medical treatment. In a sense this is merely one aspect of the application of the test that the welfare of the child is the paramount consideration. It will normally be in the best interests of a child of sufficient age and understanding to make an informed decision that the court should respect its integrity as a human being and not lightly override its decision on such a personal matter as medical treatment, all the more so if that treatment is invasive.[120]

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113 *Ibid* at para 20.

114 See *AC, supra* note 2.

115 The "best interests standard" is used in provincial legislation that governs medical decision-making by minors and the courts' ability to override a minor's autonomy and order a treatment believed to be in the minor's best interest despite the minor's refusal of such treatment. The SCC has held that the best interests standard must consider the minor's treatment wishes and relevant capacity to make medical decisions, as well as the courts overarching responsibility to protect children from harm (*AC, supra* note 2 at paras 21-23, 32). The SCC stated that the level of the minor's maturity becomes more determinative of their ability to make such a decision without interference from the court when the impact of the decision on the life of the minor is less severe. Additionally, the court should consider all relevant factors such as the mental, emotional, physical and educational needs of the child and the child's mental, emotional and physical stage of development.

116 *Infants Act, supra* note 110, s 17; *CFSA, supra* note 93; *Child, Family and Community Service Act*, RSBC 1996 c 46 s 29; *Child and Family Services Act*, SS 1989-90, c C-7.2, ss 4(b), 11.

117 *AC, supra* note 2 at para 115.

118 *Ibid* at para 4; *Charter, supra* note 11.

119 *AC, supra* note 2 at para 89.

120 *W(A Minor) (Medical Treatment: Court's Jurisdiction), Re*, [1992] 4 All ER 627 at 643-644, as cited in *AC, supra* note 2 at para 55 [emphasis removed].

Returning to the "best interests standard," Lord Balcombe also accepted that the courts should demonstrate some deference—and "give effect to the child's wishes on the basis that prima facie that will be in his or her best interests."[121]

In *AC*, the SCC referenced several cases where minors' decisions to refuse treatment have been upheld. As an example, in *Re LDK (An Infant),* a 12-year old (who was also a Jehovah's Witness) refused the blood transfusions required as a consequence of chemotherapy; the Ontario Provincial Court considered the improbability of success (the prospect of success was estimated at 10 to 30 percent), the sincerity of her religious beliefs, and the emotional trauma involved, accepting her decision.[122] In *Re AY*, as another example, the trial judge accepted a decision made by a 15-year old (who was also a Jehovah's Witness) to refuse a blood transfusion and chemotherapy; recognizing the improbability of successful treatment (the prospect of success was estimated at 10 to 40 percent) and the minor's maturity, and the trial judge accepted the minor's decision.[123] In these instances, the minors refusing treatment had terminal illnesses, the treatment had a low chance of saving their lives, and they were found to be capable of making their own medical decisions.[124] These decisions were based on the requirement that the courts consider the mental state and emotional impact of ordering medical treatment against a minor's wishes.[125]

The SCC (in *AC*) also referenced several cases where the courts intervened in minors' medical decisions. In *Dueck (Re),* the Saskatchewan Court of Queen's Bench overruled the decision of a 13-year old boy to refuse surgery and continued chemotherapy was overturned, as the boy "was deeply influenced by his father"—and "[t]he father controlled the information the boy was getting about treatment, and misled him with respect to the nature of his condition."[126] In *H(T) v Children's Aid Society of Metropolitan Toronto*, a 13-year old girl (who was also a Jehovah's Witness) was overruled after she refused a blood transfusion, as the girl "lacked the maturity to judge the foreseeable consequences of her decision."[127]

This paper argues that these cases illustrate similar circumstances to a mature minor who requests MAID. Rather than an arbitrary age requirement, the courts considered the complete circumstances of the minor making the medical decision. The "best interests standard" acted as a safeguard in these cases, as it could be a safeguard in cases of mature minors requesting MAID: it may permit some mature minors to access MAID, while preventing those that lack the necessary intelligence, independence, or maturity from receiving MAID.

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121 *Ibid*.

122 *Re LDK (An Infant),* 1985 CanLII 2907 [*Re LDK*].

123 *Re AY,* 1993 CanLII 8385 [*Re AY*].

124 *Ibid* at paras 14, 18, 23, 28, 34, 37. In *Re AY,* the Newfoundland Supreme Court denied a request by the state to administer blood products to a 15-year-old who was suffering from terminal cancer and who had refused such treatment. The likelihood that the treatment would arrest the progress of the child's disease was somewhere between 10 to 40 percent (*Ibid* at para 14). In *Re LDK,* the Ontario Provincial Court, found that a 12-year-old minor, who was suffering from acute myeloid leukemia, was of sufficient intelligence to refuse a blood transfusion; the chances of successful treatment were between 10 to 30 percent (*Re LDK, supra* note 122 at paras 3-4, 14).

125 *Re AY, supra* note 123 at para 14; *Re LDK, supra* note 122 at paras 17, 19, 21, and 34. Specifically, courts focused on whether the treatment would violate the mature minor's right to freedom of religion, produce side effects that cause pain and anguish, and the impact the treatment would have on the minor's dignity and peace of mind when that treatment was forced upon them, among other issues.

126 *AC, supra* note 2 at para 60*; Dueck (Re)*, 1999 CanLII 20568 (SKQB).

127 *AC, supra* note 2 at para 59*; H(T) v Children's Aid Society of Metropolitan Toronto*, 1996 CANLII 8153 (ONSC).

In light of the decision in *AC*, this paper argues that in order to meet the constitutional balance of a minor's autonomy with society's interest to protect vulnerable minors, the MAID provisions must at least consider a minor's maturity and capacity to consent to and refuse medical treatment before precluding them. This could be achieved through a more restrictive and controlled "best interests standard," as seen in the refusal of life-saving treatment cases.

B. Parliament Rejected Recommendations for a More Permissive Regulatory Regime

This paper accepts that the existing existing "mature minor rule" and the "best interests standard" are less restrictive than an aged-based criterion and that they could protect vulnerable minors while upholding the autonomy of minors in rare situations of irremediable and grievous pediatric disease. This argument is supported by recommendations and findings of independent groups who studied eligibility for MAID before the new provisions were implemented.

One of those independent groups is the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying ("Advisory Group").[128] The Advisory Group was created by Parliament to consult with several stakeholders[129] to make recommendations for an amendment to the *Criminal Code* as a response to *Carter*. One of the recommendations made by the Advisory Group was that eligibility for MAID be based on competence (rather than age).[130] Their Final Report states:

> […] in assessing whether someone is an adult person, an arbitrary age limit such as 18 years old provides no valid safeguard. Instead, it is important that willing physicians carefully consider the context of each request to determine whether the person has the information needed, is not under coercion or undue pressure, and is competent to make such a decision.[131]

Additionally, the Special Joint Committee on Physician-Assisted Dying ("Joint Committee"), another group created by Parliament, studied submissions from Benoît Pelletier (External Panel; Faculty of Law, University of Ottawa) and Derryck Smith (Physicians Advisory Council, Dying with Dignity Canada). Pelletier stated that "suffering is suffering, regardless of age and that there is a risk that the provisions may be challenged on the basis of section 15 of the *Charter* (equality rights) if minors are excluded."[132]

The Joint Committee also recommended that "the capacity of a person requesting medical assistance in dying to provide informed consent should be assessed using existing medical practices, emphasizing the need to pay particular attention to vulnerabilities in end-of-life

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128 Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, Final Report (30 November 2015), online: <http://www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf > archived at <https://perma.cc/B3VR-DDAV> at Appendix 1 [Canada, *PT Expert Group*]. Members of the Advisory Group included experts in bioethics, human rights, and medical and mental health (*Ibid*).

129 *Ibid* at Appendix 2. These stakeholders included the British Columbia and Canadian Civil Liberties Associations, Canadian Hospice Palliative Care Association, and College of Family Physicians Canada (*Ibid*).

130 Canada, *Legislative Summary of Bill C-14, supra* note 79 at ss 1.4, 1.5, 1.6.

131 Canada, *PT Expert Group*, *supra* note 128 at page 34.

132 Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (26 January 2016), 1810 (Benoît Pelletier), as cited in Parliament of Canada, Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient-Centred Approach*, February 2016) (Chairs: Hon Kelvin Kenneth Ogilvie & Robert Oliphant), online: <https://www.parl.ca/Content/Committee/421/PDAM/Reports/RP8120006/pdamrp01/pdamrp01-e.pdf> archived at <https://perma.cc/439W-2LGZ> [Canada, *Special Joint Committee*].

circumstances."[133] After a review of many arguments for and against allowing minors to access MAID, the Joint Committee stated:

> Allowing competent minors access to MAID would not be eliminating the requirement for competence. Given existing practices with respect to mature minors in health care […] and the obvious fact that minors can suffer as much as any adult, the Committee feels that it is difficult to justify an outright ban on access to MAID for minors. As with issues of mental health, by instituting appropriate safeguards, health care practitioners can be relied upon to identify appropriate cases for MAID and to refuse MAID to minors that do not satisfy the criteria.[134]

The Joint Committee acknowledged that there were differences of opinion among witnesses (and the reports and recommendations the Joint Committee received)—and that those opinions reflected the range of public perspectives.[135] As an example, the Canadian Paediatric Society maintained minors should not necessarily be brought into Parliament's revised MAID regulatory regime; its reasons included "the lack of evidence before the court in *Carter* regarding minors; the fact that an age limit is not arbitrary: and the lack of social consensus with respect to MAID for minors [sic]."[136] Instead, the Canadian Paediatric Society advised addressing minors' access to MAID at a later date, when more data was available to address the issue.[137] Also—Margaret Birrell (Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society) and John Soles (Society of Rural Physicians of Canada) "were open to minors possibly having access, but felt this should not be allowed at the present time."[138]

The External Panel reported some witnesses were skeptical of an age-based criterion. Specifically, the College of Physicians and Surgeons of British Columbia told the External Panel that excluding minors would be inconsistent with legislation (of several provinces) that allows minors to make their own medical decisions.[139] Additionally, three medical ethicists[140] recommended an approach to MAID eligibility restrictions that did not

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133 Canada, *Special Joint Committee, supra* note 132 at 18.

134 *Ibid* at 20-21 [citations omitted]. Peter Hogg (Osgoode Hall Law School) also asserted (to the Joint Committee) that the SCC spoke only of 'competent adults'—meaning the Joint Committee could set the age of "adulthood" though adulthood is accepted as between the ages of 18 and 21 (Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (25 January 2016), 1240 (Peter Hogg), as cited in Canada, *Special Joint Committee, supra* note 132 at 18-19).

135 Canada, *Special Joint Committee, supra* note 132 at 21.

136 *Ibid* at 19.

137 *Ibid*.

138 *Ibid* at 20; Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1730 (Margaret Birrell), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <https://perma.cc/K62E-W56V>; Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1900 (John Soles), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <https://perma.cc/K62E-W56V>. It should be noted that, at this same session, Michael Bach (Canadian Association for Community Living) also asserted: "We strongly urge that mature minors not be eligible. We don't deny the suffering of children and adolescents, but we believe that palliative care is the answer for those situations" (Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1925 (Michael Bach), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <https://perma.cc/K62E-W56V>.

139 *External Panel, supra* note 9 at 54.

140 Those medical ethicists are Dr. Thomas Foreman, Joshua Landry, and Michael Kekewich of the Champlain Centre for Health Care Ethics, Ottawa Hospital.

reference age. Instead, they argued that an age-based criterion would be arbitrary, and they advocated for an approach to MAID eligibility requirements based on actual capacity.[141]

Wayne Sumner (Department of Philosophy, University of Toronto) suggested that the revised regulatory regime allow MAID for minors between the ages of 12 and 18. Sumner stated:

> The Court did not restrict eligibility for [physician-assisted dying] to competent adults only and there is no justification for doing so. Some provision must also be made for decision-making by 'mature minors' (between the ages of twelve and eighteen). In this case, however, it may be best to reverse the presumption of capacity, so that adolescents will need to demonstrate that they have the maturity to handle a decision of this magnitude. If so, then the decision should be left in their hands, though (especially in the case of younger adolescents) consultation with parents or legal guardians may be mandated; the rule of thumb should be that if a minor is deemed to be competent to refuse life-sustaining treatment then he or she is also competent to request life-shortening treatment.[142]

Though the recommendations and reports from these groups (and the testimony of their witnesses) reveals a range of opinions regarding minors and the MAID regulatory regime, most maintain age-based restrictions are problematic and probably unconstitutional (as those restrictions disrespect mature minors' rights to bodily autonomy). The testimony of many witnesses (and groups) reflected those witnesses' (and groups') professional, political, and ethical interests in protecting populations vulnerable to coercion and compulsion; competence appeared as an acceptable alternative to an age-based restriction.

This paper reviewed the recommendations and findings of independent groups who studied eligibility requirements for MAID in anticipation of a "section 7 analysis" and "section 1 analysis" under the *Charter*. As the paper reviews below, these groups' arguments that the *Criminal Code*'s age-based eligibility requirement is probably arbitrary or disproportionate to the objective of the MAID regulatory regime are relevant to the constitutionality of section 241.2(1)(b)—as is their contention that there are alternatives to that age-based eligibility requirement that are less likely to infringe a mature minor's bodily autonomy.

C. Section 241.2(1)(b) of the *Criminal Code* Probably Infringes Mature Minors' Rights to Life, Liberty, and Security of the Person

In *Carter*, the SCC determined "that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives"[143]—and the SCC decided "not every person who wishes to commit suicide is vulnerable."[144]

So—is it possible that there are also mature minors "who have a considered, rational and persistent" wish to die? In its attempt to protect vulnerable children from compulsion and coercion into suicide, is it possible that Parliament drafted an amendment to the *Criminal Code* that went beyond that objective, capturing mature minors that are not necessarily vulnerable?

As a weighted hypothetical, consider a constitutional challenge to section 241.2(1)(b) of the *Criminal Code* by "Adolescent." Adolescent is a competent, capable, and strong-

141 *External Panel, supra* note 9 at 54.

142 *Ibid*.

143 *Carter* BCSC, *supra* note 14 at para 1136, as cited in *Carter* SCC, *supra* note 7 at para 86.

144 *Ibid*.

willed 17-year-old who was diagnosed with a degenerative disease when he was 14. He has been told by multiple physicians that he will not live to see his next birthday, and before he succumbs to the condition, he will endure more and more severe suffering and pain, eventually becoming immobile. His physicians have also told him he will need significant personal care. He fears he will have to have assistance from strangers; and he fears, similar to Taylor, that this will result in interference with his "privacy, dignity, and self-esteem."[145] Adolescent knows that there are palliative care options available to him, though he also acknowledges palliative care cannot completely prevent his severe suffering; he has considered suicide as an alternative.

To determine whether section 241.2(1)(b) of the *Criminal Code*, which prohibits Adolescent from accessing MAID because of his age, infringes his section 7 rights to life, liberty, and security of the person, the court would consider the reasons in *Carter*. Specifically, the court would determine if the reasons for the finding that Taylor's section 7 interests were engaged by a prohibition on MAID would extend to someone in Adolescent's position. The court would then determine if section 241.2(1)(b) of the *Criminal Code* was overbroad in achieving its purpose to protect vulnerable minors from taking their own lives in a moment of weakness, including coercion and a lack of understanding of their choice.

i. Application of Section 7 of the *Charter*

Admittedly, Adolescent may have difficulty claiming he has the same life experience that Taylor had had, and he may have difficulty claiming he has firmly established life principles that he lives by; and those factors were important issues in *Carter*.

However, he may wish to access MAID for reasons fundamental to him, and again, he may fear the loss of privacy or self-esteem that could come from dependence on strangers for care and a lack of independence generally. As a 17-year-old, he has an understanding of his own body (and he is entitled to a realm of personal privacy). Adolescent also faces the same fear of intolerable suffering that Taylor faced. As a result of these fears, despite his age, Adolescent could still have a "fundamental belief" about how he wishes to live his life (or cease to live his life). He may have to face the same sort of "cruel choice" that Taylor faced.

The finding, in *Carter,* that a total prohibition on MAID infringes the right to life (of those seeking MAID) by potentially forcing them to prematurely take their own life could logically extend to mature minors. Certain mature minors who experience the intolerable suffering of irremediable and grievous ailments could be faced with the same choices that Taylor was forced to face. For example, in the instance of Adolescent, he fears the imminent and intolerable suffering that will be caused by his irremediable disease as well as loss of privacy and dignity. As a result of these fears, Adolescent could have a "deeply personal and fundamental belief" about how he wishes to cease living. However, section 241.2(1)(b) of the *Criminal Code* does not allow him to pursue MAID, and instead, he must choose to face the intolerable suffering and dependence on strangers for personal care (in this clearly weighted hypothetical) or be forced to take his own life while he is still physically capable. Although cases as serious as Adolescent's are rare, they are possible, and this paper argues that based on the reasons in *Carter*, the existing provisions potentially infringe a mature minor's right to life.

Section 241.2(1)(b) infringes minors' (evolving) right to autonomy over their own body, and they may face intolerable physical and psychological pain because they were denied access to MAID. Therefore, the state interference with minors' access to MAID engages both *liberty* and *security of the person* interests (see above and below).

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145 *Carter* SCC, *supra* note 7 at para 12.

a. Overbreadth

Applying the "section 7 analysis" used by the SCC in *Carter*, this paper asserted that the current regulatory regime restricting access to MAID to persons aged 18 and older infringed the liberty and security of the person interests of mature minors, turning to the weighted hypothetical of "Adolescent." This paper acknowledges that the current scheme restricting access to MAID is probably overbroad, and therefore, it infringes a mature minor's rights to life, liberty, and security of the person. In order to be saved, the law must be justified by section 1 of the *Charter*.

In order to determine overbreadth, the court must focus on the effect of the law on the individual mature minor. First, the court must consider the object of the prohibition on access to MAID for persons under 18 years old. Second, the consideration turns to whether depriving the mature minor of their section 7 rights furthers the objective of protecting minors who are particularly vulnerable by virtue of their age; or disability, disease, or illness; or compulsion or coercion by others who may induce them to take their own lives.

If the court establishes that the mature minor is not vulnerable by virtue of those factors, it must conclude that the government's infringement of their rights applies to a larger group than the lawmakers intended. This means that the age-based MAID safeguard is catching more persons than it is required to catch, including those who would not be considered especially vulnerable. In effect, the court must find that the new provisions are overbroad and take away the life, liberty, or security of the person in a way that runs afoul of basic societal values.[146]

The current *Criminal Code* provisions restrict minors from proving they are not vulnerable based on age. At common law, the "mature minor rule" requires that an individual assessment of maturity determine an adolescent's (or child's) capacity to consent to medical treatment, rather than any pre-determined age limit.[147] A minor's developing intelligence and relative capacity to understand what is involved in making informed choices about proposed medical treatments determines their entitlement to decision-making autonomy.[148] As mature minors have been found capable of consenting and refusing consent to medical treatment, it must follow that they are capable of being competent, fully informed, and free from coercion and duress in similar circumstances. Thus, a mature minor who meets all other eligibility requirements for MAID would not be vulnerable if a permissive regulatory regime was available to them. This paper acknowledges that, by limiting access to MAID based on age and not an individual's maturity, the law effectively captures minors who are not necessarily vulnerable. Minors who are competent, fully informed, and free from coercion and duress are not at risk of being induced into taking their own lives in a moment of weakness.

Returning to that weighted hypothetical, assume that Adolescent meets all other eligibility requirements to access MAID, including giving his informed consent as approved by two independent medical or nurse practitioners. Additionally, in the opinion of a psychiatrist, he is of sufficient intelligence and relative capacity to understand the implications of a request for MAID. It could be argued that Adolescent is not vulnerable to be induced into taking his own life in a moment of weakness, but rather entitled to make that choice by virtue of his section 7 rights under the *Charter*. However, because Adolescent does not meet the age requirement (by a matter of months, in this hypothetical) he is not eligible for MAID and is subject to intolerable pain and suffering. It was likely not Parliament's intention to deny this person the right to decide to end their life when such pain and

146 *Bedford*, *supra* note 55 at paras 94-96.

147 *Van Mol, supra* note 6 at paras 76-77; *Ney, supra* note 94 at 142.

148 *Van Mol, supra* note 6 at para 75.

suffering ensued. However, the effect of their chosen criteria for MAID is denying this choice to a person who is not vulnerable.

The Department of Justice ("DOJ"), however, argues that establishing a clear age cut-off for accessing MAID rather than an individualized assessment "is justified in light of the unique interests at stake."[149] It has been recognized that in some cases, determining the capacity and maturity of a minor is not a precise measure and they could be subject to coercion and influence from others.[150] As such, to protect from mistakes in judgment regarding a minor's capacity, it is argued a clear-cut off age is justified. However, this practicality justification does not change the absence of connection between the purpose of the law and its effect on an individual mature minor who is capable of making such decisions. Accordingly, such an argument is better dealt with under the section 1 analysis (see below).

In response, this paper argues that the MAID regulatory regime can be bettered by the addition of the "mature minor rule" and "best interests standard." In addition to ensuring that they have the capacity for informed consent, the "mature minor rule" and "best interests standard" can protect minors from compulsion, coercion, and abuse.

ii. Application of Section 1 of the *Charter*

If the new provisions under the *Criminal Code* infringe a mature minor's section 7 *Charter* rights contrary to the principles of fundamental justice, they will not automatically be struck down. Instead, the provisions would need to be examined under section 1 of the *Charter*, which would justify the infringement in circumstances "of sufficient importance," such as where the countervailing public good requires infringement to the rights of the individual guaranteed under section 7.[151]

Recalling the "section 1 analysis" addressed in Part I: as established in *Carter*, the protection of vulnerable persons (including minors) is a pressing and substantial objective.

The primary consideration under the section 1 analysis, in this case, would likely be whether the law is proportionate to its objective.[152] Section 241.2(1)(b) would likely satisfy the first part of the proportionality test. The current prohibition on access to MAID for persons under 18 is rationally connected to the goal of protecting minors, who are vulnerable because of their age; or disability, disease, or illness; or compulsion or coercion by others; and a prohibition on access to MAID would prevent any possibility that they could be induced into taking their own lives.

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149 Canada, "Legislative Background", *supra* note 2. The DOJ asserted "[r]especting a mature minor's refusal of further unwanted medical treatment is not the same as acquiescing to a request for active measures to cause death" (*Ibid*). However, the DOJ acknowledged that the issue required additional study, specifically saying that there needed to be "additional safeguards to protect mature minors if they were to have access to such assistance" (*Ibid*).

150 *AC*, *supra* note 2 at paras 4, 143.

151 *Oakes, supra* note 66 at paras 69-70; *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 352.

152 *Oakes, supra* note 66 at para 73.

However, there is a strong argument to be made that it is not minimally impairing—and it is probable that the current prohibition on mature minors' access to MAID would be subject to criticisms that there are less drastic alternatives available.[153] The provisions are considered minimally impairing if the government meets its burden of proving the absence of less drastic means of achieving the objective in a real and substantive manner. Thus, courts must determine whether an age restriction is the least drastic means of ensuring the protection of vulnerable minors (in response to the unique vulnerability of children—and the gravity of the intervention at issue).

It would be difficult for the state to demonstrate that there are not more minimally impairing alternatives to the MAID prohibition for persons under the age of 18 in section 241.2(1)(b) of the *Criminal Code*. This paper reviewed the "mature minor rule" and "best interests standard" to demonstrate that age restrictions in medical decision-making are acknowledged as overbroad to similar stated objectives; an assessment of individual maturity levels is the appropriate test.[154] Additionally, this paper reviewed the recommendations made by experts (through the independent groups established as a response to the SCC's decision in *Carter*), and those experts reported that there are more minimally impairing alternatives than the current MAID prohibition for persons under 18 years of age.

As a result, it is unlikely section 241.2(1)(b) would withstand the scrutiny of a "section 1 analysis"—and the impugned provision would likely be considered unconstitutional.

iii. Deference Owed to Parliament

The current *Criminal Code* MAID provisions may require the court to exercise deference. The complete prohibition on MAID did not receive deference because it was not a complex response by the legislature to the underlying issues of a permissive MAID regime.

The new scheme is more complex in that it sets out eligibility requirements and restrictions, safeguards, and processes for accessing MAID, but it can be argued that the current eligibility restriction based solely on age is not sufficiently complex for minors. Interference with mature minors' rights to bodily autonomy must address the complexity of the interests at stake.[155] The common law entitles minors to a degree of decision-making autonomy commensurate to their maturity.[156]

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153 The provisions are minimally impairing if the government meets its burden of proving the absence of less drastic means of achieving the objective in a real and substantive manner; that is, is there a way to protect vulnerable minors in ways that are neither overbroad nor arbitrary while still permitting the free exercise of their section 7 rights under the *Charter*? For an example of a more minimally impairing legislative scheme, it is important to consider the MAID regimes of other jurisdictions. In both Belgium and the Netherlands, people under the age of 18 are able to request MAID. The regime for MAID in Belgium originally excluded those who had not reached the age of majority (18 years old), but in 2014 the law surrounding MAID removed the age requirement and instead recognized that the decision-making capacity varied depending on the child (MacIntosh, *supra* note 65 at S28). A minor who requests MAID in Belgium must have a "serious and incurable disorder," be in a hopeless situation and be experiencing unbearable suffering (*Ibid* at S27-28); additionally, the parents of the minor must consent (*Ibid* at S28). In the Netherlands, children over the age of 12 may request MAID (*Ibid* at S30). The Dutch MAID regulatory regime requires that a physician can only grant a request for MAID when the physician is convinced that the patient is voluntarily seeking MAID and is well informed of their options (*Ibid*); additionally, the patient must be experiencing lasting and intolerable suffering and be convinced that MAID is the only solution for them after two assessments of eligibility by independent physicians (*Ibid*). Depending on the age of the minor, the parents must either be consulted or consent (*Ibid*).

154 *Van Mol, supra* note 6 at paras 76-77; *Ney, supra* note 94 at 142.

155 *AC*, *supra* note 2 at para 84.

156 *Ibid* at para 108.

A counter-argument is that the requirement by Bill C-14 to further study mature minors' access to MAID creates a sufficient balance between the countervailing public and individual interests. With further study, Parliament can determine if further safeguards should be put in place for the protection of vulnerable minors, and a constitutional challenge commenced before the completion of that study may lead the court to defer to that process.

CONCLUSION

After applying a section 7 and a section 1 (*Charter*) analysis, this paper argued the amended MAID regulatory regime remains unconstitutional, as it infringes the rights to life, liberty, and security of the person of mature minors.

The paper reviewed the jurisprudence on mature minors in Canada, as mature minors' rights to request and refuse (potentially life-saving) medical treatment was a reasonable, relevant point of comparison to the MAID regulatory regime. The "mature minor rule" provides a means for children who have decisional capacity to refuse potential life-saving treatment when it is determined to be in their best interests; and the "best interests standard" provides a means for the court to intervene in the medical decisions made by mature minors to prevent them from acting contrary to their best interests. Through those rules, there are ways to protect vulnerable children while also promoting mature minors' rights to life, liberty, and security of the person; and they add to the stringent eligibility criteria and safeguards already in place to protect adults from taking their own lives in moments of vulnerability.[157]

The paper also addressed the recommendations made by independent expert groups that those rules are applicable to the issue of MAID and mature minors. Those independent expert groups reported that the "mature minor rule" and "best interests standard" are a more sophisticated, subjective approach to determinations of decisional capacity.

The paper then applied that section 7 and section 1 (*Charter*) analysis to the weighted hypothetical of "Adolescent." Adopting as many of the transferable facts from Taylor's case as possible, that weighted hypothetical demonstrated it is possible the MAID prohibition in section 241.2(1)(b) of the *Criminal Code* infringes the section 7 *Charter* rights of mature minors in ways contrary to the principles of fundamental justice.

157 *Criminal Code*, *supra* note 1, ss 241.2(2), 241.2(3).